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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LUANNY COHEN,

Plaintiff,

v.

AINSWORTH PET NUTRITION,
LLC, et al.,

Defendants.

Case No. 2:20-cv-05289-MCS-AS

**ORDER GRANTING MOTION TO
DISMISS [53]**

Defendants Ainsworth Pet Nutrition, LLC, and The J.M. Smucker Company move to dismiss Plaintiff Luanny Cohen’s First Amended Complaint (FAC, ECF No. 47). (Mot., ECF No. 53.) The Court heard oral argument on January 11, 2021. For the following reasons, the motion is granted.

I. BACKGROUND

This is a putative class action concerning purportedly false advertising of dog food. Defendants market and sell products under the Nutrish Zero Grain brand as “wholesome,” “high-quality,” “safe,” and “complete & balanced” dog food. (FAC ¶¶ 1–6; *see id.* ¶¶ 38–46 (describing marketing and sale of Nutrish Zero Grain products).) Plaintiff claims that Defendants’ products inhibit dogs from synthesizing and absorbing taurine, an essential amino acid which may help dogs avoid dilated cardiomyopathy

1 (“DCM”). The products lack supplementation with taurine or taurine precursors, amino
2 acids cysteine and methionine. (*Id.* ¶¶ 7–10, 16; *see id.* ¶¶ 58–72 (reviewing ongoing
3 discourse on possible link between taurine deficiency and DCM).) Defendants allegedly
4 deceived the public into buying Nutrish Zero Grain products at a price premium even
5 though they knew or should have known it was false and misleading to make certain
6 representations and material omissions because “grain-free dog food requires artificial
7 supplementation with taurine or precursors.” (*Id.* ¶ 40 (emphasis removed); *see also*,
8 *e.g.*, *id.* ¶¶ 12, 28–31, 38–49, 73–78, 89–90.)

9 Based on several representations on the product packaging, Plaintiff believed that
10 Nutrish Zero Grain was a complete source of nutrition for her dog, Oliver. (*Id.* ¶¶ 17,
11 20, 37, 80–81.) Plaintiff purchased Nutrish Zero Grain products every three weeks from
12 a Vons and Petco in Los Angeles, and she fed Oliver the products between 2015 and
13 2019. (*Id.* ¶¶ 20, 81–82.) In July 2019, after seeing news reports about an FDA
14 investigation of grain-free dog food brands and consulting with her veterinarian’s
15 office, she ceased feeding Oliver Nutrish Zero Grain. (*Id.* ¶¶ 85–86.)

16 Plaintiff asserts four claims: (1) violation of the California False Advertising Law
17 (“FAL”), Cal. Bus. & Prof. Code § 17500 *et seq.*; (2) violation of the California
18 Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 *et seq.*; (3) violation
19 of the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et*
20 *seq.*; and (4) breach of express warranty. (*Id.* ¶¶ 107–46.)

21 **II. LEGAL STANDARD**

22 Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for
23 “failure to state a claim upon which relief can be granted.” “To survive a motion to
24 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a
25 claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*,
26 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
27 content that allows the court to draw the reasonable inference that the defendant is liable
28 for the misconduct alleged.” *Id.* at 678.

1 The determination of whether a complaint satisfies the plausibility standard is a
2 “context-specific task that requires the reviewing court to draw on its judicial
3 experience and common sense.” *Id.* at 679. Generally, a court must accept the factual
4 allegations in the pleadings as true and view them in the light most favorable to the
5 plaintiff. *Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017); *Lee v. City of Los*
6 *Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). But a court is “not bound to accept as true
7 a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting
8 *Twombly*, 550 U.S. at 555).

9 As a general rule, leave to amend a complaint that has been dismissed should be
10 freely granted unless it is clear the complaint could not be saved by any amendment.
11 Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
12 1031 (9th Cir. 2008).

13 **III. DISCUSSION**

14 As an initial matter, the Court admonishes Defendants for filing an overlong reply
15 brief. (Initial Standing Order § 9(d), ECF No. 38.) Nonetheless, the Court considers the
16 reply in adjudicating this motion.

17 **A. Plaintiff Fails to Plausibly Plead Nutritional Deficiency**

18 Defendants argue that the FAC must be dismissed as implausible and
19 inadequately pleaded under Rule 8. (Mot. 13–18.) In its prior order, the Court dismissed
20 the Complaint with leave to amend on the basis that Plaintiff’s allegations concerning
21 the necessity of taurine fortification of grain-free dog food were “conclusory and
22 contradicted by other allegations and citations in the Complaint.” (Prior Order 9, ECF
23 No. 43.)

