UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **SACV 17-00356 JVS(JCGx)** Date November 20, 2017

Title Christina Grimm v. APN, Inc., et al.

Present: The Honorable	James V. Selna	
Karla J. Tunis		Not Present
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
Not Present		Not Present

Proceedings: (IN CHAMBERS) ORDER DENYING DEFENDANTS' MOTION TO DISMISS

The Court, having been informed by the parties in this action that they submit on the Court's tentative ruling previously issued, hereby DENIES the Defendants' Motion to Dismiss and rules in accordance with the tentative ruling as follows:

Defendants APN, Incorporated and Ainsworth Pet Nutrition (collectively "APN") filed a motion to dismiss Plaintiff Christina Grimm's Second Amended Complaint ("SAC") for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Mot., Docket No. 53. Grimm opposes the motion. Opp'n, Docket No. 56. APN filed a timely reply. Reply, Docket No. 57.

For the following reasons, the Court **denies** 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. SAC, Docket No. 48 ¶ 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 an amended complaint, APN filed another motion to dismiss. See First Am. Compl. ("FAC"), Docket

No. 28; Mot., Docket No. 29. The FAC alleged 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. See generally FAC. The Court granted APN's motion to dismiss Grimm's CLRA, FAL, and UCL claims with leave to amend, for failure to satisfy Rule 9(b)'s particularity requirements. The Court also dismissed Grimm's negligence per se claim with prejudice and denied APN's motion as to the warranty claims.

On October 2, 2017, Grimm filed the SAC. SAC, Docket No. 48. Grimm again brings claims for violations of the CLRA, the FAL, the UCL, and breaches of express and implied warranties. See generally SAC. APN filed this motion to dismiss Grimm's CLRA, FAL, and UCL claims. Docket No. 53.

II. LEGAL STANDARD

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. Grimm adequately pleads that a "significant portion of the general consuming public" would be deceived.

The consumer protection statutes[1] under which Grimm states her claims all require plausible allegations that the labeling or advertising at issue is "likely" to deceive a "reasonable consumer." See Williams v. Gerber Prods., 552 F.3d 934, 938 (9th Cir. 2008) (noting that appellant's claims under the UCL, FAL, and CLRA are "governed by the 'reasonable consumer' test"); Consumer Advocates v. Echostar Satellite Corp., 113 Cal. App. 4th 1351, 1360 (2003) (concluding that the "reasonable consumer" standard applies to the CLRA in addition to the UCL and FAL). This standard requires more than a mere possibility that a product "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003). Instead, a plaintiff needs to plead there is a probability

[1] As a general matter, the UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. and Prof. Code § 17500. The CLRA makes actionable "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770.

"that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Id. Generally, the issue of whether a business practice is deceptive is a fact question that cannot properly be resolved on a motion to dismiss. Williams, 552 F.3d at 938. However, in "rare" cases, courts can grant a motion to dismiss based upon a review of the disputed packaging. Id. at 938-39; see, e.g., Manchouck v. Mondelez Int'l. Inc., 2013 WL 5400285, at *3 (N.D. Cal., Sept. 26, 2013) (determining that the defendant's representation that the disputed product was "made with real fruit" was not misleading because the mechanically processed fruit purée used in the product was in fact real fruit); Sugawara v. Pepsico Inc., 2009 WL 1439115, at *3 (E.D. Cal., May 21, 2009) (concluding that no reasonable consumer would be deceived into thinking that "Crunchberries" cereal actually contained real fruit given that the product was identified as sweetened corn and oat cereal, did not depict fruit on the box, and made no representations that the cereal was made with real fruit or nutritious).

APN argues that Grimm fails to allege that a significant portion of the general consuming public would be deceived by APN's conduct.[2] Mot., Docket No. 53 at 5. Grimm alleges that "Defendants' Products state, represent, claim, feature, and market to be natural, yet they contain chemicals and artificial and/or synthetic ingredients, including L-Ascorbyl-2-Polyphosphate, Menadione Sodium Bisulfite Complex, Thiamine Mononitrate, 'natural flavors,' and caramel color." SAC ¶ 27 (emphasis added). She also states that "L-Ascorbyl-2-Polyphosphate, Menadione Sodium Bisulfite Complex, Thiamine Mononitrate, 'natural flavors' and caramel color are not naturally occurring, and are instead chemicals and artificial and/or synthetic ingredients that are made and/or produced by humans." Id. (emphasis added). And Grimm alleges that "Defendants engaged in deceptive labeling practice by expressly representing on the Products' labels

