UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ADAM VICTOR,

Plaintiff,

v.

R.C. BIGELOW, INC.,

Defendant.

Case No. 13-cv-02976-WHO

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS FIRST AMENDED COMPLAINT

Re: Dkt. No. 33

Plaintiff Adam Victor brings this putative class action against defendant R.C. Bigelow, Inc. ("Bigelow"), alleging that various tea products it produces are misbranded and violate California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law. I previously granted in part and denied in part Bigelow's motion to dismiss Victor's original Complaint. Dkt. No. 28 ("Order"). Victor then filed a First Amended Complaint ("FAC"), which Bigelow moves to dismiss.

In the Order, I held that Victor plausibly pleaded that the challenged products violate federal and California food-labeling regulations and therefore violated the "unlawful" prong of California's Unfair Competition Law. However, I held that Victor's other causes of action failed to state a claim because he did not plausibly plead what is fraudulent or misleading about the statement "delivers healthful antioxidants." Because neither the FAC nor this motion provides materially new facts or arguments, my opinion has not changed. Bigelow's Motion to Dismiss the FAC is GRANTED IN PART and DENIED IN PART.

FACTUAL BACKGROUND

The FAC alleges the following facts. Plaintiff Adam Victor is a California resident who purchased four of Bigelow's tea products: Earl Grey Tea; English Teatime Tea; Constant

Comment Tea; and the Six Assorted Tea Variety Pack, which contains Lemon Lift black tea in addition to the three preceding teas. FAC ¶¶ 2, 5, 76.

Bigelow is one of the largest tea producers in the country. FAC ¶ 6. The challenged products produced by Bigelow are all black tea, all come from the same plant, and all have packaging of the same size and shape. FAC ¶ 13. The products all contain the same phrase, "delivers healthful antioxidants." FAC ¶ 12. Victor read the "delivers healthful antioxidants" claim appearing on the labels of the products he purchased and relied on it in deciding to purchase those products.[1] FAC ¶¶ 18, 77. He placed "great importance on the claimed statement that black tea '*delivers*' healthful or healthy antioxidants in choosing [Bigelow's] products over other tea products and alternative beverage products." FAC ¶ 43 (original emphasis). He believed the representation was legal. FAC ¶ 64. Victor relied on Bigelow's claim that its products contained antioxidants "that would provide healthful and beneficial nutrients" when in fact they did not. FAC ¶¶ 19, 79.

While federal food labeling laws and regulations require a manufacturer to use only approved nutrient claims on a food label, none of Bigelow's tea products contain an antioxidant nutrient accepted by regulation; thus the use of "antioxidant" on its product labels violates labeling rules. FAC ¶ 12. "The phrase '***delivers healthful antioxidants***' suggests that the food, because of its nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim that the claimed antioxidants in tea (which are flavonoids or polyphenols) are 'healthful' and have a beneficial effect on humans. This is not true and is fraudulent and misleading. FDA [(the Food and Drug Administration)] has not set a recommended daily intake (RDI) for flavonoids, polyphenols or any other substance in tea and has not recognized a substantial consensus of the scientific or medical community of any beneficial

[1] The Order held that Victor could not bring claims related to statements found on Bigelow's website because the website was not legally incorporated into the challenged products' actual labeling. Order 19-21. Bigelow argues that various allegations in the FAC referencing its website and other "off-label statements" are irrelevant, immaterial, and not actionable, and requests that they be struck. Mot. Br. 11-12. Victor clarifies in his opposition brief that he is not relying on Bigelow's website to support any of his claims. Opp'n 3-4. Accordingly, I will disregard these statements but DENY the request that they be struck.

effects on humans." FAC ¶ 14 (original emphasis). Similarly, Bigelow's products do not conform with regulations specifically governing antioxidants and terms such as "healthful." FAC ¶ 12.

Victor "did not know, and had no reason to know, that the [challenged products] were misbranded and bore food labeling claims despite failing to meet the requirements to make those food labeling claims. Similarly, [Victor] did not know, and had no reason to know, that [the products] he purchased were misbranded because their labeling was false and misleading." FAC ¶¶ 30, 80. Bigelow's labels are illegal for the following additional reasons:

> (1) because the names of the antioxidants are not disclosed on the product labels in violation of 21 C.F.R. § 101.54(g)(4); (2) because there are no RDIs for the claimed antioxidant substances in tea, including flavonoids and polyphenols; and (3) because Defendant lacks adequate scientific evidence that the claimed antioxidant nutrients participate in physiological, biochemical, or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions after they are eaten and absorbed from the gastrointestinal tract.

