

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 18-1736 DOC (JPRx)

Date: February 6, 2019

Title: JENNIFER REITMAN ET AL V. CHAMPION PETFOODS USA, INC. ET AL

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Lewman
Courtroom Clerk

Not Present
Court Reporter

ATTORNEYS PRESENT FOR
PLAINTIFF:
None Present

ATTORNEYS PRESENT FOR
DEFENDANT:
None Present

**PROCEEDINGS (IN CHAMBERS): ORDER DENYING MOTION TO
DISMISS [100]**

Before the Court is Defendants Champion Petfoods USA Inc. (“Champion USA”) and Champion Petfoods LP’s (“Champion LP” and, together with Champion USA, “Defendants”) Motion to Dismiss (“Motion”) (Dkt. 100). The Court finds this matter appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having reviewed the papers and considered the parties’ arguments, the Court DENIES Defendants’ Motion.

I. Background

A. Facts

These facts are taken from the Second Amended Complaint (“SAC”) (Dkt. 99). Defendants sell pet food under the brand names Acana and Orijen throughout the United States. SAC ¶ 2. Defendants have created a niche in the pet food market by making biologically appropriate pet food with natural ingredients. *Id.* ¶ 3. They then charge a premium for this purportedly higher-quality food. *Id.* Defendants’ packaging and labels further emphasize fresh, quality, and properly sourced ingredients. *Id.* ¶ 5. Defendants made a variety of statements regarding the benefits of the pet foods, such as that they are free of any heavy metals and/or chemicals like BPA by assuring the foods represent an

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evolutionary diet that mirrors that of a wolf – free of anything “nature did not intend for your dog to eat.” *Id.* ¶¶ 7–9.

Nowhere in the labeling, advertising, statements, warranties and/or packaging do Defendants disclose that the pet foods contain levels of arsenic, mercury, lead, cadmium and/or BISPHENOL A (“BPA”), which are known to pose health risks to humans and animals, including dogs. *Id.* ¶ 6. Based on the risks associated with exposure to higher levels of arsenic, both the Environmental Protection Agency (“EPA”) and Food and Drug Administration (“FDA”) have set limits concerning the allowable limit of arsenic at 10 parts per billion (“ppb”) for human consumption in apple juice (regulated by the FDA) and drinking water (regulating by the EPA). *Id.* ¶ 10. The FDA is considering limiting the action level for arsenic in rice cereals for infants to 100 ppb. *Id.* ¶ 11. The pet foods also contain lead, mercury, and cadmium, which can cause various health problems. *Id.* ¶¶ 12–16.

Despite the known risks of exposure to these heavy metals, Defendants have negligently, recklessly, and/or knowingly sold the pet foods without disclosing they contain levels of arsenic, mercury, cadmium, and lead to consumers like Plaintiffs. *Id.* ¶ 16. Defendants have wrongfully and misleadingly advertised and sold the pet foods without any label or warning indicating to consumers that these products contain heavy metals, or that these toxins can over time accumulate in the dog’s body to the point where poisoning, injury, and/or disease can occur. *Id.* ¶ 18. Defendants’ omissions are material, false, misleading, and reasonably likely to deceive the public. *Id.* ¶ 19. This is true especially in light of the long-standing campaign by Defendants to market the pet foods as healthy and safe to induce consumers, such as Plaintiffs, to purchase the products. *Id.* For instance, Defendants market the pet foods as “Biologically Appropriate,” using “Fresh Regional Ingredients” comprised of 100 percent meat, poultry, fish, and/or vegetables, both on the products’ packaging and on Defendants’ websites. *Id.*

Plaintiffs seek certification of the following class: “All persons who are citizens of the State of California who, from July 1, 2013, to the present, purchased the [pet foods] for household or business use, and not for resale.” *Id.* ¶ 82.