24 The FAC clarifies Plaintiff’s position: Plaintiff alleges that Defendants
25 represented that Nutrish Zero Grain products provide all of the essential nutrients
26 required for dogs’ health. She claims these representations are false and misleading to
27 reasonable consumers because the products are inadequately formulated. They have
28 high legume and vegetable protein content, making it difficult for dogs to synthesize

1 and absorb taurine. Without fortification with taurine or taurine precursors, the products
2 present a heightened risk of taurine deficiency and DCM. (*E.g.*, FAC ¶¶ 4–5, 7–10, 13–
3 18, 38, 40.) Plaintiff supports her theory with newly cited scientific sources allegedly
4 indicating that grain-free dog food high in legume-based protein should be
5 supplemented with taurine or taurine precursors. (*See id.* ¶¶ 52–60.)

6 The new allegations do not render the pleading any more plausible. Nothing in
7 the FAC substantiates Plaintiff’s assertion that “grain-free dog food *requires* artificial
8 supplementation with taurine or precursors.” (*Id.* ¶ 40 (emphasis changed).) Plaintiff
9 acknowledges that her allegations are “primarily informed by” a newly cited article.
10 (Opp’n 14, ECF No. 58 (citing FAC ¶ 59 n.37).) The Court deems the article
11 incorporated by reference into the FAC. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th
12 Cir. 2006) (“A court may consider evidence on which the complaint ‘necessarily relies’
13 if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s
14 claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6)
15 motion.”). The article, a commentary discussing other sources, concludes:

16 Recently, it has been suggested that pulse ingredients [*i.e.*,
17 legumes such as peas, lentils, chickpeas, and dry beans] in
18 commercial dog foods are associated with a limited number
19 of cases of DCM. Although pulse ingredients have been
20 implicated for having negative effects on the taurine status in
21 dogs (deficiency of which is a known cause of canine DCM)
22 *based on the available evidence, the relationship between*
23 *pulses and canine DCM remains undefined. . . .* Pulses and
24 other plant-based ingredients can be used to formulate
25 nutritionally adequate dog foods, and final product
26 formulations should be assessed for nutrient balance and
27 bioavailability, especially when using a limited number of
28 ingredients. Although dietary factors are important in the

1 prevention of sulfur AA [amino acid] deficiency and
2 development of DCM, *empirical data and mechanistic*
3 *studies are required to better understand* the indispensable
4 AA requirements of dogs and preventing DCM. In diets that
5 contain high concentrations of dietary fiber, compensative
6 inclusion of dietary indispensable sulfur AAs, including
7 exogenous taurine, *might be required* to offset the possibility
8 of increased fecal excretion or microbial assimilation of
9 taurine in the large intestine. . . . Greater awareness of AA
10 balance is crucial for ensuring that AA requirements are met
11 for dogs consuming static diets.

12 (Rothstein Decl. Ex. F, at 993–94, ECF No. 53-2 (emphases added).) At best, this article
13 suggests that exogenous taurine “*might be required*” for dogs with diets containing high
14 dietary fiber. (*Id.* at 994 (emphasis added).) The authors acknowledge that further study
15 is necessary to show a link between dog food with high legume content and taurine
16 deficiency or DCM. (*See id.* at 985 (“[A]ssociations between pulse ingredients and
17 incidence of DCM are, at the present time, premature.”); *id.* at 993 (“[A] true cause-
18 and-effect relationship between grain-free diets and DCM has not been proven, and
19 other factors may ultimately be more important.” (citation omitted)).) In other words,
20 the article posits a possible link between grain-free canine diets and DCM, but it draws
21 no conclusions establishing such a link and ultimately fails to support Plaintiff’s theory
22 that Defendants misrepresent their products because they are inadequately formulated
23 without sufficient taurine or precursors.

24 *Otto v. Abbott Laboratories, Inc.*, No. CV 12-1411-SVW (DTB), 2013 U.S. Dist.
25 LEXIS 53287 (C.D. Cal. Mar. 15, 2013), is instructive. There, the court evaluated
26 articles plaintiff proffered in support of his assertion that the product at issue would not
27 help rebuild muscle and strength, as represented by defendant, unless it was used by
28 adults who exercise. *See generally id.* at *9–23. The court determined that the articles

1 did not address whether the products at issue would deliver the claimed benefits. *E.g.*,
2 *id.* at *13, 18. In doing so, the court was careful not to evaluate the articles on their
3 merits:

4 Instead, the Court is only examining whether, at face value,
5 the study shows what Plaintiff claims it does: that the
6 Products cannot rebuild muscle and strength without exercise.
7 Where, as here, the Court cannot reasonably discern whether
8 the study supports this contention, the study cannot give rise
9 to a plausible claim that the Products’ representation is
10 misleading.

