United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LISA ROBIE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

TRADER JOE'S COMPANY,

Defendant.

Case No. 20-cv-07355-JSW

ORDER GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND

Re: Dkt. No. 35

Now before the Court for consideration is the motion to dismiss the first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) filed by Trader Joe's Company ("Trader Joe's"). The Court has considered the parties' papers, relevant legal authority, and the record in this case, the Court GRANTS Trader Joe's motion and GRANTS Plaintiff Lisa Robie ("Plaintiff") leave to amend.

BACKGROUND

In her first amended complaint, Plaintiff alleges that Trader Joe's labels its Almond Clusters cereal (the "Product") as "Vanilla Flavored With Other Natural Flavors" which causes consumers like herself to believe that the Product will contain an appreciable amount of vanilla from the vanilla plant and non-vanilla, natural flavors. (Dkt. No. 33, Am. Compl. at ¶¶ 4, 106-09.)

Plaintiff alleges Trader Joe's representations are false and misleading because (1) the amount of vanilla is a trace or *de minimus* and (2) the predominant source of the purported vanilla taste is from artificial flavors – vanillin and ethyl vanillin. (*Id.* at ¶¶ 92-96.) Plaintiffs assert that these versions of vanillin are "from an artificial petrochemical source" made through chemical reactions. (*Id.* at ¶¶ 106-07.)

Further, Plaintiff alleges that the Product is sold at a premium price as compared to similar products, based on the misleading labeling. (*Id.* at ¶ 121.) Plaintiff alleges that she saw the labeling and relied upon it to expect that the Product would contain vanilla from the vanilla plant in addition to only other natural, not artificial, flavors. (*Id.* at ¶ 18.) Plaintiff alleges that had she known the labeling was false, she would not have purchased the Product at a premium price or would not have purchased the Product at all. (*Id.* at ¶ 23.)

Plaintiff filed a consumer protection class action in which she alleges that the mislabeling of the Product constitutes fraud and violates various consumer protection statutes. Plaintiff alleges causes of action for (1) and (2) violations of the unlawful and unfair/fraudulent prongs of the California Unfair Competition Law ("UCL"), California Business and Professions Code section 17200, *et seq.*; (3) violation of California False Advertising Law ("FAL"), California Business and Professions code section 17500, *et seq.*; (4) violation of California's Consumers Legal Remedies Act ("CLRA"), California Civil Code section 1750; (5) breach of express warranty, implied warranty, and Magnuson-Moss warranty; (6) fraud; and, (7) unjust enrichment. (*Id.* at ¶¶ 172-87). Plaintiff seeks monetary damage as well as equitable and injunctive relief.

In its motion to dismiss, Trader Joe's argues that (1) Plaintiff's state law claims are preempted; (2) Plaintiff has not plausibly alleged that a reasonable consumer would likely be misled by their labeling; (3) Plaintiff may not seek equitable relief pursuant to her UCL, FAL, unjust enrichment, and CLRA claims where she may have an adequate remedy at law; (4) Plaintiff lacks statutory standing to assert claims under the UCL, FAL, and CLRA because she has not plausibly alleged a "price premium" and therefore has not alleged economic injury; (5) Plaintiff's warranty and state law claims fail to state a cause of action.

The Court shall address any additional relevant facts in the remainder of this order.

ANALYSIS

A. Applicable Legal Standards.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. A court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Pursuant to *Twombly*, a plaintiff cannot merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows 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) (citing *Twombly*, 550 U.S. at 556). If the allegations are insufficient to state a claim, a court should grant leave to amend unless amendment would be futile. *See, e.g.*, *Reddy v. Litton Indus., Inc.*, 912 F.3d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N.Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

Where, as here, a plaintiff asserts a claim sounding in fraud, the plaintiff must "state with particularity the circumstances regarding fraud or mistake." Fed. R. Civ. P. 9(b) ("Rule 9(b)"). A claim sounds in fraud if the plaintiff alleges "a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). The particularity requirement of Rule 9(b) is satisfied if the complaint "identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *see also Vess*, 317 F.3d at 1106. Accordingly, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id.* at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