[2] APN claims that Grimm fails to satisfy the reasonable consumer test, in part, because she has not pled the circumstances surrounding how she discovered that the labels were allegedly deceptive. Mot., Docket No. 53 at 6. However, APN cites no authority for the proposition that Grimm must identify, in the SAC, how she discovered APN's alleged deception. And, in so arguing, APN impliedly requests that the Court make inferences in its favor in reading the allegations in the SAC. Id. This contravenes the governing law on a motion to dismiss. See Manzarek, 519 F.3d at1031. APN asks the Court to presume that Grimm discovered the alleged deception by reading the label as a whole, which it maintains means that the label is not misleading as a matter of law. See Mot., Docket No. 53 at 6. But Grimm does not plead as much and the Court will construe the pleadings in the light most favorable to the non-moving party.

and website that the Products are 'natural' and have 'no artificial preservatives' despite the presence of these chemicals and artificial and/or synthetic ingredients." Id. Finally, Grimm alleges that "Nutrish's Product labels state, claim, represent, and describe the food as natural without any disclosure that this is limited to only certain ingredients and that the disclosure excludes the added vitamins and minerals. As a result, consumers such as Plaintiff were unaware that certain ingredients, including 'Added Vitamins & Minerals,' contained in the Products were not natural." Id. ¶ 30 (emphasis added).

APN contends that the labeling of its products do not mislead consumers as a matter of law because the representations on its labels–that its products are "natural food for dogs with added vitamins & minerals" and "made with simple, natural ingredients"–are literally true and confirmed by the ingredient list. Mot., Docket No. 53 at 8. But the SAC alleges that the representations are *not* literally true. Grimm pleads that, contrary to APN's representations, some ingredients contained in APN's products are "not naturally occurring" and are in fact "chemicals and artificial and/or synthetic ingredients." SAC ¶ 27. APN does not argue that "the added vitamins and minerals" are "natural;" rather it argues that the language "natural food for dogs with added vitamins & minerals" makes it clear to a reasonable consumer that such vitamins and minerals are excluded from the "natural dog food" label. See Mot., Docket No. 53 at 8; Reply, Docket No. 57 at 11. APN analogizes to Rooney v. Cumberland Packing Corp., No. 12-CV-0033-H (DHB), 2012 WL 1512106, at * 4 (S.D. Cal. Apr. 16, 2012), where the court found that the use of the phrase "Sugar in the Raw" would not lead a reasonable consumer to believe that natural cane turbinado sugar was unprocessed and unrefined. There, though the brand name used the term "raw," the packaging did not state that the product was unprocessed or unrefined. Id. And calling the product "raw" was not deceptive because turbinado sugar was a well-known type of raw sugar. Id. As such, the court found that the plaintiff's inference–that because the product was called raw it was unprocessed and unrefined–was unreasonable. Id.

Here, APN urges the Court to find that it was unreasonable for Grimm to believe the added vitamins and minerals were natural when they are "by definition" synthetic. Reply, Docket No. 57 at 11. However, whether added vitamins and minerals are "by definition" synthetic is an inappropriate determination for this Court to make at this time because the Court possesses no definition of "added vitamins & minerals." And, unlike in Rooney, there is no other evidence before the Court–nor should there be at this stage–that the understanding that added vitamins and minerals are synthetic is so

widespread that it would be unreasonable for a consumer to believe otherwise. The words "with added vitamins and minerals" say just that. At this stage, it is ambiguous whether those words represent that the added vitamins and minerals are natural or synthetic.

APN also argues that Grimm insufficiently pleads that "caramel color" and "natural flavors" are not natural. Though, Grimm only alleges that "[c]aramel color is also an artificial ingredient, and therefore unnatural," she also states that both ingredients are "not naturally occurring, and instead chemicals and artificial and/or synthetic ingredients that are made and/or produced by humans." SAC ¶¶ 27–28. She further explains that the FDA "has considered the term 'natural' to mean that nothing artificial or synthetic (including all color additives regardless of sources) has been included in, or has been added to, a food that would not normally be expected to be in that food." Id. ¶ 27. This is more than sufficient, at this stage, to plausibly allege that both caramel color and natural flavors are not natural ingredients. Therefore, Grimm sufficiently pleads that the added vitamins and minerals, caramel color, and natural flavors are not natural ingredients and that APN's representations are not literally true.

Furthermore, in Williams, the Ninth Circuit explained that an ingredient list should not "shield [a manufacturer from] liability for the deception" caused by misleading representations on a product's labeling. 552 F.3d at 939; see also Yumul v. Smart Balance, Inc., 733 F. Supp. 2d 1117, 1129 (C.D. Cal. 2010) ("Williams stands for the proposition that where product packaging contains an affirmative misrepresentation, the manufacturer cannot rely on the small-print nutritional label to contradict and cure that misrepresentation."). This is because "reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging." Williams, 552 F.3d at 939–40. In that case, the product was called "fruit juice snacks" and the packaging prominently featured images of different fruit. Id. at 939. Additionally, a statement on the side panel of the packaging described the product as made "with real fruit juice and all natural ingredients." Id. And the products contained a claim that they were "nutritious" and were "designed to help toddlers grow up strong and healthy." Id. The Court found that taken together the front of the product could lead a reasonable consumer to believe falsely that the products contained the fruit–or their juices–depicted on the packaging and that all the ingredients in the products were natural. Id. Though the ingredient list correctly identified all the ingredients in the product, the court found that a reasonable consumer should not "be

expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." Id.

