UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

AMY MAXWELL,

Plaintiff,

v.

UNILEVER UNITED STATES, INC., et al.,

Defendants.

Case No. 5:12-cv-01736-EJD

ORDER GRANTING DEFENDANT PEPSICO, INC.'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT

Re: Dkt. No. 123

Presently before the Court is Defendant PepsiCo, Inc.'s ("PepsiCo") motion to dismiss all of the claims and causes of action in Plaintiff Amy Maxwell's ("Plaintiff") Third Amended Complaint ("TAC") relating to Pepsi's carbonated soft drinks. Motion to Dismiss ("Mot."), Dkt. No. 123. Pursuant to Civil Local Rule 7-1(b), this matter is suitable for decision without oral argument. For the reasons stated below, Pepsi's motion is GRANTED.

I. BACKGROUND

The Court's first and second dismissal orders (Dkt. Nos. 60, 83) set forth the detailed legal and factual background for Plaintiff's claims. The Court reviews facts relevant to the instant motion below:

Plaintiff is a California consumer who purchased Pepsi and seven other of Defendants' products. Third Amended Complaint ("TAC") ¶¶ 1-2. Plaintiff brings a putative class action suit against Defendants on behalf of all persons in the United States who, since April 6, 2008 to the present, purchased the same or 83 similar food products allegedly mislabeled. *Id.* ¶ 1. Of the 83,

Plaintiff claims the following 12 are "substantially similar" to Pepsi:

- Caffeine Free Pepsi
- Pepsi MAX
- Pepsi NEXT
- Pepsi One
- Pepsi Wild Cherry
- Diet Pepsi
- Caffeine Free Diet Pepsi
- Diet Pepsi Lime
- Diet Pepsi Vanilla
- Diet Pepsi Wild Cherry
- Pepsi Made in Mexico
- Pepsi Throwback

Id. ¶ 4.

With respect to these products, Plaintiff alleges a single theory of liability: that PepsiCo engaged in unlawful food labeling practices by failing to disclose the presence of chemical preservatives, artificial flavorings, or artificial added colors. *Id.* ¶ 16. In the allegedly offending products, "phosphoric acid" and "citric acid" appear in the list of ingredients on the side of the can, but the can does not otherwise give any indication that the Pepsi products contain artificial preservatives or flavors. *Id.* ¶ 183. For example, one Pepsi can contains the following labels:

PepsiCo's Request for Judicial Notice ("PepsiCo's RJN"), Dkt. No. 124, Exs. A and B.

Plaintiff complains that "phosphoric acid" and "citric acid" are "unlawful and misleading

language" because they are not identified as providing artificial preservatives and/or flavors." *Id*. ¶ 183. Plaintiff argues that she reasonably relied on these representations, and that she "would not have otherwise purchased this product had she known the truth about this product, i.e., that it contained artificial flavors or artificial preservatives." *Id*. ¶ 185.

The Court has already twice dismissed Plaintiff's claims. Dkt. Nos. 60, 83. After filing her TAC, Defendants again moved to dismiss. Mot. The Court subsequently stayed this case under the primary jurisdiction doctrine, with the exception that it would accommodate the instant motion from PepsiCo. Dkt. No. 122.

II. LEGAL STANDARDS

A. Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss under Rule 12(b)(1) challenges subject matter jurisdiction, and may be either facial or factual. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). A facial Rule 12(b)(1) motion involves an inquiry confined to the allegations in the complaint. Thus, it functions like a limited-issue motion under Rule 12(b)(6); all material allegations in the complaint are assumed true, and the court must determine whether lack of federal jurisdiction appears from the face of the complaint itself. *Thornhill Publ'g Co. v. General Tel. Elec.*, 594 F.2d 730, 733 (9th Cir. 1979).

B. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). Moreover, the factual allegations "must be enough to raise a right to relief above the

speculative level" such that the claim "is plausible on its face." *Twombly*, 550 U.S. at 556-57.

When deciding whether to grant a motion to dismiss, the court generally "may not consider any material beyond the pleadings." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). The court must accept as true all "well-pleaded factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court must also construe the alleged facts in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1998). "[M]aterial which is properly submitted as part of the complaint may be considered." *Twombly*, 550 U.S. at 555. But "courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Id*.

Fraud-based claims are subject to heightened pleading requirements under Federal Rule of Civil Procedure 9(b). In that regard, a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). The allegations 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." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). To that end, the allegations must contain "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Averments of fraud must be accompanied by 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) (citation omitted). Additionally, "the plaintiff must plead facts explaining why the statement was false when it was made." *Smith v. Allstate Ins. Co.*, 160 F.Supp.2d 1150, 1152 (S.D.Cal. 2001) (citation omitted); *see also In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994) (en banc) (superseded by statute on other grounds).