FAC ¶ 49. Finally, Bigelow claims that its products are "healthful," but they "do not contain any ingredient which provides at least 10% of the daily value (DV) of vitamin A, vitamin C, calcium, iron, protein, or fiber per reference amount as required by" 21 C.F.R. § 101.65(d)(2). FAC ¶ 12.

Victor "erroneously believed the misrepresentation that the Bigelow products he was purchasing were beneficial, healthy and met the minimum nutritional threshold to make such claims." FAC ¶ 44. Had he known that the products were mislabeled, he would not have purchased them or paid a premium for them. FAC ¶¶ 18, 78. "After Plaintiff learned that Defendant's Black Tea Products are falsely labeled, he stopped purchasing them." FAC ¶ 81.

Though he only purchased four Bigelow products, Victor seeks to bring a class action on behalf of all persons in California who purchased any of the following 28 products since June 25, 2009: Caramel Chai Black Tea; Chocolate Chai Tea; Constant Comment Tea; Constant Comment Decaffeinated Tea; Darjeeling Tea; English Breakfast Tea; English Teatime Tea; English Teatime Decaffeinated Tea; Cinnamon Stick Tea; Earl Grey Tea; Earl Grey Decaffeinated Tea; French Vanilla Tea; French Vanilla Decaffeinated Tea; Spiced Chai Tea; Spiced Chai Decaffeinated Tea; Vanilla Caramel Tea; Vanilla Chai Tea; Chinese Oolong Tea; Plantation Mint Tea; Lemon Lift Tea; Lemon Lift Decaffeinated Tea; Raspberry Royale Tea; Pomegranate Black Tea; White

Chocolate Obsession; Pumpkin Spice Tea; Eggnogg'n Tea; Six Assorted Teas Variety Pack; and Six Assorted Teas Decaffeinated Variety Pack. FAC ¶ 1.

PROCEDURAL HISTORY

Victor filed this action on June 27, 2013.[2] Dkt. No. 1. Bigelow filed a motion to dismiss the Complaint on January 15, 2014, which I granted in part on March 14, 2014.[3] Dkt. Nos. 18, 28. I gave Victor leave to file an amended complaint, and he filed the FAC on April 12, 2014. Dkt. No. 30. On May 15, 2014, Bigelow filed this motion to dismiss.[4] Dkt. No. 33. I held a hearing on the motion on July 9, 2014.

As with the original Complaint, Victor brings six causes of action in the FAC: (1) violation of the "unlawful" prong of California's Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE §§ 17200 *et seq.*; (2) violation of the "unfair" prong of the UCL; (3) violation of the "fraudulent" prong of the UCL; (4) misleading and deceptive advertising under California's False Advertising Law ("FAL"), CAL. BUS. & PROF. CODE §§ 17500 *et seq.*; (5) untrue advertising under the FAL; and (6) violation of California's Consumer Legal Remedies Act ("CLRA"), CAL. CIV. CODE §§ 1750 *et seq.* The plaintiff seeks both damages and injunctive relief.

LEGAL STANDARD

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. FED. R. CIV. P. 12(b)(6). The court must "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). The complaint "does not need detailed factual allegations," but

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[2] This case is related to *Khasin v. R.C. Bigelow, Inc.*, No. 12-cv-2204, currently pending before me.

[3] In granting the first motion to dismiss, I disagreed with Bigelow's preemption and primary jurisdiction arguments. Bigelow states in its current motion that it wishes to preserve those arguments. Mot. Br. 19-22. Its objections on those issues are noted.

[4] Victor filed a Request for Judicial Notice in support of his opposition brief. Dkt. No. 35. The document sought to be noticed is guidance from the FDA. Because the guidance is a document of a governmental agency, is readily verifiable, and Bigelow does not object to it, the request is GRANTED. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *Lamle v. City of Santa Monica*, No. 04-cv-6355, 2010 WL 3734868, at *4-5 (C.D. Cal. July 23, 2010), *report and recommendation adopted*, No. 04-cv-6355, 2010 WL 3734864 (C.D. Cal. Sept. 22, 2010), *aff'd*, 498 F. App'x 738 (9th Cir. 2012).

instead only needs enough factual allegations "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "However, conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss." *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 834 (9th Cir. 2012).

Additionally, fraud claims are subject to a higher standard and must be pleaded with particularity. FED. R. CIV. P. 9(b). This is true of claims state law claims, such as those under the UCL, CLRA, and FAL, that are grounded in fraud, which 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, 1103, 1106 (9th Cir. 2003) (quotation marks omitted). Such claims "must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (citation omitted). If a complaint "alleges a unified fraudulent course of conduct," the claims are grounded in fraud and the "entire complaint must therefore be pleaded with particularity." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009).