The same is true here. Grimm adequately pleads that a reasonable consumer would be misled by the "natural" representations, along with the overall impression conveyed by the packaging.[3] Though APN does not represent that its products are "natural" in a vacuum, this is also not a case where "Plaintiff's claim is based on a single out-of-context phrase found in one component of the [manufacturer's] label." See Hairston v. S. Beach Beverage Co., No. CV 12-1429-JFW DTBX, 2012 WL 1893818, at *4 (C.D. Cal. May 18, 2012). The labels focus on claims about natural ingredients, depict images of meat, vegetables, and grains, and repeat the word "natural" at least two or three times per label. See, e.g., id. ¶¶ 2, 18. Many of the labels even feature depictions of crossed-out test-tubes. See, e.g., id. ¶¶ 2, 18 (c), (d), (e). Therefore, the overall impression could lead a reasonable consumer to believe that the products contain only natural ingredients. Though the ingredient lists disclose all the ingredients contained in the products, the Court will not find that the packaging is not misleading as a matter of law because a consumer could "look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." See Williams, 552 F.3d at 939. Therefore, Grimm adequately pleads that APN's "natural" representations are likely to mislead a reasonable consumer.

Grimm also sufficiently pleads that APN engaged in a deceptive labeling practice by labeling and advertising its products as containing "no artificial preservatives." APN argues that Grimm fails to show how the phrase "no artificial preservatives" is false. Reply, Docket No. 57 at 12. However, Grimm identifies certain ingredients in APN's products as "artificial and/or synthetic ingredients," but alleges that APN still represents that their products contain "no artificial preservatives." SAC ¶ 27. Therefore, Grimm satisfies the threshold requirement of pleading that APN's representing were false or misleading because they allegedly contain artificial ingredients and sufficiently alleges that APN engaged in a deceptive practice. Id. One can infer from paragraph 27 of the SAC that some of the chemicals listed in the paragraph are artificial preservatives.

[3] APN argues that Grimm makes allegations about the images on the products' packaging for the first time in her opposition. Reply, Docket No. 57 at 1. But Grimm includes large, color depictions of various APN products' labels, ingredient lists, and advertising throughout the SAC. See SAC ¶¶ 2, 18. Therefore, the Court can consider such depictions as part of the allegations in the SAC.

B. Grimm sufficiently pleads injury in fact.

To establish standing under the UCL and FAL, the plaintiff must allege (1) "economic injury" (i.e., a loss or deprivation of money or property sufficient to qualify as an injury-in-fact), and (2) the defendant's unfair business practices caused plaintiff's economic injury. Pulaski v. Middleman, LLC v. Google, Inc., 802 F.3d 979, 985 n.6 (9th Cir. 2015). "Courts have found an injury in fact sufficient to confer standing under the UCL where a party has expended money, lost money or property, or been denied money to which it has a cognizable claim as a result of unfair conduct." Thomas v. Dun & Bradstreet Credibility Corp., 100 F. Supp. 3d 937, 947 (C.D. Cal. 2015) (citing Martinez v. Welk Grp., Inc., 907 F. Supp. 2d 1123, 1137–38 (S.D. Cal. 2012)).

APN argues that Grimm lacks standing to assert her claims because she alleges that she stopped purchasing APN's products "in or around February 2017," but provided APN with written notice that their conduct violated the CLRA on January 3, 2017. Mot., Docket No. 53 at 10. They contend this means that she continued buying APN's products for at least a month after discovering that they contained allegedly false labels and therefore cannot claim she lost money or property as a result of APN's conduct. Id. However, the SAC specifically alleges that "[i]n or around February 2017, [Grimm] ceased purchasing the products upon learning the products were not natural as advertised." SAC ¶ 13. And she repeatedly alleges that she purchased the products "approximately . . . through February 2017." See id. ¶¶ 61, 69, 77. The Court does not find these statements necessarily inconsistent because Grimm uses the words "in or around" and "approximately." See id. ¶¶ 13, 61, 69, 77. Furthermore, Grimm alleges that she was injured because "she paid the purchase price or a price premium for the Products that did not deliver or otherwise conform to what Defendants promised." Id. ¶ 14. That allegation remains sufficient to plead injury in fact whether Grimm only bought the products before she learned that the products were allegedly not natural or continued to buy the products after the discovery. In either case, purchasing the products after she learned that they were deceptive would not deprive her of standing. See In re ConAgra Foods, Inc., 90 F. Supp. 3d 919, 967 (C.D. Cal. 2015) (finding plaintiffs had standing even where they purchased the misleadingly labeled products after filing the lawsuit).