III. DISCUSSION

All of Plaintiff's claims are premised on her contention that, by listing "phosphoric acid" and "citric acid" as ingredients on the Pepsi can label but not identifying them as artificial flavors

and/or preservatives, Pepsi is unlawfully and misleadingly mislabeled. TAC ¶ 185. Plaintiff claims that Defendants violate California's False Advertising Law, *see* Cal. Bus. & Prof. Code § 17500, the Consumer Legal Remedies Act, *see* Cal. Civ. Code § 1770, and the Unfair Competition Law ("UCL"), *see* Cal. Bus. & Prof. Code § 17200. *Id*. ¶¶ 240-304.

PepsiCo attacks Plaintiff's claims as (1) lacking standing under Rule 12(b)(1); and (2) legally insufficient under Rule 12(b)(6). The Court addresses each in turn.

A. Requests for Judicial Notice

A court may take judicial notice of a document on which the complaint "necessarily relies" if: (1) "the complaint refers to the document," (2) "the document is central to the plaintiff's claim," and (3) "no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Daniels-Hall v. Natl. Educ. Assn.*, 629 F.3d 992, 998 (9th Cir. 2010); *see also Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000, 1003 (N.D. Cal. 2012) ("Courts often take judicial notice of packaging labels in false advertising suits when neither party objects to the authenticity of the label and the labels are central to the plaintiff's complaint.").

PepsiCo requests judicial notice of the eleven product labels at issue (Exs. A-H). Dkt. No. 124. Plaintiff does not appear to object to PepsiCo's request, and the packaging labels satisfy the requirements discussed above. In addition, the Court has previously judicially noticed product labels in this case. Dkt. No. 83 at 6. Accordingly, PepsiCo's request for judicial notice is GRANTED.

Plaintiff requests judicial notice of ingredient definitions which she downloaded from PepsiCo's website. Dkt. No. 128. PepsiCo objects to this request on the ground that the website is not incorporated into or referenced by the TAC. Dkt. No. 130. The Court agrees with PepsiCo that these definitions are not referenced in the TAC or central to Plaintiff's claim. Indeed, as the discussion below reveals, the Court can decide the present motion without considering them. Accordingly, Plaintiff's request for judicial notice is DENIED.

B. Article III Standing

To have standing under Article III of the U.S. Constitution, a plaintiff must allege: (1) an injury-in-fact that is concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that the injury is redressable by a favorable ruling. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000).

As with PepsiCo's last motion to dismiss, PepsiCo does not dispute that Plaintiff has standing as to the purchased Pepsi product, and instead only challenges Plaintiff's standing as to the 12 non-purchased Pepsi products. Mot. 14-18. To date, courts have reached different conclusions as to whether a plaintiff has standing for products they did not purchase. *See, e.g.*, *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 921-22 (N.D. Cal. 2012) (collecting cases). In its previous dismissal order, this Court adopted the approach of some courts in this district, which have concluded that a plaintiff may have standing to assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged misrepresentations are substantially similar. Dkt. No. 83 at 7-10. It nevertheless dismissed Plaintiff's claims with leave to amend as to the unpurchased products because Plaintiff had not adequately alleged that the non-purchased products were substantially similar to the purchased products. *Id*.

Here, PepsiCo argues that Plaintiff again failed to adequately allege that the non-purchased products are substantially similar. Mot. 14-18. The Court disagrees. The TAC alleges that the non-purchased products "have the same basic ingredients (differing only in flavor) and the same label claims as the Purchased regular Pepsi product." TAC ¶ 224. It also makes specific allegations as to phosphoric acid and citric acid, the alleged misleading statements at issue here. *Id*. ¶¶ 225-26. Taken as true and construed in the light most favorable to Plaintiff, this is sufficient.

C. UCL, FAL, CLRA Statutory Standing

In addition to the Article III requirements, the UCL, FAL, and CLRA require that Plaintiff

demonstrate standing. To have standing under the FAL and the CLRA, a plaintiff must allege that she relied on the defendant's alleged misrepresentation and that she suffered economic injury as a result. *See, e.g.*, Cal. Bus. & Prof. Code § 17535 (providing that a plaintiff must have "suffered injury in fact and ha[ve] lost money or property as a result of a violation of this chapter"); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010) (finding plaintiff's CLRA claim failed because plaintiff failed to allege facts showing that he "relied on any representation by" defendant). To have standing under the UCL's fraud prong, a plaintiff must demonstrate that she actually relied upon the allegedly fraudulent misrepresentation. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009). In addition, courts have held that at least for claims under the UCL's unlawful and unfair prongs that are based on misrepresentation or deception, a plaintiff must plead actual reliance to have standing. *See, e.g., In re Actimmune Mktg. Litig.*, No. 08-2376, 2010 WL 3463491, at *8 (N.D. Cal. Sept. 1, 2010) *aff'd*, 464 Fed. Appx. 651 (9th Cir. 2011).

Reliance is proved by showing that the defendant's misrepresentation or nondisclosure was 'an immediate cause' of the plaintiff's injury-producing conduct." *In re Tobacco II*, 46 Cal. 4th at 326 (citation and alteration omitted). "A plaintiff may establish that the defendant's misrepresentation is an 'immediate cause' of the plaintiff's conduct by showing that in its absence the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct." *Id.* However, "the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct." *Id.* at 328. Instead, "[i]t is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing his decision." *Id.* at 207.

