UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALLISON PAPPAS, Plaintiff, v. CHIPOTLE MEXICAN GRILL, INC., Defendant.	Case No.: 16CV612-MMA (JLB) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS** [Doc. No. 15]

On March 10, 2016, Plaintiff Alison Pappas filed this putative class action against Defendant Chipotle Mexican Grill, Inc., alleging violations of California's False Advertising Law ("FAL"), California Business and Professions Code sections 17500, *et seq.*; California's Consumer Legal Remedies Act ("CLRA"), California Civil Code section 1750 *et seq.*; and California's Unfair Competition Law ("UCL"), Business and Professions Code sections 17200, *et seq.* On April 19, 2016, Defendant moved to dismiss Plaintiff's Complaint. Doc. No. 6. The Court entertained oral argument and subsequently affirmed its tentative ruling, Doc. No. 11, granting Defendant's motion to dismiss and allowing Plaintiff leave to amend some of her claims. Plaintiff timely filed the First Amended Complaint (FAC) on June 1, 2016. Defendant Chipotle Mexican Grill, Inc. now moves to dismiss the FAC, Doc. No. 14, pursuant to Federal Rule of Civil Procedure 12(b)(6). Doc. No. 15. The Court heard oral argument on Monday, August 22, 2016 and subsequently took the matters under submission. For the reasons set forth

below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion to dismiss.

BACKGROUND[1]

Plaintiff alleges Defendant "operates fast-casual and fresh Mexican food restaurants" throughout the United States. FAC ¶ 8. Plaintiff alleges that Defendant began an advertising campaign in April 2015, which falsely advertised to consumers that Defendant's food does not contain genetically modified organisms (GMOs). However, Plaintiff contends that Defendant serves or served GMO-containing flour and corn tortillas, uses or used GMO-containing soy products in its cooking oils, and serves or served meat and dairy products derived from animals fed GMO-containing feed. Plaintiff alleges she relied on Defendant's representations regarding GMOs and accordingly was deceived into purchasing, and paying a premium for, Defendant's food.

Plaintiff describes and defines the term "GMO" as follows:

> With advances in technology, new techniques have been applied that obtain faster results in getting desired genetic traits. Now, genes that express a desired trait can be physically moved or added to a new organism to enhance the trait in that organism. Also known as genetic engineering or genetic modification, this technique allows new traits to be introduced one at a time without unwanted complications from extra genes and extensive crossbreeding. A GMO, also known as a transgenic organism, is the term used for any organism whose genetic material has been altered using these genetic engineering techniques.

FAC ¶ 14.

Plaintiff alleges she has purchased Defendant's food products on several occasions, beginning in May 2015. On all occasions, Plaintiff believes she purchased "one to three

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[1] Because this matter is before the Court on a motion to dismiss, the Court must accept as true the allegations set forth in the complaint. *See Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 740 (1976).

meat and cheese only tacos on flour tortillas with a side of tortilla chips." FAC ¶ 35. Plaintiff states she only made these purchases because she saw "all of the storefront and in-store billboards and signs used by Chipotle at its downtown location, to utilize 'Only NON-GMO Ingredients." FAC ¶ 35. Plaintiff states she understood the advertisements to convey that Defendant's "menu items did not contain GMOs, were not sourced from animals that were raised on GMO feed, did not use GMO processing aids in food preparation, and were otherwise certified as non-GMO under industry standards." FAC ¶ 35. However, "Plaintiff is informed and believes [. . .] that all of the food she purchased [. . .] either contained GMO ingredients, or was a meat or dairy product, raised, at least in part, from cattle fed on GMO ingredients." FAC ¶ 36.

Plaintiff seeks to certify a class of "[a]ll persons who purchased, between April 27, 2015 and the present, Chipotle Food Products, in California, which contain GMO products, or meat or dairy products derived from animals which were fed GMO products, and who did not review the disclosures on defendant's website relative to its GMO product sales prior to purchase." FAC ¶ 52.

