

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Lesh v. D's Naturals, LLC

No. 22-cv-01036-HSG (N.D. Cal. Mar. 15, 2023) · No. 22-cv-01036-HSG · Decided March 15, 2023

OPINION

Lesh v. D's Naturals, LLC

PER CURIAM.

1 2 3

4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 7 CAROL LESH, Case No. 22-cv-01036-HSG 8 Plaintiff, ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO

9 v. DISMISS

10 DS NATURALS, LLC, Re: Dkt. No. 17 11 Defendant. 12 13 Pending before the Court is
Defendant D's Naturals, LLC's motion to dismiss. Dkt. No. 14 17. The Court finds this matter
appropriate for disposition without oral argument and the matter is 15 deemed submitted. See
Civil L.R. 7-1(b). For the reasons detailed below, the Court GRANTS IN 16 PART and DENIES
IN PART the motion.

17 I. BACKGROUND

18 Plaintiff Carol Lesh filed this putative class action on February 18, 2022, alleging that 19
Defendant's No Cow Protein Bars falsely advertise the amount of protein they contain. Dkt. No. 1
20 ("Compl."). Plaintiff contends that the product labels do not account for the quality—or 21
digestibility—of the protein, as required under federal and state law. See *id.* at ¶¶ 6–8, 16–18, 22–
22 28, 37. Plaintiff contends that Defendant's products are made with rice and pea protein, which
are 23 "low quality proteins" that are not fully digestible. See *id.* at ¶¶ 2–7. Of the 22 grams of
protein 24 advertised on the lemon meringue pie flavored bar, for example, Plaintiff states that it
actually 25 only contains approximately 13 grams of protein "in a form humans can use." *Id.* at ¶
7. 26 Plaintiff's claims, which parallel those brought against protein-containing products in a 27
ballooning number of cases in this district, turn on the regulatory structure created by the Food
and 1 Foods, Inc., No. 21-CV-05132-HSG, 2022 WL 717816, at *1–2 (N.D. Cal. Mar. 10, 2022),
and 2 only briefly summarizes it here. 3 A. Regulatory Structure 4 The FDA extensively regulates
what manufacturers may say about the protein in their 5 products. The FDA requires all products
to include "the number of grams of protein in a serving, 6 expressed to the nearest gram" on the
product's nutrition facts panel ("NFP"). See 21 C.F.R. 7 § 101.9(c)(7). In doing so, manufacturers
"may" use "the nitrogen method" to calculate the 8 amount of protein by multiplying the product's

nitrogen content by a factor of 6.25. See *id.*; see also *Nacarino v. Kashi Co.*, 584 F. Supp. 3d 806, 808 (N.D. Cal. 2022) (“The more protein that a 10 product has, the more nitrogen there will be. Thus, the amount of protein in a product can be 11 estimated by multiplying its nitrogen content by some factor (6.25, as it turns out).”). 12 However, if the manufacturer wants to include additional statements about a product’s 13 protein content outside the NFP (known as “nutrient content claims”), then the manufacturer must 14 also amend the NFP to include a “statement of the corrected amount of protein per serving,” 15 expressed as a “Percent of Daily Value.” 21 C.F.R. § 101.9(c)(7)(i). This figure takes the “actual 16 amount of protein” from the NFP and adjusts it based on the product’s “protein digestibility- 17 corrected amino acid score” (“PDCAAS”) to create a “corrected amount of protein per serving” 18 that accounts for digestibility. *Id.* at § 101.9(c)(7)(ii)(i). 19 As this Court has previously explained, the FDA regulations do not explicitly specify how 20 manufacturers must calculate the amount of protein in the protein content claim itself. See *Brown*, 21 2022 WL 717816, at *2. But this Court and others in the district have routinely concluded that 22 under FDA regulations, the figures in such protein content claims may be calculated using the 23 nitrogen method rather than PDCAAS. See *id.* at *6–7; see also *Swartz v. Dave’s Killer Bread, Inc.*, No. 4:21-CV-10053-YGR, 2022 WL 1766463, at *3–5 (N.D. Cal. May 20, 2022) (collecting 25 cases). 26 B. Plaintiff’s Claims 27 Plaintiff contends that Defendant’s labels are both unlawful and misleading because they 1 regulations.¹ See Compl. at ¶ 64; see also Cal. Health & Safety Code § 110100 (“All food 2 labeling regulations and any amendments to those regulations adopted pursuant to the federal act, 3 in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations 4 of this state.”). Specifically, Plaintiff appears to challenge three aspects of Defendant’s labeling: 5 • First, Plaintiff brings a “front label claim,” in which she alleges that the protein 6 content claim on the front of the bars is inaccurate because Defendant uses plant- 7 based proteins which are not fully digestible, and this figure is not calculated using 8 PDCAAS. See Compl. at ¶¶ 6–7, 27–28, 32–37, 96. 9 • Second, Plaintiff brings a “nutrition facts panel claim,” in which she alleges that 10 Defendant failed to include the corrected amount of protein per serving, expressed 11 as a “Percent of Daily Value” figure, in the NFP. See Compl. at ¶¶ 5–6, 17, 30–31, 12 37, 65, 96. 13 • Lastly, Plaintiff brings a hybrid claim in which she contends that the protein 14 content claim on the front label is misleading because Defendant does not include 15 the percent of daily value figure in the NFP. See Compl. at ¶¶ 5–7, 30–31, 37, 65. 16 Based on these allegations, Plaintiff brings causes of action for violations of California’s 17 Unfair Competition Law (“UCL”), Consumers Legal Remedies Act (“CLRA”), and False 18 Advertising Law (“FAL”), as well as for fraud, deceit and/or misrepresentation and unjust 19 enrichment. See *id.* at ¶¶ 62–107. Defendant seeks to dismiss the complaint in its entirety. Dkt.