PepsiCo argues that Plaintiff failed to plead actual reliance as to any of her claims because she did not identify the particular statements she allegedly relied upon.[1] Mot. 6. The Court

[1] PepsiCo also, in so arguing, contends that Plaintiff has not alleged reliance under the reasonable consumer standard. However, the reasonable consumer standard is not a standing requirement, but a substantive requirement of UCL, FAL, and CLRA claims. *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) ("But the reasonable consumer standard, unlike the individual reliance requirement described above, is not a standing requirement."). Accordingly, the Court will

agrees. The TAC alleges:

> The following unlawful and misleading language appears on the label of Pepsi as an ingredient: "phosphoric acid" and "citric acid" which are not identified as providing artificial preservatives and/or flavors

TAC ¶ 183. It also alleges that Plaintiff "reasonably relied on the[se] label representations" and "based and justified the decision to purchase the product" on these representations. TAC ¶ 185. However, even accepting these allegations as true and construing them in the light most favorable to Plaintiff, the TAC fails to explain how Plaintiff could have read the words "phosphoric acid" and "citric acid" (or otherwise read the Pepsi label) and been lead to believe that Pepsi did not contain artificial flavors. This theory becomes even more attenuated when viewed in context: colas like Pepsi are artificial products and have been familiar to the public as such for decades. In addition, the ingredients list identifies at least one other artificially sounding flavor: "Caramel Color." PepsiCo's RJN, Ex. B. As such, Plaintiff's theory that she read the words "phosphoric acid" and "citric acid" and concluded that Pepsi did not contain artificial ingredients simply is not plausible under either Rule 8(a) or Rule 9(b).[2]

Because Plaintiff has failed to adequately allege reliance and reliance is a necessary element of all of Plaintiff's claims, Plaintiff's claims are DISMISSED. Although this, in and of itself, is sufficient to decide PepsiCo's motion, the Court also finds for the reasons discussed below that certain substantive standards of the UCL, FAL, and CLRA also provide grounds for dismissal, so the Court will address those as well.

D. UCL, FAL, CLRA Substantive Claims

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus.

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discuss this issue separately, below.

[2] As the Court previously found in its order on PepsiCo's motion to dismiss Plaintiff's Amended Complaint, Plaintiff's claims "sound in fraud"—e.g., PepsiCo's alleged misleading labeling of its Pepsi cans—and must be judged under the heightened pleading standard of Rule 9(b). Dkt. No. 60 at 6-7; *see Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (holding that if "fraud is not a necessary element of a [particular] claim," Rule 9(b) will apply if the plaintiff has "allege[d] a unified course of fraudulent conduct and rel[ied] entirely on that course of conduct as the basis of [the] claim").

& Prof. Code § 17200. "Each prong of the UCL is a separate and distinct theory of liability." *Kearns v. Ford Motor Co*., 567 F.3d 1120, 1127 (9th Cir.2009). The FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. and Prof. Code § 17500. The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770.

False advertising claims under the FAL, the CLRA, and the fraudulent and unfair prongs of the UCL are governed by the "reasonable consumer" standard. *Williams v. Gerber Products Co*., 552 F.3d 934, 938 (9th Cir. 2008); *Lavie v. Procter & Gamble Co*., 105 Cal.App. 4th 496, 504 (2003); *Kasky v. Nike, Inc*., 27 Cal.4th 939, 951 (2002); *cf. Bruton v. Gerber Prod. Co*., 703 F. App'x 468, 472 (9th Cir. 2017) ("[T]he reasonable consumer test is a requirement under the UCL's unlawful prong only when it is an element of the predicate violation.").

The "reasonable consumer" standard requires a plaintiff to show that "members of the public are likely to be deceived." *Williams*, 552 F.3d at 938; *Consumer Advocates v. Echostar Satellite Corp*., 113 Cal. App. 4th 1351, 1360, 8 Cal. Rptr. 3d 22 (2003). As the Ninth Circuit has explained, the "reasonable consumer" standard

> requires more than a mere possibility that [Defendants'] label "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Procter & Gamble Co*., 105 Cal. App. 4th 496, 129 Cal. Rptr. 2d 486, 495 (2003). Rather, the reasonable 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." *Id*.

Ebner v. Fresh, Inc., 838 F.3d 958, 965 (9th Cir. 2016).