C. The SAC complies with Rule 9(b)'s particularity requirement.

APN maintains that Grimm's UCL, FAC and CLRA claims remain deficient as a matter of law. Mot., Docket No. 53 at 10. Grimm's UCL, CLRA, and FAL claims are principally grounded in fraud and, accordingly, must meet the requirements of Rule 9(b). 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. Vess, 317 F.3d 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 necessary to identify the transaction" is insufficient. Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting In re GlenFed, Inc. Sec. Litig., 42 F.3d at 1549).

Grimm's UCL, FAL, and CLRA claims, as alleged in the SAC, satisfy Rule 9(b)'s particularity requirements. Grimm alleges with sufficient particularity when she purchased APN's products. SAC ¶ 13. In its prior order, the Court noted that Grimm merely alleged that she purchased the products monthly starting in 2016, but did not allege in the FAC when in 2016 she began or when she stopped making such purchases. Order, Docket No. 43-1 at 9. Here, Grimm alleges that she "purchased the Products at least once per month from approximately September 2016 through February 2017." See SAC ¶¶ 61, 69, 77. Previously, the Court found that Grimm described what terms on APN's labels were misleading, but did not describe why they were misleading. Order, Docket No. 43-1 at 9. But here, Grimm alleges that APN's products contain certain synthetic vitamins, natural flavors, and caramel color and adequately alleges why the presence of those ingredients makes APN's labels and marketing practices misleading. See SAC ¶¶ 7, 27, 61, 69, 77. She alleges that she was not aware that such products were unnatural and explains that "[p]roduct ingredients often times have complex and/or scientific names regardless of whether they are natural or artificial." SAC ¶¶ 6–7. These allegations are sufficient to state why the terms on APN's products were misleading.

Grimm also adequately pleads reliance. She alleges that "she switched from her previous dog food because Nutrish claimed that the Products were natural and had no artificial preservatives." SAC ¶ 13. And she alleges that she "ceased purchasing Nutrish dog food upon learning the products were not natural as advertised." Id. Therefore, Grimm adequately pleads that she switched to and continued to buy APN's products in reliance on its misleading representations that they were natural and contained no artificial preservatives. If Grimm actually bought APN's products after learning that their labels were false, it would "seriously undercut [her] claim that [her] purchasing decisions was influenced" by the misleading conduct. See In re ConAgra, 90

F. Supp. 3d at 967. However, these allegations are sufficient to plead reliance at this stage.

Finally, Grimm alleges sufficient details about APN's advertising campaign. SAC ¶¶ 23–24. She alleges that APN "engaged in a multi-million dollar advertising campaign that has utilized, among other things, television, print, digital, and even a food truck." Id. ¶ 23. She alleges that "many of these advertisements explicitly claim, feature, state, represent, advertise, or otherwise market that Nutrish's Products are 'natural' and/or contain no 'artificial preservatives.'" Id. She specifically alleges that "the announcer in a 2015 Nutrish commercial proclaims that Nutrish dog food contains 'simple, natural ingredients,'" and that a "a Nutrish commercial from 2016 also states that Nutrish dog food contains 'simple, natural ingredients.'" Id. She provides links to both commercials. She also provides a print advertisement for another APN product that "discusses the products 'natural' qualities." Id. Finally, she alleges that she saw "the same or similar" advertisements when deciding to purchase the APN products. Id. ¶ 24. This in not the sort of general description 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); In re 5-Hour ENERGY Marketing and Sales Practices Litigation, MDL 13-2438, 2015 WL 12734796, at *16 (C.D. Cal. Jan. 22, 2015) (dismissing UCL, CLRA, and FAL claims were plaintiffs "failed to indicated which particular statements (in advertisements or otherwise) they relied on when purchasing 5-hour ENERGY."). Grimm specifically alleges what were the representations featured in the "same or similar" advertisements that she saw when making her purchasing decisions. Therefore, Grimm's claims satisfy Rule 9(b)'s requirement.

To the extent that APN challenges the SAC for failing to allege other facts, those facts are not necessary to satisfy the particularity requirement of Rule 9(b).

IV. CONCLUSION

For the foregoing reasons, the Court **denies** APN's motion to dismiss.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **SACV 17-00356 JVS(JCGx)** Date November 20, 2017

Title Christina Grimm v. APN, Inc., et al.

IT IS SO ORDERED.

.

: 00

Initials of Preparer kjt