20 No. 17.

21 II. LEGAL STANDARD

22 Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain 23

statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Rule 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). To survive a Rule 12(b)(6) motion, a plaintiff need only plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a 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).

Rule 9(b) imposes a heightened pleading standard where fraud is an essential element of a claim. See Fed. R. Civ. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”); see also *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). A plaintiff must identify “the who, what, when, where, and how” of the alleged conduct, so as to provide defendants with sufficient information to defend against the charge. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). However, “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P.

Rule 9(b).

In reviewing the plausibility of a complaint, courts “accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless, courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 19 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

III. DISCUSSION

A. Standing i. Nutrition Facts Panel Claims As an initial matter, Defendant argues that Plaintiff lacks standing to bring her NFP claims because she does not allege that she relied on any information in the NFP when purchasing the products. See Dkt. No. 17 at 7–9. To plead standing under the UCL, FAL, or CLRA, a plaintiff must also allege that they relied on the defendant’s purported misrepresentations and suffered economic injury as a result. See *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 (Cal. 1 reading and relying on the Product’s front label that promised the protein[] bar provided ‘22g 2 PLANT PROTEIN.’” Compl. at ¶ 49 (emphasis added). She does not allege that she reviewed the NFP, or that she relied on the purported absence of the percent of daily value figure when she made her purchases. Plaintiff appears to concede that she does not adequately allege reliance for purposes of her NFP claims. See Dkt. No. 22 at 15. The Court therefore GRANTS the motion on this basis. Accord *Brown*,