As discussed above, Plaintiff's theory of liability revolves around a single alleged fact: Pepsi listed "phosphoric acid" and "citric acid" as ingredients, but did not identify that Pepsi contained artificial preservatives or flavors. *See id*. ¶¶ 182-86. Plaintiff claims this constitutes an "unlawful" business practice under the UCL because it violates a number of laws and regulations,

including California Health & Safety Code § 110740[3] and 21 C.F.R. § 101.22.[4] TAC ¶¶ 184, 187-202; Opposition to Motion to Dismiss ("Opp'n"), Dkt. No. 127, at 9. Plaintiff also claims this mislead consumers into believing that the Pepsi products did not "contain[] artificial flavors or artificial preservatives," TAC ¶ 185, and as such violated the FAL, CLRA, and unfair and fraudulent prongs of the UCL. TAC ¶¶ 253-304, Opp'n 11. At least this latter set of claims is governed by the "reasonable consumer" standard.[5]

Plaintiff has not alleged claims under the FAL, CLRA, and fraudulent and unfair prongs of the UCL (as well as the unlawful prong of the UCL, to the extent it is premised on violations of the FAL and CLRA) that satisfy the reasonable consumer standard. After carefully reviewing the labels of the Pepsi products at issue, the Court finds that a reasonable consumer would not be deceived by them. The labels contain no affirmative representation that the contents are free from artificial ingredients. Instead, they correctly (a point which Plaintiff does not disagree with) report the ingredients of Pepsi, and identify that these ingredients include "phosphoric acid" and "citric

[3] California Health & Safety Code § 110740 provides that "[a]ny food is misbranded if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless its labeling states that fact."

[4] 21 C.F.R. § 101.22(c) provides in relevant part that "[a] statement of artificial flavoring, artificial coloring, or chemical preservative shall be placed on the food or on its container or wrapper, or on any two or all three of these, as may be necessary to render such statement likely to be read by the ordinary person under customary conditions of purchase and use of such food."

[5] Courts in this district have found that the "reasonable consumer" standard applies to claims under the unlawful prong of the UCL when the claim is "grounded in fraud." *See, e.g.*, *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1098 (N.D. Cal. 2017) (unlawful prong of UCL claims grounded in fraud where plaintiff alleged that defendant made deceptive health claims on its packaging); *Kane v. Chobani, Inc.*, No. 12-CV-02425-LHK, 2013 WL 5289253, at *6 (N.D. Cal. Sept. 19, 2013) (unlawful prong of UCL claims grounded in fraud where the plaintiff alleged "violations of the advertising and misbranding provisions of the Sherman Law"). Under this logic, the Court would conclude that Plaintiff's claim under the unlawful prong of the UCL is "grounded in fraud" and thus subject to the "reasonable consumer" standard because the gravamen of Plaintiff's claim is that Defendant deceptively failed to identify that Pepsi contained artificial flavors or ingredients. *See* TAC ¶¶ 182-86. However, the Ninth Circuit's unpublished opinion in *Bruton*, 703 F. App'x at 471 casts some doubt as to how far this logic extends, as the court there reversed a finding that the "reasonable consumer" standard applied to a plaintiff's unlawful prong UCL claims because the predicate violations "include[d] no requirement that the public be likely to experience deception." Accordingly, the Court will decline to apply the "reasonable consumer" standard to Plaintiff's claims that are based on the unlawful prong of the UCL at least at this stage.

acid." Neither of these ingredients are substances that an ordinary person would immediately recognize as occurring in nature, and the fact that the labels do not call these out as artificial would not deceive a reasonable consumer into thinking otherwise. Indeed, soft drinks such as Pepsi are highly artificial and processed products that have been around for decades and are familiar to most consumers. It would not be reasonable for a consumer to assume, just based on the absence of some kind of affirmative indicator of artificiality in a back-side ingredient list, that a product was not artificial.

Further, to the extent that "phosphoric acid" and "citric acid" in and of themselves are not enough to suggest artificiality, the label read in its entirety does. For example, the ingredients list also includes "Caramel Color." PepsiCo's RJN, Ex. B. No reasonable consumer would deem this a non-artificial ingredient. Accordingly, to the extent that Plaintiff's theory of deception is premised on the entire Pepsi label (as opposed to simply the words "phosphoric acid" and "citric acid"), it fails for this reason as well.

Plaintiff's argument to the contrary is not persuasive. Plaintiff appears to rest her theory of deception on the salability of the products, which appears to be as follows: According to Plaintiff, by failing to disclose that "phosphoric acid" and "citric acid" were artificial ingredients, PepsiCo violated various laws and regulations (e.g., California Health & Safety Code § 110740 and 21 C.F.R. § 101.22), which rendered the Pepsi products unsalable. Opp'n 13-16. However, because these products were put on the market, Plaintiff continues, consumers were deceived into thinking they did not violate these statutes and/or were otherwise mislabeled. *Id*. This reasoning is circular and has been consistently rejected by courts. *See, e.g.*, *Figy v. Frito-Lay N. Am., Inc.*, 67 F. Supp. 3d 1075, 1091 (N.D. Cal. 2014) ("[D]eception claims must be predicated on more than simple regulatory violations."). The Court likewise declines to entertain this reasoning here.