A plaintiff claiming fraud must also plead reliance. *Kwikset Corp. v. Super. Ct. of Orange Cnty.*, 51 Cal. 4th 310, 326-27 (2011) (UCL); *Princess Cruise Lines v. Super. Ct. of Los Angeles Cnty.*, 101 Cal. Rptr. 3d 323, 331 (Ct. App. 2009) (CLRA). The challenged statements must be judged against the "reasonable consumer" standard under the UCL, CLRA, and FAL. *Consumer Advocates v. Echostar Satellite Corp.*, 8 Cal. Rptr. 3d. 22, 29 (Ct. App. 2003).

If a motion to dismiss is granted, a court should normally grant leave to amend unless it determines that the pleading could not possibly be cured by allegations of other facts. *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990).

DISCUSSION

This discussion incorporates by reference the legal discussion in the earlier Order on the first motion to dismiss.

I. Victor States A Claim Under The "Unlawful" Prong Of The UCL.

I previously held that Victor plausibly pleaded that Bigelow's statement, "delivers

healthful antioxidants," violated the "unlawful" prong of the UCL despite his obligation to show reliance, which he also satisfied. Order 25. Absent any significant changes in the FAC from the original Complaint in this regard, Bigelow rehashes arguments that have already been rejected. There is no need to repeat what I have already said in my Order and Victor has stated a claim under the "unlawful" prong of the UCL.[5]

Bigelow appears to suggest that it cannot be liable for "unlawful" claims because Victor cannot allege that he is subjecting himself to criminal liability by purchasing the challenged products whose labeling he relied upon as legal. *See* Mot. Br. 14. Bigelow asserts that Victor's "argument has already been rejected by the courts," and cites Judge Whyte as "holding that plaintiffs' allegations that a company's products are 'legally worthless' is a 'theoretical construct and not an injury in fact.'" Mot. Br. 14 (quoting *Lanovaz v. Twinings N. Am., Inc.*, No. 12-cv-2646-RMW, 2013 WL 675929, at *6 (N.D. Cal. Feb. 25, 2013)).

Bigelow is mistaken. As Judge Grewal recently explained in *Park v. Welch Foods, Inc.*, as "unlikely" as it is that a California consumer would be subject to jail time and a criminal fine for possessing misbranded food, California does criminalize the possession of misbranded goods, so "it is plausible in the *Twombly* and *Iqbal* sense of the word to believe that Plaintiffs may have acted differently if they were aware of a way to avoid it." No. 12-cv-6449, 2014 WL 1231035, at *2 (N.D. Cal. March 20, 2014). Accordingly, this is not an argument that "has already been rejected by the courts." Furthermore, Bigelow mischaracterizes Judge Whyte's order in *Lanovaz v. Twinings North America*, No. 12-cv-2646-RMW, 2013 WL 675929, at *6 (N.D. Cal. Feb. 25, 2013). In stating the proposition that whether a company's products are "legally worthless" is a "theoretical construct and not an injury in fact," Judge Whyte was not characterizing the plaintiff's argument in that case but was reiterating the *defendant's* argument—an argument which he actually rejected, contrary to Bigelow's assertion that it was his "holding." *Id.* at *6 (original

[5] In addition, while the Order previously dismissed Victor's claims concerning the term "healthful" because he provided nothing but conclusory statements to support them, Order 25-26, Victor's allegation in the FAC that none of the challenged products provide at least 10 percent of the daily value of certain substances as required by federal regulations governing variants of the term "healthy" renders Victor's claims about the word "healthful" plausibly pleaded. *See* FAC ¶ 12.

emphasis). Indeed, Judge Whyte goes on to say, "defendant's argument misses the mark because plaintiff's injury is based on the allegation that she would not have *purchased* the product if she had known that the label was unlawful. The alleged purchase of a product that plaintiff would not otherwise have purchased but for the alleged unlawful label is sufficient to establish an economic injury-in-fact for plaintiff's unfair competition claims." *Id.* (original emphasis). The same reasoning applies here.

I stated in the Order that *Lanovaz* did not support Bigelow on this point, but as with its other arguments, Bigelow does not address my concerns. As I wrote before, "I am not helped by Bigelow's lack of explanation of why its products do *not* violate any law." Order 21-22 n.4. Neither Bigelow's motion brief nor its reply brief expends any effort to explain why its labels do not in fact violate FDA and other regulations. Without any such discussion, Bigelow's motion must again fail with regard to Victor's claim under the "unlawful" prong of the UCL.