2022 WL 717816, at *4 (finding that plaintiffs had “a reliance 7 problem” when they alleged only that they purchased the products based on the amount of protein 8 per serving on the front label of the package). 9 ii. Injunctive Relief 10 Defendant also contends that Plaintiff lacks standing to pursue injunctive relief. Dkt. No. 11 17 at 9–11. 12 To have standing to seek injunctive relief under Article III, a plaintiff must “demonstrate a 13 real and immediate threat of repeated injury in the future.” *Chapman v. Pier 1 Imports (U.S.) Inc.*, 14 631 F.3d 939, 946 (9th Cir. 2011) (quotation omitted). So once a plaintiff has been wronged, they 15 are entitled to injunctive relief only if they can show that they face a “real or immediate threat that 16 [they] will again be wronged in a similar way.” *Mayfield v. United States*, 599 F.3d 964, 970 (9th 17 Cir. 2010) (quotation omitted). In the context of false advertising cases, the Ninth Circuit has 18 confirmed “that a previously deceived consumer may have standing to seek an injunction against 19 false advertising or labeling, even though the consumer now knows or suspects that the advertising 20 was false at the time of the original purchase.” *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 21 969 (9th Cir. 2018). A plaintiff may establish the risk of future harm in two ways: (1) “the 22 consumer’s plausible allegations that [they] will be unable to rely on the product’s advertising or 23 labeling in the future, and so will not purchase the product although [they] would like to”; or 24 (2) “the consumer’s plausible allegations that [they] might purchase the product in the future, 25 despite the fact it was once marred by false advertising or labeling, as [they] may reasonably, but 26 incorrectly, assume the product was improved.” *Id.* at 969–70. 27 Here, Plaintiff alleges that she was deceived by the labeling on the No Cow’s bars because 1 labels. See Compl. at ¶¶ 49–50. She also alleges that she “continues to desire to purchase protein 2 products, including those marketed and sold by Defendant,” and if they “were reformulated to 3 provide the grams of protein that are represented on the labels, Plaintiff would likely purchase 4 them again in the future.” *Id.* at ¶ 52. She also explains that she “regularly visits stores where the 5 Products and other protein products are sold,” but “cannot test whether or not the Products provide 6 the amount of protein that is represented on the label.” *Id.* She concludes that consequently she 7 “will be unable to rely on Defendant’s labels when shopping for protein products in the 8 future” *Id.* 9 Defendant argues that Plaintiff is demanding that it either comply with labeling 10 requirements not required by the FDA or reformulate its product to contain animal protein. See 11 Dkt. No. 17 at 10. But the Court finds that when Plaintiff’s allegations are viewed in the light 12 most favorable to her—as they must be at this stage—Plaintiff simply seeks to buy the No Cow’s 13 products as advertised. Plaintiff has alleged that she cannot rely on the product’s labels when 14 shopping for protein bars, and thus cannot purchase the products although she would like to 15 purchase them in future if properly labeled. These allegations are sufficient to establish a risk of 16 future harm. Accord *Starratt v. Fermented Scis., Inc.*, No. 22-CV-03895-HSG, 2023 WL 359500, 17 at *2 (N.D. Cal. Jan. 23, 2023); *Nacarino v. Chobani, LLC*, No. 20-CV-07437-EMC, 2022 WL 18 344966, at *10–11 (N.D. Cal. Feb. 4, 2022). 19 B. Preemption 20 Defendant next contends that Plaintiff’s front label claims are expressly preempted by 21 FDA regulations. See

Dkt. No. 17 at 4–5. As explained above, Plaintiff alleges that the front 22 labels on the No Cow’s bars are unlawful and misleading for two reasons: (1) because the amount 23 of protein on the front is calculated using the nitrogen method and not PDCAAS (“front label 24 claims”); and (2) because Defendant does not include the percent of daily value figure in the NFP 25 (“hybrid claims”). See Compl. at ¶¶ 6–7, 27–28, 32–37, 96; see also Dkt. No. 22 at 2–3, 7, 15–20. 26 Because the Food, Drug, and Cosmetic Act (“FDCA”) preempts state causes of action that are 27 “not identical to” federal requirements, the central legal question is whether Plaintiff’s claims 1 U.S.C. § 343-1(a)(5); see *Hawkins v. Kroger Co.*, 906 F.3d 763, 769–70 (9th Cir. 2018). 2 To the extent Plaintiff suggests that the protein content claim on the front label must be 3 calculated using PDCAAS, the Court has already found that the FDA regulations permit use of the 4 nitrogen method for such statements. See *Brown*, 2022 WL 717816, at *2. Plaintiff’s front label 5 claims therefore seek to impose labeling requirements that differ from FDA regulations, and are 6 expressly preempted. See *id.* at *6. The Court adopts its prior reasoning in its entirety and 7 GRANTS the motion to dismiss as to Plaintiff’s front label claims with prejudice. Accord *Swartz 8 v. Dave’s Killer Bread, Inc.*, No. 4:21-CV-10053-YGR, 2022 WL 1766463, at *3–5 (N.D. Cal. 9 May 20, 2022).