As a general rule, "a district court may not consider any material beyond the pleadings in ruling on Rule 12(b)(6) motion." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citation omitted). However, documents subject to judicial notice may be considered on a motion to dismiss. *See Mack S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). In doing so, the Court does not convert a motion to dismiss to one for summary judgment. *Id.* The Court may review matters that are in the public record, including pleadings, orders, and other papers filed in court. *See id.*

B. Preemption Issues.

Trader Joe's contends that Plaintiff's claims are expressly preempted because the Product fully complies with Federal Drug Administration ("FDA") regulations, which preempt any provision of state law that is not identical to its federal counterpart. The Food, Drug, and Cosmetic Act ("FDCA") empowers the FDA with the power to (a) protect the public health by ensuring the safety, wholesomeness, sanitariness, and proper labeling of foods; (b) promulgate regulations to implement the statute; and (c) enforce regulations through its administrative proceedings. 21 U.S.C. § 393(b)(2)(A). The FDCA creates a comprehensive federal scheme of food regulation to ensure food safety and proper labeling in an effort to avoid misleading consumers. *See* 21 U.S.C. § 341. In general, the FDA considers food misbranded if "its labeling is false or misleading in any particular." 21 U.S.C. § 343(a)(1).

FDA regulations control how flavor must be declared on a food's label, including when flavors can be described as "natural" and when they must be labeled "artificial." The FDA defines "flavor" as any ingredient "whose significant function in food is flavoring rather than nutritional," and which is used "to impart or help impart a taste or aroma in food." *See* 21 C.F.R. § 101.22(a)(3); 21 C.F.R. § 170.3(o)(13). The general rule is that a label may "make direct or indirect representations with respect to the primary recognizable flavor(s), by word, vignette, e.g., depiction of a fruit, or other means" or otherwise "designate the type of flavor in the food other than through the statement of ingredients." 21 C.F.R. § 101.22(i).

FDA regulations define "natural flavor" and "artificial flavor." The definition of "natural flavor" is:

> [T]he essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof, who significant function in food is flavoring rather than nutritional. Natural flavors include the natural essence or extractives from plants listed in §§ 182.10, 182.20 [and others].

21 C.F.R. § 101.22(a)(3). The vanilla plant is listed in the enumerated sections.

"Artificial flavor," on the other hand, is defined by FDA regulation as "any substance, the function of which is to impart flavor, which is not derived" from sources specified in the definition of "natural flavor." *Id.* § 101.22(a)(1). The definition further states that it "includes substances listed in [another section of the chapter] except where these are derived from natural sources." *Id.*

Trader Joe's argues that Plaintiff attempts not to enforce only the federal labelling requirements, but also independent of those requirements, Plaintiff contends that the Product's labeling is misleading and should be revised to say that the Product is "artificially flavored" even if the added vanillin was made from a natural source and through a natural process. However, the FDA regulations merely require that if a food derives its characterizing flavor from both the source characterized (here, vanilla) and natural flavor is derived from a different source (for instance, from "bark, bud, root leaf or similar plant material"), the product label must state "with other natural flavors." *See* 21 C.F.R. § 101.22(i)(1)(iii). To the extent Plaintiff seeks to impose additional labeling requirements or requirements that differ from FDA regulations, those claims are preempted. *See Reid v. Johnson & Johnson*, 780 F.3d 952, 959 (9th Cir. 2015) (holding that federal law provides that no state may directly or indirectly establish any requirement for the labeling of food that is not identical to the federal requirements) (citations omitted). "The phrase 'not identical to' means 'that the State requirement directly or indirectly imposes obligations to contain provisions concerning the composition or labeling of food that are not imposed by or contained in the applicable federal regulation or differ from those specifically imposed by or contained in the applicable federal regulation. *Id.* (citing *Lilly v. ConAgra Foods, Inc.*, 743 F.3d

662, 665 (9th Cir. 2014) (quoting 21 C.F.R. § 100.1(c)(4)).