B. Procedural History

Plaintiffs assert state-law claims on behalf of the class: (1) violations of California’s Consumer Legal Remedies Act, California Civil Code §§1750, *et seq.*; (2) violations of California False Advertising Law, California Business & Professions Code §§ 17500, *et seq.*; (3) violations of the Unfair Competition Law, California Business & Professions Code §§ 17200, *et seq.*; (4) breach of express warranty; (5) breach of implied

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warranty of merchantability; (6) fraudulent misrepresentation; (7) fraud by omission; (8) negligent misrepresentation; and (9) unjust enrichment. FAC ¶¶ 93–167.

On October 30, 2018, Defendants filed the Motion. On December 17, 2018, Plaintiffs opposed (“Opp’n”) (Dkt. 125). On December 21, 2018, Defendants replied (“Reply”) (Dkt. 127).

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff’s allegations fail to set forth a set of facts which, if true, would entitle the complainant to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, courts accept as true a plaintiff’s well-pleaded factual allegations and construe all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Courts are not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678. In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and materials properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

Claims sounding in fraud or mistake are subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires that such claims “state with particularity the circumstances constituting fraud or mistake,” Fed. R. Civ. P. 9(b), including “the who, what, when, where, and how of the misconduct charged.” *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks and citation omitted). “The plaintiff must set forth what is false or misleading about a statement, and why it is false.” *Id.* The allegations of fraud “must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

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III. Discussion

A. All Claims

Defendants move to dismiss all claims asserted in the SAC for a global failure to state plausible claims. Mot. at 5. According to Defendants, the “tie that binds” all of Plaintiffs’ causes of action together is the allegation that Champion’s pet foods contain levels of heavy metals making them unsafe for consumption, such that various Champion advertising statements are misleading or that Champion had a duty to disclose the presence of heavy metals and BPA in its food. *Id.* Defendants argue that such allegations regarding the safety of the pet food is speculative. *Id.* According to Defendants, the failure to allege a level at which any of the heavy metals or BPA pose a danger to pets is fatal to the SAC because none of the statements is deceptive without such an allegation. *Id.* at 6.

Defendants note that the SAC references Champion’s May 2017 White Paper (“White Paper”), its own published analysis of the safety levels of naturally occurring heavy metals in the dog foods. *Id.* at 1. Defendants argue the White Paper discloses the results of independent testing performed by two third-party laboratories over the course of three years, reporting the average levels of heavy metals contained in Champion’s pet food and showing the levels of heavy metals in Champion’s pet food are far below the standards set by the FDA and the National Research Council of National Academies Committee on Mineral and Toxic Substances in Diets and Water for Animals. *Id.* at 6.

With this flaw in mind, Defendants attack each statement alleged to be deceptive. *See id.* at 7.

- First, Defendants argue Plaintiffs improperly rely on the statement that the pet foods are “fit for human consumption” because such a statement was never actually made; rather Champion has stated that certain ingredients are fit for human consumption before inclusion into the pet foods. *Id.*
- Second, Defendants argue the statement “Biologically Appropriate” is an opinion of Champion’s that dogs evolved to eat foods high in protein and thus is not an actionable representation of fact and does not constitute a false statement due to the existence of naturally occurring levels of heavy metals. *Id.* at 8.

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- Third, Defendants argue the statements that some of its food is made from “Fresh Regional Ingredients” is not rendered misleading by the presence of naturally occurring heavy metals. *Id.*
- Fourth, according to Defendants the SAC fails to allege a claim based on the statement that the food contains “only 1 supplement – zinc” because BPA is not a supplement and the SAC does not allege that Champion adds other ingredients as a supplement or otherwise. *Id.* at 9.
- Fifth, Defendants argue the statement “providing a natural source of virtually every nutrient your dog needs to thrive” is puffery and not actionable as a matter of law, and the SAC fails to allege what levels of heavy metal or BPA make the food unsafe. *Id.*
- Sixth, Defendants also argue the statement “guaranteed to keep your dog healthy, happy and strong” is not actionable as a matter of law. *Id.*