Accordingly, because, based on the Court's own review of the Pepsi labels, a reasonable consumer is not likely to be deceived into believing that Pepsi does not contain artificial preservatives or flavors, Plaintiff has failed to allege claims under the FAL, CLRA, and fraudulent

and unfair prongs of the UCL (as well as the unlawful prong of the UCL, to the extent it is premised on violations of the FAL and CLRA) that satisfy the "reasonable consumer" standard. As such, these claims fail as a matter of law and are DISMISSED on this basis as well.

E. Leave to Amend

Leave to amend a complaint, while generally granted liberally, is properly denied when the amendments would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Here, amendment is futile as to Plaintiff's claims under the FAL, CLRA, and fraudulent and unfair prongs of the UCL (as well as the unlawful prong of the UCL, to the extent it is premised on violations of the FAL and CLRA) because the Court concludes that labels at issue are not deceptive under the "reasonable consumer" test and the labels themselves cannot be changed by further amendment. What remains, then, are the alleged violations of the unlawful prong of the UCL. However, as discussed above, these claims fail because Plaintiff has not plausibly plead reliance. Because this is the same ground under which the Court has previously dismissed these claims, *see* Dkt. No. 83 at 13-14, the Court finds that, under the circumstances here, further amendment would be futile as to these claims as well. Accordingly, the Court will not permit amendment as to any of Plaintiff's claims.

IV. CONCLUSION

PepsiCo's motion to dismiss all of the claims and causes of action in the TAC relating to Pepsi's carbonated soft drinks is GRANTED. Further, because further amendment would be futile, leave to amend is DENIED.

IT IS SO ORDERED.

Dated: March 29, 2018

EDWARD J. DAVILA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

AARON KORTE, individually and on behalf of others similarly situated,	)	
Plaintiff,	)	**Case No. 17-CV-199-SMY-SCW**
vs.	)	
PINNACLE FOODS GROUP, LLC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Before the Court is Defendant's Motion to Dismiss (Doc. 11). Plaintiff filed a Response (Doc. 19). For the following reasons, the motion is **DENIED**.

Background

Plaintiff Aaron Korte filed this putative class action against Defendant Pinnacle Foods Group, LLC ("Pinnacle") in Illinois state court. (Complaint, Doc. 2-1). Pinnacle subsequently removed the case to this Court. (Notice of Removal, Doc. 2)

This case involves a line of salad dressings sold by Pinnacle under the label "Wish-Bone® E.V.O.O. Dressing- Made With Extra Virgin Olive Oil". Plaintiff alleges that the products violate the Illinois Consumer Fraud & Deceptive Business Practices Act (810 ILCS § 505/1 *et seq.*) ("IFCA")(Count I) and the Missouri Merchandising Practices Act (§407.010 R.S.Mo, *et seq.*) ("MMPA")(Count II), and that the money realized by Defendant as a result of the alleged deceptive practices constitutes unjust enrichment (Count III). Plaintiff seeks class certification for consumers who bought the product from December 19, 2013 onward.

Defendant moves to dismiss each Count of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, as well as under *F.R.C.P.* 9(b) for failure to plead fraud with adequate particularity.

Legal Standard

To survive a motion to dismiss for failure to state a claim under *F.R.C.P.* 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Lodholtz v. York Risk Servs. Group, Inc.*, 778 F.3d 635, 639 (7th Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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). "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The Court also draws all reasonable inferences and facts in favor of the nonmovant. *See Vesely v. Armslist LLC*, 762 F.3d 661, 664 (7th Cir. 2014).

Under Rule 9(b), a party pleading fraud must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). This "ordinarily requires describing the 'who, what, when, where, and how' of the fraud, although the exact level of particularity that is required will necessarily differ based on the facts of the case." *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).

Discussion

Plaintiff alleges that Defendant "promotes, markets and sells its E.V.O.O. line of dressings in such a manner to deceive the consumer into purchasing what he or she [believes] is a true 100% E.V.O.O. product." (*Id.* at ¶ 16). In particular, Plaintiff alleges that Pinnacle's naming and marketing of the dressings in question was deceptive because although they are

made with extra virgin olive oil (sometimes abbreviated E.V.O.O. or EVOO), they are "comprised mainly of water and cheap soybean oil, and not premium E.V.O.O." (Doc. 2-1 at ¶ 16). Plaintiff also alleges that Pinnacle made several statements in a press release accompanying the introduction of the dressing that were misleading as to the EVOO content (and therefore product quality). (*Id.* at ¶ 11). Plaintiff further alleges that Pinnacle charged 25% more, on average, for the products than similar salad dressings on the basis that it was made with extra virgin olive oil. (*Id.* at ¶ 13).

Plaintiff, a Missouri citizen, purchased the product in the Fall of 2016 from a Schnuck's Market in St. Clair County, Illinois. (*Id.* at ¶ 8).

Food and Drug Administration Preemption

Pinnacle first argues that Plaintiff's ICFA claim is preempted by federal law. Specifically, Pinnacle points to a provision of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 343–1(a)(5), added by the Nutrition Labeling and Education Act of 1990 ("NLEA"), that prevents states from imposing "any requirement respecting any claim of the type described in section 343(r)(1) [of the FDCA] ... made in the label or labeling of food that is not identical to the requirement of section 343(r)." It contends that allowing a state consumer fraud claim for use of the phrase "Made With Extra Virgin Olive Oil" when a product contains less that a certain amount of extra virgin olive oil would be an improper imposition of differing labelling requirements.