II. Victor Fails To State A Claim Under The "Fraudulent" Prong Of The UCL, The CLRA, And The FAL.

The holding in the Order explaining why Victor failed to state a claim under the "fraudulent" prong of the UCL, the CLRA, and the FAL bears quoting:

> Victor fails to adequately plead that the statement "delivers healthful antioxidants" is fraudulent. He does not explain how the statement is either false or misleading to a reasonable consumer. He does not allege that Bigelow's products do not in fact have antioxidants or that the antioxidants are not in fact healthful. In short, he does not plead what expectations a reasonable consumer might have from seeing or hearing that statement such that they were fraudulently misled by what Bigelow actually offered. Although Victor argues that he reasonably expected all consumer products to abide by the relevant regulations, *see* Opp'n 19, as Judge Grewal explains, "[w]hile regulatory violations might suggest that [ ] statements might be misleading to a reasonable consumer, that alone is not enough to plead a claim under the FAL, CLRA, or the misleading/false advertising prongs of the UCL." *Trazo*, 2013 WL 4083218, at *10.

Order 28.

Victor alleges that he read the phrase "delivers healthful antioxidants" on the challenged products and relied on the statement to purchase them. Opp'n 21 (citing FAC ¶ 18). He "relied on Defendant's claims that its products contained antioxidant nutrients that would provide healthful and beneficial nutrients when, in fact the tea products did not contain any such nutrients that

would do so." Opp'n 21 (quoting FAC ¶ 19). Victor argues that because none of the challenged products "contain an antioxidant nutrient recognized by regulation or which has a scientically [sic] recognized beneficial effect on humans," using the term "antioxidant" is misleading because it implies "that the product will 'deliver' a 'healthful' beneficial effect to the consumer." Opp'n 4. Further, "[t]he use of the prase [sic] also violates the nutrient content labeling statutes." Opp'n 4. He believed that the products "were beneficial, healthy and met the minimum nutritional thresholds to make such claims." Opp'n 21 (quoting FAC ¶ 44). He argues, however, that he was "misled into the belief that such claims were legal and had passed regulatory muster and were supported by substantial and recognized scientific and medical evidence capable of securing regulatory acceptance." Opp'n 21. He would not have purchased the challenged products had he known that Bigelow's claims "were unlawful, false, misleading, unapproved[,] and . . . were misbranded." Opp'n 21 (citing FAC ¶ 63).

The FAC suffers from the same defects as the original Complaint. While Victor is correct that "the FAC makes significant organizational improvements and excisions of what the Court found to be unnecessary verbiage," Opp'n 4, the FAC still fails to explain what is false or misleading about the phrase "delivers healthful antioxidants"—the FAC does not provide any new factual allegations and any new allegations are conclusory. Victor argues that the challenged statement "is misleading, in and of itself, because it promises to deliver a healthful dose of antioxidants to any consumer who drinks the tea." Opp'n 21. But Victor does not argue that the challenged products do not in fact have antioxidants at all or that any antioxidants are not healthful—indeed, Victor's counsel stated at the hearing that he does not deny that the challenged products have antioxidants. The crux of Victor's claims is that any antioxidants in the challenged products do not meet FDA-approved levels.[6] *See* FAC ¶¶ 23, 40; *see also* Opp'n 21 & 21 n.6

[6] Victor appears to allege at times that the challenged products do not have any antioxidants and that antioxidants are not in fact healthful. *See, e.g.*, FAC ¶ 12 ("there is no nutrient in its tea products with recognized antioxidant activity"), ¶ 40 (asserting that antioxidants are "not recognized as having a beneficial effect on humans"). To the extent that Victor's theory of liability is that the challenged statements are literally false, rather than simply non-compliant with regulations, Victor still does not adequately plead a cause of action because the FAC provides nothing but bare factual assertions. Under Rule 9(b), which applies here, Victor must plead with particularity and state more than that Bigelow's products lack antioxidants and are not healthful.

("Bigelow did not have FDA approval to make a qualified health claim of any sort"). That is quite different, however, than the challenged products' not having any healthful antioxidants at all. The challenged products' labeling may be unlawful in the sense that they do not meet FDA regulations, but contrary to Victor's argument, there is nothing about the claim that makes it, "by its very nature, misleading." Opp'n 22. Victor does not allege that there is anything about the statement itself that led him to believe that it met FDA regulations or contained any particular level or type of antioxidants.