Plaintiffs respond that globally, this action is not about proving that any pets were physically harmed by consuming the contaminated dog food products. Opp’n at 5. Rather, according to Plaintiffs, the SAC properly alleges deceptive, misleading, and false marketing representing the products as possessing natural, healthy, and quality claims when in reality they contain undisclosed toxins and contaminants. *Id.* Plaintiffs argue the SAC references regulations, articles, and research detailing the known harmful and toxic effects caused by consuming heavy metals and BPA to show that the presence of these contaminants is material to a reasonable consumer. *Id.* With regards to the specific statements, Plaintiffs argue the labeling, packaging, marketing, and advertising “must be taken as a whole[.]” *Id.* at 6.

The Court agrees that Plaintiffs have adequately pled facts that, taken as true, form a plausible claim that Champion made actionable false, misleading, or otherwise deceptive statements regarding the nature and quality of their pet food. It is not clear to the Court at this stage whether the existence of BPA or heavy metals makes the alleged statements false or otherwise actionable. But as discussed in greater detail *infra*, several of the statements are disputable facts that may or may not be proven. Defendants’ reliance on the White Paper—its own published analysis of the safety levels of naturally occurring heavy metals in its dog foods—is misplaced at this stage of the proceedings. Regardless of the Court’s ability to treat the document as part of the Complaint, the White Paper’s contents do not prove whether the alleged statements are deceptive, misleading, or false, especially in light of contradicting allegations in the SAC. Dismissal at this stage is improper on this basis.

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But not all of the alleged statements in the SAC are actionable. Plaintiffs cannot rely on the first statement listed above that the pet food is “fit for human consumption” because as alleged, Defendants state the food is made with “protein sources that are ‘Deemed fit for human consumption’” before inclusion into the ingredients or before inclusion into the finished pet foods. SAC ¶ 9. Defendants did not market their pet foods as “fit for human consumption.” *Id.* The Court addresses subsequent alleged statements in the proceeding sections.

B. Individual Claims

In addition to their global attack on the SAC, Defendants move to dismiss each individual claim. The Court addresses each in turn.

1. Consumer Protection Claims

Defendants argue that the statutory claims under the UCL, FAL, and CLRA fail because Plaintiffs do not allege facts demonstrating that Champion engaged in deceptive, misleading, false, or unfair practices in marketing and selling its dog food. Mot. at 11. First, Defendants argue statements regarding “fresh ingredients,” “a natural source of virtually every nutrient your dog needs to thrive,” and “guaranteed to keep your dog healthy, happy, and strong” are mere puffery or opinions that are not actionable. *Id.* Second, Defendants argue that Plaintiffs fail to plead why the inclusion of heavy metals and BPA in dog food at the levels alleged would make any of the statements deceptive, misleading, false, or unfair, because such metals occur naturally. *Id.*

Defendants also argue that the consumer protection claims fail because they do not comply with the heightened pleading standard under Federal Rule of Civil Procedure 9(b). *Id.* at 13. Defendants argue that Plaintiffs do not allege which representations on the various packaging Plaintiffs actually saw. *Id.* at 14. And Defendants argue Plaintiff has failed to show why the alleged statements are false. *Id.* at 15.

Plaintiffs argue the statements are not mere puffery but are misstatements of specific or absolute characteristics of a product that a consumer could reasonably rely upon. Opp’n at 8. Plaintiffs argue they can determine the truth of the statements and that such truths or falsities have specific meanings to Plaintiffs. *Id.* at 9. As to the 9(b) challenges, Plaintiffs argue the SAC does identify which products were purchased, when they were purchased, which statements form the bases for Plaintiffs’ claims, and why those claims are misleading. *Id.* at 12.