To the extent Plaintiff's argument that the Product's labeling is deceptive because the flavors, and not the ingredients, are unnatural, those claims are preempted. Under "21 C.F.R. § 101.22(i), a product may be labeled as 'fruit flavored' or 'naturally flavored,' even if it does not contain fruit or natural ingredients. So long as that product 'contains natural flavor' which is 'derived from' the 'characterizing food ingredient,' it will not run afoul of the regulation." *Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097, 1102-03 (N.D. Cal. 2012).

C. The Court Dismisses the Statutory Claims.

Trader Joe's argues that, to the extent her statutory claims are not preempted, they would fail as a matter of law because Plaintiff has not plausibly alleged that any representation on the Product's labeling would deceive a reasonable consumer. Plaintiff relies on the theory that she and other reasonable consumers would be misled by the labeling because the label suggests that the vanilla flavor comes exclusively or predominantly from the vanilla plant when, in fact, the Product contains vanillin and ethyl vanillin, which Plaintiff contends are "artificial flavors." (*See* Am. Compl. ¶¶ 31-32.) Plaintiff specifically alleges that the Product contains an artificial version of vanillin and ethyl vanillin, which she alleges are "classified by the FDA as synthetic flavoring substances and artificial flavors." (*Id.* at ¶ 52, citing 21 C.F.R. § 182.60.)

In order to state a claim under the FAL, CLRA, or the UCL, Plaintiff must allege facts satisfying the "reasonable consumer" standard, *i.e.* that members of the public are likely to be deceived. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). "Likely to deceive" implies more than a mere possibility that the label might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the label is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled. *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003); *accord Clark v. Westbrae Natural, Inc.*, Case No. 20-cv-03221-JSC, 2020 WL 7043879, at *3-4 (N.D. Cal. Dec. 1, 2020); 2021 WL 158027, at *2-3 (N.D. Cal. Apr. 22, 2021). A reasonable consumer is the "ordinary consumer within a target population." *Lavie*, 105 Cal. App. 4th at 510. The consumer is "not versed in the art of inspecting

and judging a product, in the process of its preparation or manufacture." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682 (2006). Under this standard, a cognizable claim exists even where the statement is not untrue "if a reasonable consumer could find [a] statement would be 'either actually misleading' or having the 'capacity, likelihood, or tendency to deceive or confuse the public.'" *Bailey v. Rite Aid Corp.*, No. 18-cv-06926-YGR, 2019 WL 4260394, at *6 (N.D. Cal. Sept. 9, 2019) (citing *Williams*, 552 F.3d at 938). This requires more than a "mere possibility" that the use of the term on the label "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (quoting *Lavie*, 105 Cal. App. 4th at 508). Rather, it must be "probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie*, 105 Cal. App. 4th at 508); *see also Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1304 (2011) (holding that "the standard is not a least sophisticated consumer," but rather a reasonable one).

Plaintiff need not prove that she can satisfy the "reasonable consumer" standard at this procedural posture, but a complaint must contain sufficient factual allegations to state a claim that is "plausible on its face." *Iqbal*¸ 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable conclusion that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The determination is context-specific and requires the court "to draw on its judicial experience and common sense. *Id.* at 679.

Whether a business practice is deceptive is an issue of fact not generally appropriate for decision on a motion to dismiss. *See, e.g.*, *Williams*, 552 F.3d at 938-39 (citing *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134-35 (2007)). However, courts have granted motions to dismiss under the UCL and similar statutes on the basis that the alleged misrepresentations were not false, misleading, or deceptive as a matter of law. *See, e.g.*, *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 989 (S.D. Cal. 2014); *Freeman v. Time, Inc.*, 68 F.3d 285, 290 (9th Cir. 1995) (holding that reading flyer as a whole dispelled plaintiff's allegation that a particular statement was deceptive). The reasonable

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consumer standard "requires a probability 'that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'" *Clark*, 2020 WL 7043879, at *3 (quoting *Lavie*, 105 Cal. App. 4th at 507, 504).