Federal preemption is an affirmative defense upon which the defendants bear the burden of proof. *Fifth Third Bank ex rel. Tr. Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005). It applies when Congress declares its intention to preempt state regulation through a direct statement in the text of federal law ("express preemption"), by implication in the "structure and

purpose" of federal law showing a Congressional intent to preempt state law ("implied preemption"), or by an actual conflict between state and federal law, such as occurs when it is impossible for a private party to comply with both federal and state law requirements. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). In all three types of preemption, "the ultimate touchstone" is congressional purpose. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

The facts in this case raise the question of express preemption. Congress declared that the NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section [343–1(a)] of the [FDCA]." Section 6(c), Pub.L. No. 101–535, 104 Stat. 2353, 2364 (Nov. 8, 1990). Section 343(r)(1), upon which Defendant relies, relates to requirements for the labeling of food which:

> (A) characterizes the level of any nutrient which is of the type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food unless the claim is made in accordance with subparagraph (2), or
>
> (B) characterizes the relationship of any nutrient which is of the type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food to a disease or a health-related condition unless the claim is made in accordance with subparagraph (3) or (5)(D).

21 U.S.C. 343(r)(1). Sections (q)(1) and (q)(2), in turn, cover nutrients such as total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and total protein contained in each serving size or other unit of measure, as well as any other nutrient the FDA deems appropriate to add via regulation.

One of the regulations Defendant cites is 21 C.F.R. § 101.13(b), which governs requirements for claims that "expressly or implicitly characterize the level of a nutrient of the type required to be in nutrition labeling under § 101.9 or under § 101.36 (that is, a nutrient content claim)." However, a review of those sections fails to reveal what nutrient, express or implied, would be implicated in labeling a product "extra virgin olive oil." Indeed, 21 C.F.R.

§101.65(b)(5) specifically provides that the labeling requirements of §101.13 are generally not applicable to "[a] statement of identity that names as a characterizing ingredient, an ingredient associated with a nutrient benefit (e.g., "corn oil margarine," "oat bran muffins," or "whole wheat bagels"), unless such claim is made in a context in which label or labeling statements, symbols, vignettes, or other forms of communication suggest that a nutrient is absent or present in a certain amount[.]" Thus, these provisions do not show any federal labeling requirement for extra virgin olive oil from which a state requirement could differ.

Defendant also cites to the Seventh Circuit's Opinion in *Turek v. Gen. Mills, Inc.*, 662 F.3d 423 (7th Cir. 2011) in support of its preemption argument. But *Turek* is readily distinguishable, as it involved a claim where the plaintiff sought to add disclaimers to labels of snack bars containing processed (as opposed to natural) dietary fiber. Fiber is one of the nutrients specifically subject to Section 343(q), and therefore does fall under specific FDCA labeling requirements for nutrient claims.

In the absence of a nutrient claim, the regulations cited by Defendant do not apply. As such, there can be no preemption of differing state law requirements. Plaintiff's ICFA claims are therefore not preempted.

Illinois Consumer Fraud Act

To plead a violation of the IFCA, a plaintiff must allege "(1) a deceptive or unfair act or promise by the defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) that the unfair or deceptive practice occurred during a course of conduct involving trade or commerce." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 934 (7th Cir. 2010).

Pinnacle argues that Plaintiff's ICFA claims are subject to a statutory exception. Specifically, Section 10b provides that the statute does not apply to "[a]ctions or transactions

specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1). Defendant maintains that the labeling, "Made With Extra Virgin Olive Oil" is "specifically authorized" by the federal regulations cited in connection with its preemption argument. But as discussed above, the cited regulations appear not to require any specific labeling for extra virgin olive. Therefore, the most that can be said is that Defendant's labeling does not run afoul of those requirements. The Illinois Supreme Court has explained, however, that "conduct is not specifically authorized merely because it has not been specifically prohibited" and "mere compliance with the rules applicable to labeling and advertising is not sufficient to trigger the exemption created by section 10b(1)" . *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 36 (2005). Thus, the labeling in question is not excluded from the scope of the ICFA solely because it does not violate the cited federal regulations.

Pinnacle also argues that Plaintiff fails to make a plausible allegation that the statement "Made With Extra Virgin Olive Oil" is deceptive. Pinnacle refers to the fact that the product is actually made with extra virgin olive oil, and that the ingredient list on the back of the bottle discloses that it contains different oils and other ingredients. It also submits a picture of one of the products which purports to show the oil portion separated out from the remainder of the dressing, claiming that this separation would put any reasonable consumer on notice that the product did not consist entirely of extra virgin olive oil. (Docs. 11 at 11; 11-1). The picture is a matter outside the pleadings, and under *F.R.C.P.* 12(d), the Court may either exclude it from consideration or convert the motion to one for summary judgment under F.R.C.P. 56 and give the parties an opportunity to present materials pertinent to summary judgment. *See Jacobs v.*

City of Chicago, 215 F.3d 758, 766 (7th Cir. 2000). At this stage, the Court declines to consider the additional materials submitted by Pinnacle.