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As discussed, Plaintiff alleges that Champion marketed its food as: “biologically appropriate”; made from “fresh regional ingredients”; meeting the “European Union’s standards”; containing “only 1 supplement-zinc”; providing “a natural source of virtually every nutrient your dog needs to thrive”; and being “guaranteed to keep your dog healthy, happy and strong.” SAC ¶¶ 99, 105, 112. These statements are disputable facts that cannot be dismissed as mere puffery or opinions. Whether the food is “biologically appropriate” or made from “fresh regional ingredients” can be proven through discovery. It is a closer call as to “a natural source of virtually every nutrient your dog needs to thrive” and “guaranteed to keep your dog healthy, happy and strong,” but such statements do convey to consumers that the pet foods are safe, nutritious, and natural. As pled, the claims are actionable.

Plaintiffs have satisfied their 9(b) requirements in the SAC by alleging with particularity the circumstances constituting fraud. *See* SAC ¶ 5 (“ingredients we love”); ¶¶ 7, 66 (“biologically appropriate” and “excluding ... synthetic additives and anything else that nature didn’t intend your dog to eat”); ¶ 29 (“Nourish as Nature Intended”); ¶ 43 (illustrations of each Pet foods’ packaging); ¶ 6 (describing levels of BPA and heavy metals found in the pet foods); ¶ 65 (“after conducting third-party scientific testing, it is clear that the Pet foods” do contain “both heavy metals and/or BPA”). Plaintiffs adequately allege the packages they saw and the who, what, when, where, why, and how of their claims. *See id.* ¶ 37–38.

2. Fraud-Based Claims

Next, Defendants argue that Plaintiffs’ fraudulent and negligent misrepresentation claims and fraudulent omission claim fail to satisfy Federal Rule of Civil Procedure 9(b). Mot. at 16. According to Defendants, the only specific allegation as to what Plaintiffs saw is the assertion that they “saw the nutritional claims on the packaging, which he or she relied on when deciding to purchase” Champion’s dog food. *Id.* Defendants argue this statement does not satisfy the who, what, when, where, and how requirements to plead a fraud or negligent misrepresentation claim. *Id.* at 17. Defendants also argue the claims fail because the statements are either puffery or Plaintiffs fail to allege they are not true. *Id.* And according to Defendants, Plaintiffs’ fraud by omission claim fails because Plaintiffs do not plead facts that Champion had a duty to disclose levels of heavy metals or BPA in its dog food. *Id.* at 18.

Plaintiffs respond that the SAC as a whole provides the type of dog food purchased, when it was purchased, the frequency with which it was purchased, where it was purchased, why it was purchased, how Plaintiffs were deceived, and when Plaintiffs

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stopped purchasing the pet food. Opp'n at 14. Plaintiffs also note they allege that Plaintiffs paid a premium price for the dog foods and that they would not have purchased the dog foods had they known about the presence of heavy metals and BPA. *Id.*

For the reasons already discussed, the Court agrees that Plaintiffs have satisfied the heightened standard under Rule 9(b). Plaintiffs provide photos identifying the product labels along with screenshots and identify which claims are misleading. Whether the statements that the pet foods are natural, biologically appropriate, fresh, meet European Union standards, or contain only one supplement are disputable facts that may or may not be true; but Plaintiff has sufficiently alleged facts to put Defendants on notice of the circumstances giving rise to their claims.

Plaintiffs have also properly alleged facts giving rise to a duty to disclose. To allege a duty to disclose, a plaintiff must show that the defendant (1) is in a fiduciary relationship with the plaintiff; (2) had exclusive knowledge of material facts not known to the plaintiff; (3) actively concealed a material fact from the plaintiff; or (4) made partial representations but also suppresses some material fact. *Davidson v. Kimberly-Clark Corp.*, No. C 14-1783 PJH, 2014 WL 3919857, at *10 (N.D. Cal. Aug. 8, 2014). The SAC meets each element. Plaintiffs allege that Defendants knew this information was important to their customers, among other facts already discussed.