Here, the Court finds that Plaintiff has not alleged facts that could plausibly support an inference that a reasonable consumer would interpret "vanilla" on the Product's label to mean that the flavor is derived exclusively from the vanilla plant. *See id.* Contrary to Plaintiff's bare assertions, vanillin is not automatically considered artificial flavoring under the FDA's regulations. Multiple courts have determined that vanillin may be either artificial or natural, "depending on their derivation." *Wynn v. Topco Assocs., LLC*, 2021 WL 168541, at *1 n.3 (S.D.N.Y. Jan. 19, 2021); *see also Barreto v. Westbrae Natural, Inc.*, 2021 WL 76331, at *3-4 (S.D.N.Y. Jan. 7, 2021); *see also Cosgrove v. Blue Diamond Growers*, 202 WL 7211218, at *1 (describing vanillin as a "naturally occurring substance obtained from tree bark which simulates vanilla flavor"). In fact, Plaintiff's original complaint conceded that vanillin may be derived from vanilla beans and other natural sources like wood pulp, thus satisfying the FDA's definition of "natural flavor" as being "derived from" sources like "bark, bud, root, leaf or similar plant material." (*See* Dkt. No. 1, Compl. ¶ 50; 21 C.F.R. § 101.22(a)(3).) Here, Plaintiff fails to allege that the vanillin in the Product comes from artificial rather than natural sources. The conclusory allegations that the flavoring is artificial are insufficient to state a claim. *See Wynn*, 2021 WL 168541, at *6 ("[T]he lack of sufficient allegations here that the purportedly artificial flavors are in fact artificial is fatal to Plaintiffs' claim."); *Barreto*, 2021 WL 76331, at *3 (dismissing claim because plaintiff "does not plausibly allege that the added vanillin detected by the GS-MS analysis was derived from artificial rather than natural sources"). The Court finds that Plaintiff's allegations that the vanillin is artificial is based on generalized manufacturing practices and not specific to the Product at issue here.[1]

[1] Plaintiff's claim that the Product contains ethyl vanillin is similarly unsupported by factual allegations in the amended complaint, which alleges only that "[a]nalytic testing of the Product performed in the summer of 2020" "detected" ethyl vanillin. (Am. Compl. ¶¶ 92-93.) In her original complaint, Plaintiff alleged that a gas chromatography-mass spectrometry analysis detected ethyl vanillin at the concentration of 6.53 parts per billion. (Compl. ¶ 52.) Although the results of the testing are not specifically mentioned in the amended complaint, the Court finds

Further, as in *Clark*, the label here does not contain "any other words or pictures that suggest the vanilla flavor is derived exclusively from the vanilla bean." 2020 WL 7043879, at *3. The Court follows the decision in *Clark* and "numerous other courts considering challenges to the use of the word 'vanilla' in food descriptions [which] have held, there is nothing about the word 'vanilla' itself which suggests to the reasonable consumer that the flavor comes *exclusively* from the vanilla bean." *Clark*, 2021 WL 1580827, at *2 (citations omitted). There is nothing additional in the flavor description of the Product's label "which would prompt a reasonable consumer to conclude otherwise." *Id.* (citations omitted). There is no description that the Product is made with vanilla nor does it include any vignettes or images of a vanilla plant or bean. *See id*. Even if the Product's reference to "vanilla" would lead some consumers to believe that it contains vanilla from the plant, there is no deception because, as Plaintiffs concede, the Product does in fact contain vanilla. (*See* Am. Compl. ¶ 33.)

Because the Court finds, as drafted, the first amended complaint does not plausibly allege that a reasonable consumer would be deceived by the representations on the Product's label, the statutory claims fail as a matter of law.