11 *Id.* at *14–15 n.8. Like in *Otto*, the Court does not evaluate the truth of the scientific
12 commentary or the findings of its collected studies. Instead, the Court determines that
13 the article and the studies it cites fail to support Plaintiff’s cornerstone conclusion that
14 Defendants’ products required taurine or precursor supplementation to provide
15 adequate nutrition and fulfill the representations at issue.

16 Plaintiff argues that she makes reasonable inferences from her sources at the same
17 time she acknowledges that Defendants’ dog food formulas are not the subject of those
18 sources. (*See* Opp’n 13–14.) At the hearing, Plaintiff acknowledged that no published
19 study has found that the products at issue here contain inadequate nutritional content.
20 Plaintiff noted that an FDA investigation of grain-free dog food “raises the specter” that
21 Defendants’ products are unhealthy. Plaintiff’s inferences are merely speculative as
22 applied to Defendants’ products, and thus do not render her conclusions about the
23 products’ nutritional adequacy plausible. *See, e.g., Tubbs v. AdvoCare Int’l, LP*, No.
24 CV 17-4454 PSG (AJWx), 2017 U.S. Dist. LEXIS 147681, at *20–21 (C.D. Cal. Sept.
25 12, 2017) (concluding that articles plaintiffs cited “suggest[] that some of Defendant’s
26 representations might lack substantiation, but they contain no allegations regarding
27 Defendant’s conduct or its products, and certainly no indication that the representations
28 upon which Plaintiffs reputedly relied were false”); *Murray v. Elations Co.*, No. 13-cv-

1 02357-BAS (WVG), 2014 U.S. Dist. LEXIS 107721, at *21–22 (S.D. Cal. Aug. 4,
2 2014) (“None of the studies cited in the Complaint test Elations or the same combination
3 of ingredients found in Elations, and therefore do not bear on the truthfulness of the
4 representations as to Elations.”); *Otto*, 2013 U.S. Dist. LEXIS 53287, at *16 (“[A]t best,
5 the Wilson article implies that, as of 2008, the state of research was inconclusive as to
6 the benefits of HMB without exercise. However, this does not plausibly suggest that
7 Defendant’s representation is false or misleading.”).

8 Plaintiff’s claims otherwise draw spurious inferences from inconsistent
9 allegations. *See Twombly*, 550 U.S. at 555. Plaintiff still acknowledges that dogs
10 synthesize taurine naturally without dietary supplementation, (FAC ¶¶ 58 n.35, 66(b)),
11 and that “taurine is not classified as essential in complete and balanced dog food
12 formulas,” (*id.* ¶¶ 66(e)). Plaintiff acknowledges a lack of scientific consensus on
13 whether taurine supplementation is necessary or even advisable for dogs on a diet of
14 grain-free dog food. (*See, e.g., id.* ¶ 18 (“[I]t is *believed* that the additional legume and
15 vegetable content of grain-free brands is *partially* responsible for the nutritional
16 imbalance that required taurine fortification.” (emphasis added)); *id.* ¶¶ 69–72
17 (detailing FDA investigation into link between grain-free dog food and DCM while
18 acknowledging that the investigation is ongoing).) As the Court previously observed,
19 “Plaintiff simultaneously pleads that taurine fortification is, is not, and possibly could
20 be required in grain-free dog food to provide complete nutrition and be safe and
21 wholesome.” (Prior Order 8.)

22 Plaintiff fails to plead facts above the speculative level supporting her conclusion
23 that Defendants’ products are nutritionally deficient. As Plaintiff conceded at the
24 hearing, all of her claims are predicated on her theory that Defendants’ representations
25 were false or misleading because of this purported nutritional deficiency. (*See Opp’n*
26 9–10, 23; FAC ¶¶ 109–11, 120–22, 130–35, 140–44.) Because Plaintiff fails to
27 plausibly plead an essential factual predicate of her claims, all of the claims must be
28 dismissed. *Otto*, 2013 U.S. Dist. LEXIS 53287, at *9, 26 (noting that FAL, CLRA, and

1 UCL claims “require[] a showing that ‘members of the public are likely to be deceived’
2 by the subject representation,” and dismissing claims “[b]ecause Plaintiff has not stated
3 a plausible claim that the statement was misleading” (quoting *Williams v. Gerber Prods.*
4 *Co.*, 552 F.3d 934, 938 (9th Cir. 2008)); *Murray*, 2014 U.S. Dist. LEXIS 107721, at
5 *33–34 (noting that express warranty claim requires factual allegations showing falsity
6 of representations, and dismissing claim because “Plaintiff has not plausibly alleged
7 that the representations on Elations label and packaging are false or misleading”).