3. Express Warranty Claims

Defendants move to dismiss the express warranty claims. Mot. at 26. According to Defendants, the statements in the SAC are either true or subjective and cannot support a breach of express warranty claim. Mot. at 2627. Because Champion's statements make "no specific and unequivocal promise," Defendants argue the claim must be dismissed. *Id.*

Plaintiffs argue that Defendants ignore the distinction between product descriptions and assertions of fact on the one hand, and vague, subjective, or general assertions on the other. Opp'n at 19. According to Plaintiffs, the promises and statements in the SAC fall into the former category and are constitute specific, testable express warranties. *Id.* at 20.

As discussed, the statements "biologically appropriate"; made from "fresh regional ingredients"; meeting the "European Union's standards"; containing "only 1 supplement-zinc"; providing "a natural source of virtually every nutrient your dog needs to thrive"; and being "guaranteed to keep your dog healthy, happy and strong" are assertions of fact of which the seller has special knowledge and as alleged were relied on by customers.

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Whether or not the statements are true is to be determined. But they are not subjective, and as alleged can support a claim for express breach of warranty.

4. Implied Warranty Claims

Defendants move to dismiss the implied warranty claims. Mot. at 27. According to Defendants, an end consumer such as Plaintiffs who buy products from a retailer are not in privity with a manufacturer. *Id.* Defendants argue that the exception to the privity requirement does not apply because Plaintiffs have not pled specific facts as to what they saw and relied on. *Id.* n.9. Next, Defendants argue that Plaintiffs have not pled facts that demonstrate the pet food is not merchantable. *Id.* at 28.

Plaintiffs argue the implied warranty claims are predicated on whether the goods conform to the promises or affirmations of fact made on the container or label, and are thus adequately pled. Opp'n at 20. Plaintiffs note the SAC describes how Defendants labeled the foods with "various statements of fact" that were reinforced with packaging images, and that the SAC alleges the foods do not conform to these promises and affirmations of fact "based on the presence of heavy metals and BPA." *Id.* at 20. And Plaintiffs argue the SAC satisfies the exception to the privity requirement as it alleges Defendants made express and implied warranties with the intention they be considered by end users and were the intended beneficiaries of the warranties. *Id.* at 22.

The statements alleged in the implied warranty claim are the same as the express warranty claim discussed *supra*. The same analysis applies here. The SAC satisfies the requirements and states an actionable claim. Moreover, Plaintiff has satisfied the exception to the privity requirement. Pet food consumers are third-party beneficiaries.

5. Unjust Enrichment

Defendants move to dismiss Plaintiffs' unjust enrichment claim. According to Defendants, Plaintiffs do not plead facts that establish it would be inequitable for Champion to retain the indirect benefit allegedly conferred. *Id.* at 29. Defendants rely largely on the same arguments made for the other claims.

Plaintiffs argue the SAC contains all necessary allegations to plead an unjust enrichment claim: that Plaintiffs conferred a benefit on Defendants by paying a premium for the pet foods; that Defendants appreciated that they received a benefit because they knew that consumers paid a premium purchase price; and that Defendants' retention and acceptance of the benefit would be inequitable because Plaintiffs would not have purchased the pet food had the ingredients been disclosed. Opp'n at 22.

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Under California law, a plaintiff states a claim for unjust enrichment where the defendant has received a benefit “through mistake, fraud, coercion, or request.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (citing *Nibbi Bros., Inc. v. Home Fed. Sav. & Loan Assn.*, 205 Cal. App. 3d 1415, 1423 (1988)). As discussed, Plaintiffs have sufficiently alleged facts supporting a claim that they purchased food at a premium based on false misleading representations. The unjust enrichment claim thus survives.

IV. Disposition

Accordingly, the Court DENIES Defendants’ Motion to Dismiss.

The Clerk shall serve this minute order on the parties.

Initials of Deputy Clerk: rrp

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