Plaintiff maintains that Pinnacle has misconstrued his claim; that his claim is not that the product has to be 100% extra virgin olive oil to not be deceptive, but rather that a reasonable consumer would believe that all of the oil in the product is extra virgin olive oil instead of an admixture with water and soybean oil.

When presented with a motion to dismiss alleging that a claim is not deceptive under the ICFA, "[the Court must] ask whether the allegedly false and misleading statements on which [Plaintiff] based his CFA claim can be read to create a likelihood of deception or to have the capacity to deceive." *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 938 (7th Cir. 2001). Although there are situations where the determination of the possibility for deception can made as a matter of law, the relevant questions in this case – whether a reasonable consumer would be deceived by the products' name and label and a reasonable consumer's understanding of the terms "E.V.O.O." and "Made With Extra Virgin Olive Oil" – are not so clear-cut. Making all reasonable inferences in favor of Plaintiff, the Court cannot conclude as a matter of law that the representations are not deceptive. The possibility for deception in this situation is a question of fact, and one that Plaintiff has adequately pled.

Similarly, the fact that the back of the bottle may disclose the presence of oils and liquids other than extra virgin olive oil does not settle the issue of whether the front of the bottle may be deceptive. The "ingredient list" defense has been rejected by a number of courts, including this one. *York v. Andalou Nats., Inc.*, No. 16-CV-894-SMY-DGW, 2016 WL 7157555, at *3 (S.D. Ill. Dec. 8, 2016) *citing Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939-40 (9th Cir. 2008); *Thornton v. Pinnacle Foods Grp, LLC*, 2016 WL 4073713, at *3 (E.D. Mo. Aug. 1, 2016); *Blue*

Buffalo Co. v. Nestle Purina Petcare Co., 2015 WL 3645262, at *5 (E.D. Mo. June 10, 2015); *Lam v. Gen. Mills, Inc*., 859 F.Supp.2d 1097, 1105 (N.D. Cal. 2012). That is because when analyzing a claim under the ICFA, "the allegedly deceptive act must be looked upon in light of the totality of the information made available to the plaintiff. *Davis v. G.N. Mortg. Corp*., 396 F.3d 869, 884 (7th Cir. 2005). In other words, whether listing other ingredients on the back would be sufficient to dispel any misunderstanding the name and description on the front of the package might cause is a question of fact. Plaintiff has pled a sufficiently plausible claim for deception to survive a motion to dismiss.

Pinnacle also asserts that Plaintiff has failed to plead actual damages, because he received the benefit of the bargain; that is, he was promised salad dressing containing extra virgin olive oil and that's what he received. Plaintiff responds that he paid a higher price than the product was actually worth because he (and the putative class members) believed the product contained more extra virgin olive oil (a "premium" ingredient) than it actually did.

The actual damage element of an ICFA claim requires that the plaintiff suffer "actual pecuniary loss." *Kim v. Carter's Inc*., 598 F.3d 362, 365 (7th Cir. 2010); *citing Mulligan v. QVC, Inc*., 888 N.E.2d 1190, 1197 (2008). In the consumer context, a plaintiff may satisfy this element if the seller's deception deprives them of the benefit of his or her bargain by causing them to pay "more than the actual value of the property." *Id.* Here, Plaintiff has pled that the dressings were sold "at a premium price, 25% more on average, over similar salad dressings on store shelves because the represented ingredient…is a premium oil[,]" and that the use of water and other oil made it worth less than the "premium paid" by consumers. (Doc. 2-1 at ¶ 13). These allegations are sufficient to assert that Plaintiff paid more than the product was worth due to the alleged deceptive practice, and therefore was deprived the benefit of the bargain. *See Muir*

v. Playtex Prods., LLC, 983 F. Supp. 2d 980, 990 (N.D. Ill. 2013) (plaintiff may plead actual damages by alleging that he was deprived of the benefit of the bargain because the product was worth less than it would have been worth but for the deception). As such, Plaintiff's damage allegations as to his ICFA claim survive 12(b)(6) dismissal.

Missouri Merchandising Practice Act

The MMPA prohibits the "act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose…in or from the state of Missouri[.]" Mo. Rev. Stat. § 407.020.1. The statute defines "trade" or "commerce" as "the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated. The terms "trade" and "commerce" include any trade or commerce directly or indirectly affecting the people of this state." Mo. Rev. Stat. § 407.010.7. The Supreme Court of Missouri describes the MMPA's language regarding unlawful merchandising as "unrestricted, all-encompassing and exceedingly broad." *Ports Petroleum Co. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001).