8 **B. Plaintiff Fails to Plead Her Averments of Fraud with Particularity**

9 Defendants assert that the Complaint also fails to meet the heightened pleading
10 requirements of Rule 9(b). (Mot. 19–23.) Averments of fraudulent conduct are subject
11 to the heightened pleading standard of Rule 9(b). *See Vess v. Ciba-Geigy Corp. USA*,
12 317 F.3d 1097, 1105 (9th Cir. 2003). To meet Rule 9(b), a plaintiff must “state with
13 particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). The complaint
14 must identify the “who, what, when, where, and how” of the fraudulent misconduct, “as
15 well as what is false or misleading about” it, and “why it is false.” *Cafasso v. Gen.*
16 *Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks
17 omitted).

18 The Court concluded that the allegations in the Complaint failed to meet the Rule
19 9(b) standard because Plaintiff did “not allege with specificity any context surrounding
20 when, where, and how she encountered the purported misrepresentations” and failed
21 “to identify how some identified representations are false and misleading.” (Prior Order
22 10). The FAC fails for similar reasons. Plaintiff may have adequately pleaded how she
23 encountered a small subset of the packaging representations, (*see* FAC ¶ 20), but she
24 does not aver that she ever encountered other purported misrepresentations, (*see* FAC
25 ¶¶ 38, 43, 90 (detailing dozens of packaging claims, website claims, and material
26 omissions)).

27 Nor does she plead how any of the representations at issue are false or misleading.
28 As discussed, Plaintiff has not adequately alleged that Defendants’ products are

1 deficient as formulated, so her claims are inadequately pleaded as to representations
2 made purportedly false or misleading by this conclusion. Plaintiff’s brief does not
3 identify any other basis upon which she claims Defendants’ representations are false or
4 misleading. (*See* Opp’n 22–23.) In the prior order, the Court gave one example of a
5 representation whose purported falsity did not rely upon the poorly pleaded taurine
6 deficiency theory. (Prior Order 10.) The FAC does not remedy the Court’s concern. For
7 example, assuming *arguendo* that Plaintiff’s nutritional deficiency theory were well
8 pleaded, Plaintiff fails to plead facts showing how the following representations about
9 Defendants’ products are false or misleading:

- 10 • “Made for dogs of all sizes”;
- 11 • “Real recipes. Real ingredients. Real good”;
- 12 • “Only the best, high-quality, carefully chose ingredients”;
- 13 • “Backed by 80+ years of focused excellence in pet nutrition”;
- 14 • “Made with safe, high-quality ingredients”;
- 15 • “Real salmon is the #1 ingredient”;
- 16 • “Zero grain, gluten or fillers”;
- 17 • “Zero poultry by-product meal, artificial flavors, colors or artificial
18 preservatives”;
- 19 • “Real salmon is a high quality, easily digestible protein that provides essential
20 nutrients, which help maintain healthy organs [. . .]. Cats and dogs both love our
21 tasty, fresh salmon, which is less likely to aggravate food sensitivities in dogs.
22 It’s also naturally rich in Omega 3 fatty acids, which help support cognitive
23 health”;
- 24 • “These veggies have been carefully chosen because they’re naturally gluten-free
25 and gentle on the digestive system”;
- 26 • “Beet pulp is a wholesome fiber source that naturally provides prebiotics, which
27 help support healthy digestion.”

28

1 (FAC ¶¶ 38, 43 (omission in original) (footnotes omitted).) Without facts establishing
2 “what is false or misleading about” Defendants’ representations, Plaintiff’s claims
3 relying on averments of fraud must be dismissed. *Cafasso*, 637 F.3d at 1055.

4 **C. Leave to Amend Is Inappropriate**

5 The Court previously dismissed the Complaint with leave to amend on the
6 grounds that Plaintiff’s key allegations concerning the purported nutritional deficiencies
7 in Defendants’ products were inadequately pleaded and that she failed to plead
8 averments of fraud with particularity. (Prior Order 7–10.) Plaintiff failed to cure these
9 deficiencies upon amendment. The Court determines that granting further leave to
10 amend would be futile. *See Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729,
11 738 (9th Cir. 1987) (affirming denial of leave to amend where amended complaint failed
12 to cure defects identified in order dismissing prior complaint).

13 Because granting the motion and denying leave to amend on these grounds is
14 dispositive, the Court declines to address the other arguments presented in Defendants’
15 motion.

16 **IV. CONCLUSION**

17 The motion is granted. Plaintiff’s claims are dismissed with prejudice and without
18 leave to amend. Defendants shall file a proposed judgment within 14 days.

19
20 **IT IS SO ORDERED.**

21
22 Dated: January 21, 2021

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24 MARK C. SCARSI
25 UNITED STATES DISTRICT JUDGE
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