As Judge Grewal and I have explained, the mere fact that a statement violates a regulation is insufficient to show that it is also misleading. Victor's argument would effectively render every violation of the "unlawful" prong of the UCL a violation of the "fraudulent" prong as well—an untenable result without any legal basis. A technical violation of a law does not in itself mean that the violation will mislead a reasonable consumer.[7] Indeed, Victor himself admits that he was unaware of the relevant FDA regulations, so it is simply implausible that he was misled solely because Bigelow's products violated those regulations.[8] Even if Victor claims that he relied on the lawfulness of the challenged products' labeling (which is what allows him to succeed on his "unlawful" claim, which is not subject to the reasonable-consumer test), as the Order held, such

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Victor's allegations are simply implausible because he does not give facts that explain with specificity how he knows or realized that Bigelow's products do not have antioxidants or are not healthful, and thus he was misled by Bigelow's statement. His allegations do not even meet the laxer standard under Rule 8. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("the allegations are conclusory and not entitled to be assumed true"); *Twombly*, 550 U.S. at 557 ("a conclusory allegation . . . does not supply facts adequate to show illegality").

[7] Victor again cites *Delacruz v. Cytosport, Inc.*, No. 11-cv-3532-CW, 2012 WL 2563857 (N.D. Cal. June 28, 2012), for the proposition that "FDA regulations may lend objective criteria by which to determine whether certain words and phrases used on the labels are misleading." Opp'n 22. However, as I already explained in the Order, whether the FDA may find something misleading is different from whether something is misleading under the reasonable consumer test—as *Delacruz* states, FDA regulations only *may* indicate whether something is misleading, but it is not determinative. Order 28.

[8] Victor argues that his awareness of FDA regulations is irrelevant to whether violations of those regulations are likely to mislead. Opp'n 22. At least in this context, that is true. The problem for Victor is that he does not plausibly allege that the challenged statement standing on its own is likely to mislead a reasonable consumer, which is the relevant test. As stated in the Order, Victor does not say or explain what is false, fraudulent, or misleading about the phrase "delivers healthful antioxidants" with regard to the challenged products.

reliance is unreasonable and therefore insufficient to state a "fraudulent" claim.[9] Victor therefore fails to adequately plead a violation of the "fraudulent" prong of the UCL.

Because the requirements for stating a claim under the CLRA and FAL are essentially identical to those for stating a claim under the "fraudulent" prong of the UCL, Victor fails to adequately plead a violation of those statutes as well.[10]

III. Victor Fails To State A Claim Under The "Unfair" Prong Of The UCL.

With regard to the "unfair" prong, the Order held that Victor failed to explain how Bigelow's statement offends an established public policy or is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers"; the Order also stated that Victor failed to say whether the utility of the defendant's conduct does or does not outweigh the gravity of the alleged harm to the plaintiffs, which is his burden. Order 29. Victor has not pleaded any new allegations in his FAC or provided any argument in his opposition brief on these issues. Accordingly, he again fails to state a claim under the "unfair" prong of the UCL.

CONCLUSION

Because Victor's FAC has not substantially changed from his original Complaint, and Bigelow's briefs have raised no new persuasive argument, Bigelow's motion to dismiss the FAC's First Cause of Action is DENIED. For the same reason, Bigelow's motion to dismiss all other causes of action is GRANTED. Those claims are dismissed WITH PREJUDICE because Victor was already given an opportunity to amend his complaint, additional pleading is likely to be futile, and Victor's counsel effectively conceded at the hearing that he could not plead anything more.

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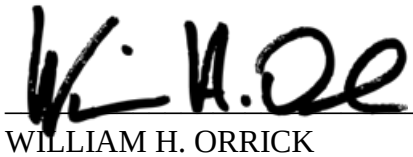
[9] Victor points out that the fraudulent claims in *Khasin v. Bigelow* and *Lanovaz v. Twinings North America, Inc.*, were allowed to go forward. Opp'n 10 (citing *Khasin v. R.C. Bigelow, Inc.*, No. 12-cv-2204-JSW, 2013 WL 2403579 (N.D. Cal. May 31, 2013), and *Lanovaz*, 2013 WL 2285221. I already considered *Khasin* in the Order and did not follow it. Order 26-27. I do not follow *Lanovaz* for the same reason I did not follow *Khasin*—the court did not explain why it allowed the claim to survive.

[10] Bigelow says that Victor still has not provided the requisite CLRA notice and thus the cause of action must be dismissed. Mot. Br. 18. Victor argues that his counsel's November 13, 2013, letter serves as proper CLRA notice for the FAC. However, he asserts that Bigelow "has ignored the opportunity to change its labeling in response to the CLRA notices" and "is continuing to place the allegedly unlawful language on its packages." Opp'n 23. Given that Victor cannot substantively establish a CLRA violation, there is no need to address this issue.

Bigelow shall file its answer within 20 days.

IT IS SO ORDERED.

Dated: July 18, 2014



WILLIAM H. ORRICK
United States District Judge