10 Defendant does not appear to argue that Plaintiff’s hybrid claims are preempted, see Dkt.

11 No. 17 at 4–5, and the Court finds that they are not. Plaintiff contends that because Defendant did

12 not comply with the NFP requirements for protein, its front label claims also violate the Sherman 13 Law. See Dkt. No. 22 at 10, 21; see also Compl. at ¶¶ 5–7, 30–31, 37, 65. In addition to the NFP 14 requirements already discussed, FDA regulations provide that a label may only contain an explicit 15 statement about the “amount . . . of a nutrient” outside of the NFP if the statement “is not false or 16 misleading in any respect.” 21 C.F.R. § 101.13(i)(3). As Judge Chhabria recently found, 17 “prominently advertising a product’s protein quantity outside of the nutrition facts panel is 18 misleading (within the meaning of the Food, Drug, and Cosmetic Act and the FDA’s regulations), 19 if the manufacturer doesn’t include the quality-adjusted percent in the nutrition facts panel.” 20 *Rausch v. Flatout, Inc.*, No. 22-CV-04157-VC, 2023 WL 2401452, at *5 (N.D. Cal. Mar. 8, 2023). 21 This is so because “the FDA’s regulations are best understood as reflecting a determination that 22 when a manufacturer emphasizes a product’s protein content, that statement is misleading without 23 including information about the product’s protein quality on the nutrition facts panel.” *Id.* Such 24 claims do not impose additional or different requirements than those mandated by the FDA 25 regulations, and the Court accordingly DENIES the motion as to Plaintiff’s hybrid claims on this 26 basis.² 27 1 C. Reasonable Consumer Test 2 Lastly, Defendant argues that Plaintiff’s claims are not supported by plausible allegations 3 that a reasonable consumer is likely to be deceived. See Dkt. No. 17 at 12–14; Dkt. No. 23 at 6–8. 4 The parties agree that the UCL, CLRA, and FAL claims are all governed by the 5 “reasonable consumer” test. See *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). 6 “Under the

reasonable consumer test, [Plaintiff] must show that members of the public are likely to be deceived.” Id. (quotations omitted). “‘Likely to deceive’ implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.” *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (Cal. Ct. App. 2003). Rather, the test is whether “it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.” Id. “California courts . . . have recognized that whether a business practice is deceptive will usually be a question of fact.” *Williams*, 552 F.3d at 938. It is thus a “rare situation” when “granting a motion to dismiss [a UCL, CLRA, or FAL claim] is appropriate.” Id. at 939. Defendant urges that this is one of those rare cases where dismissal is warranted because the No Cow’s bars contain the number of grams of protein indicated on the label and Plaintiff’s allegations are otherwise too conclusory. Dkt. No. 17 at 13–14; Dkt. No. 23 at 6–8. The Court disagrees. Plaintiff alleges that the labels, which made protein content claims on the front without the percentage daily value figure in the NFP, led consumers to believe that the advertised protein is the amount of protein the bars “actually provide[], in a form humans can use,” and masked that the products contained protein of “low quality” or “low biological value to humans.” See Compl. at ¶¶ 2, 7, 17–18, 22–25, 27–28, 35–36, 43, 49. However inartfully pled, the Court finds that at this stage Plaintiff has plausibly alleged that Defendant’s labels could deceive a reasonable consumer. Defendant raises this argument as to the hybrid claims. In any event, the Court agrees with the reasoning in *Brown v. Van’s Int’l Foods, Inc.*, No. 22-CV-00001-WHO, 2022 WL 1471454, at *7 (N.D. Cal. May 10, 2022), that Buckman preemption does not apply in cases like this where the plaintiff “is suing because the protein statements at issue are allegedly misleading under California law, not consumer law.” See *Rausch*, 2023 WL 2401452, at *5–6; *Roffman v. Perfect Bar, LLC*, No. 22-CV-2 02479-JSC, 2022 WL 4021714, at *5 (N.D. Cal. Sept. 2, 2022); 58 Fed. Reg. at 2101 (noting that “information on protein quantity alone can be misleading on foods that are of low protein quality”).

IV. CONCLUSION

Accordingly, the Court GRANTS IN PART and DENIES IN PART Defendant’s motion to dismiss. Plaintiff’s claims based on the NFP are DISMISSED for lack of standing with leave to amend and Plaintiff’s claims based on the front labels are DISMISSED as preempted under FDA regulations without leave to amend. However, the Court DENIES the motion as to Plaintiff’s hybrid claims. Plaintiff may file an amended complaint within 21 days of this order. Further, the Court SETS a telephonic case management conference on May 9, 2023, at 2:00 p.m. All counsel shall use the following dial-in information to access the call: Dial-In: 888-808-6929; Passcode: 6064255 All attorneys and pro se litigants appearing for a telephonic case management conference are required to dial in at least 15 minutes before the hearing to check in with the courtroom deputy. For call clarity, parties shall NOT use speaker phone or earpieces for these calls, and where at all possible, parties shall use landlines. IT IS SO

ORDERED. 20 Dated: 21 _____ HAYWOOD S.
GILLIAM, JR. 22 United States District Judge 23 24 25 26 27 3 Having found Plaintiff's
allegations are sufficient to establish deception under the reasonable

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