D. Equitable Relief Claims.

Trader Joe's argues that Plaintiff cannot proceed on her equitable claims where there is an adequate remedy at law. Based on the holding in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020), Trader Joe's argues that equitable claims under the UCL, FAL, and unjust enrichment claims, as well as restitution and injunctive relief under the CLRA, are precluded by the request for damages under the CLRA, warranty, and fraud claims. Because Plaintiff has not alleged that she lacks an adequate remedy at law, the claims for equitable relief and restitution fail. *See id.* (dismissing equitable claims because the operative complaint failed to allege that the plaintiff lacked an adequate legal remedy); *see also In re MacBook Keyboard Litig.*, 2020 WL 6047253, at *3 (N.D. Cal. Oct. 13, 2020) (collecting cases which find that *Sonner*

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flaws in the factual allegations. First, there is no indication that there was a control condition during the testing and there no presentation to the Court by someone qualified to interpret whether the purported finding of such an infinitesimal amount is material or significant.

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applies to preclude both restitution and injunctive relief in cases in which the plaintiff had failed to allege that they lack an adequate remedy at law).

E. Economic Injury.

Trader Joe's argues that Plaintiff's claims should be dismissed for failure to allege a cognizable economic injury. Contrary to Trader Joe's contentions, the Court finds that dismissal is not warranted on the independent ground that Plaintiff has not pled sufficient facts to support a plausible theory of economic injury. Plaintiff alleges she purchased the Product at a premium price based on her reading of the label. Pleading economic injury requires a plaintiff to alleged that the label statement at issue "caused the product to be sold at a higher price." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 966 (9th Cir. 2018). Here, Plaintiff alleges that she "and the Class lost money as a result of Defendant's conduct because they would not have purchased the Product or would not have paid as much as they did in the absence of Defendant's misrepresentations and omissions." (Am. Compl. ¶ 23.) Although sparse, these allegations are sufficient to suffice the plausibility standard. *See e.g., Chavez v. Blue Sky Natural Beverage Co.*, 340 F. App'x 359, 361 (9th Cir. 2009) (holding that under the UCL, FAL, and CLRA, sufficient injury pled when plaintiff alleged "he did not receive what he had paid for" and "he would not have paid had he known the truth"); *Davidson*, 889 F.3d at 965 ("[T]he economic injury of paying a premium for a falsely advertised product is sufficient hard to maintain a cause of action.").

F. Other State Claims.

Trader Joe's also moves to dismiss Plaintiff's remaining state claims. Because the warranty and fraud claims rise and fall on whether Plaintiff has been able plausibly to allege false or misleading representations, these claims are dismissed.

Plaintiff's claim for unjust enrichment fails to identify any independent theory of unjust enrichment that does not rise or fall with her statutory claims or are merely duplicative of those claims. As such, this separate cause of action is also dismissed. *See, e.g., Gudgel v. Clorox Co.*¸ No. 20-cv-05712-PJH, 2021 WL 212899, at *6 (N.D. Cal. Jan. 21, 2021) (dismissing unjust enrichment claim that rises or falls with the statutory claims or, in the context of the "reasonable consumer" test, fails to identify an actionable deception).

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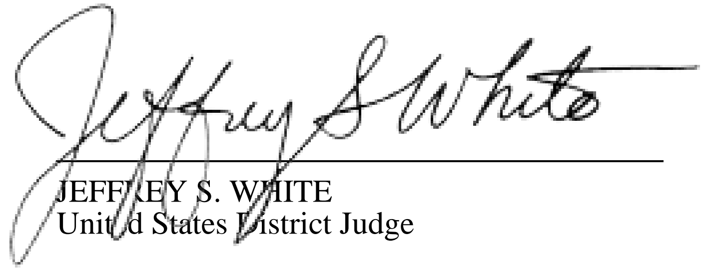
CONCLUSION

For the reasons stated above, the Court GRANTS Trader Joe's motion to dismiss the first amended complaint. The Court GRANTS Plaintiff leave to file an amended complaint, consistent with the holdings in this order. Should Plaintiff elect to file a second amended complaint, she shall do so by no later than 20 days from issuance of this order.

IT IS SO ORDERED.

Dated: June 14, 2021



JEFFREY S. WHITE
United States District Judge