Pinnacle argues that because Plaintiff purchased the product in Illinois, there are "no ties between the allegedly fraudulent transactions and Missouri." *Perras v. H&R Block*, 789 F.3d 914, 918 (8th Cir. 2015). Plaintiff contends that there are ties to Missouri because Pinnacle marketed the products with the same allegedly deceptive labeling in Missouri, and because he is a Missouri resident who purchased the product for use in Missouri.

Interpreting the MMPA as broadly as it has been recognized by the Missouri Supreme Court, Plaintiff has adequately alleged grounds for application of the statute. Specifically, Plaintiff alleges that Pinnacle sells the products at issue in Missouri, and that any deception or misrepresentation in the name or on the bottle would take place "in connection with the sale or advertisement of any merchandise in trade or commerce…in or from the state of Missouri[.]" (Doc. 2-1 at ¶ 9). Additionally, at least one federal court has held that "conduct originating outside Missouri that affects Missouri consumers is actionable" under the MMPA. *Lopez v. Dlorah, Inc.*, No. 11-1101-CV-SJ-ODS, 2012 WL 4091975, at *5 (W.D. Mo. Sept. 17, 2012)

Perras involved a different factual scenario, and is thus distinguishable from this case. In *Perras*, the plaintiff was a California resident suing a tax preparation company headquartered in Missouri for charging a "compliance fee" greater than the cost of actually complying with new regulations. 789 F.3d at 915. Significantly, the case was a proposed class action, where the putative class was defined as persons in all states *except* Missouri who had purchased tax preparation services in given years and paid the offending fee. The Eighth Circuit examined whether the claims fell within the scope of the MMPA when none of the putative class members were Missouri residents, all of the complained-of transactions (paying the compliance fee) occurred outside Missouri, and the only conduct that allegedly took place in Missouri was the design and implementation of the compliance fee. The Court of Appeals specifically noted that the Missouri Supreme Court had not decided whether the language of the MMPA "is broad enough to cover transactions taking place outside of Missouri." *Id.* at 917. Ultimately, the Court concluded that because every part of the transactions took place between the putative class members and the local branches (i.e. wholly outside the state of Missouri), "the acts of

commerce that Perras grieves did not occur in, or originate from, the State of Missouri" as required to fall under the MMPA. *Id.* at 918.

Here, there are acts of commerce alleged in the Complaint that link the purported misrepresentations to trade and commerce in Missouri. Therefore, the Complaint adequately alleges an MMPA claim on this ground.[1]

Rule 9(b)

Pinnacle also argues that the Complaint does not meet the heightened pleading standard for allegations of fraud under *F.R.C.P.* 9(b), which requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." The heightened pleading requirement applies to "averments of fraud," not claims of fraud, so whether the rule applies depends on the plaintiffs' factual allegations. *Borsellino v. Goldman Sachs Grp., Inc.*, 477 F.3d 502, 507 (7th Cir. 2007). Consumer actions alleging misrepresentation and deceptive practices, including those brought under the ICFA, are subject to the heightened pleading standard. *See Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014).

"A claim that 'sounds in fraud' – in other words, one that is premised upon a course of fraudulent conduct – can implicate Rule 9(b)'s heightened pleading requirements." *Id.* The precise level of particularity required under Rule 9(b) depends upon the facts of the case. However, in the context of consumer fraud statutory claims, a plaintiff must generally state the identity of the person making the representation, the time, the place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff. *Id.* (quoting *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992))

[1] In a footnote, Pinnacle also claims that the MMPA claims are pre-empted or fail for the same reasons alleged for the ICFA claim. These arguments are denied for the reasons outlined above.

Pinnacle alleges that Plaintiff has failed to identify which of the five flavors in the E.V.O.O. line he bought, the date (presumably the specific date) that he purchased the product, and which store he bought it from. Pinnacle also argues that Plaintiff is required to plead when and where he read the allegedly deceptive representations, and how he was deceived before buying the product.

Although the pleading standard is higher for fraud claims, it does not require as much detail as Pinnacle suggests. Plaintiff has pled who (Pinnacle) did what (made deceptive statements regarding the extra virgin olive oil content of the E.V.O.O. line of products) and specified what the allegedly deceptive statements were. He has also adequately specified the method by which those alleged misrepresentations (product name and statements on the bottle) were communicated— via the bottle of the products themselves. He has identified the store and area where he purchased the product and a reasonably definite timeframe. Requiring the specific flavor, the specific date and the specific store address, as well as a detailed description of Plaintiff's specific mental processes is a bridge too far at the pleading stage, even under the Rule 9(b)'s heightened standard.

Unjust Enrichment

Finally, Pinnacle argues that Plaintiff's unjust enrichment claim fails because it cannot stand in the absence of the ICFA (or presumably MMPA) claim. Because those claims survive dismissal, this argument fails as well. Accordingly, Pinnacle's Motion to Dismiss (Doc. 11) is **DENIED** in its entirety.

IT IS SO ORDERED.

DATED: March 27, 2018

s/ Staci M. Yandle
STACI M. YANDLE
United States District Judge