LEGAL STANDARD

A. Requests for Judicial Notice

Generally, a district court's review of a 12(b)(6) motion to dismiss is "limited to the complaint." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002) (quoting *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993)). Consideration of extrinsic evidence ordinarily converts a 12(b)(6) motion to dismiss into a summary judgment motion. *Lee*, 250 F.3d at 688. However, there are two exceptions to this rule. *Id.* "First, a court may consider 'material which is properly submitted as part of the complaint.'" *Id.* That includes documents that are physically attached to the complaint, and those that are not, but whose authenticity is not contested and where the plaintiff's complaint necessarily relies on them. *Id.* (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 705–06 (9th Cir. 1998) (internal quotations omitted)). Second, a court may

take judicial notice of matters of public record. *Id.* at 688–89 (citing *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)).

B. Rule 12(b)(6)

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). However, plaintiffs must also plead "enough facts to state a claim to relief that is plausible on its face." Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard thus demands more than a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, the complaint "must contain allegations of underlying facts sufficient to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not take legal conclusions as true merely because they are cast in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Similarly, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

In determining the propriety of a Rule 12(b)(6) dismissal, courts generally may not look beyond the complaint for additional facts. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). "A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *Id.*; *see also Lee*, 250 F.3d at 688. Where dismissal is appropriate, a court should grant leave to amend unless the plaintiff could not possibly cure the

defects in the pleading. *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009).

II. Rule 9(b)[2]

In alleging fraud or mistake, the plaintiff must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Failure to satisfy this heightened pleading requirement can result in dismissal of the claim. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). In general, the plaintiff's allegations of fraud or mistake must be "specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* at 1106. This heightened pleading standard requires the plaintiff to allege fraud or mistake by detailing "the who, what, when, where, and how" of the misconduct charged. *Id.* at 1106–07. In other words, the plaintiff must specify the time, place, and content of the alleged fraudulent or mistaken misconduct. *See id.* However, "malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

DISCUSSION

A. Defendant's Requests for Judicial Notice

First, Defendant requests judicial notice of a Northern District of California order granting a motion to dismiss in a similar case, *Gallagher v. Chipotle Mexican Grill, Inc.*, Case No. 15-cv-3952-HSG. Doc. No. 15-2, Exh. 1. While a court may take judicial notice of undisputed matters of public record, it may not take judicial notice of a fact that is subject to reasonable dispute. Fed. R. Evid. 201(b); *Lee*, 250 F.3d at 690. For example, "when a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." *Lee*, 250 F.3d at 690 (internal

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[2] Both parties acknowledge that Rule 9(b)'s heightened pleading standard applies to Plaintiff's claims. *See also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (stating Rule 9(b) applies to California's consumer protection statutes).

quotations omitted). Plaintiff does not dispute the authenticity of the opinion, and the opinion is public record. *See Gallagher*, Case No. 15-cv-03952-HSG, 2016 WL 454083 (N.D. Cal. Feb. 5, 2016); *Lee*, 250 F.3d at 688. Accordingly, the Court **GRANTS** Defendant's request and takes judicial notice of the existence of the opinion, but does not take judicial notice of any disputed facts contained therein.

Second, Defendant requests judicial notice of ten articles or websites that Plaintiff cites to or quotes in the FAC pursuant to the incorporation by reference doctrine. Doc. No. 15-2, Exh. 2–11. Defendant requests judicial notice of the articles for the truth of the facts stated therein, such as that a chicken that eats GMO-containing feed does not itself become a GMO. *See* Doc. 15-1, p. 11:20–28. Regarding these articles, the Court **DENIES** Defendant's request for judicial notice because the underlying facts in the articles are not readily verifiable by the Court, and the veracity of the facts contained within would be more properly considered upon a motion for summary judgment. Further, a "district court may, but is not required to incorporate documents by reference." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012). Defendant also requests judicial notice of several of Defendant's online advertisements. As discussed more fully below, advertisements which Plaintiff never saw are irrelevant to the disposition of the issues before the Court. "[J]udicial notice is inappropriate where the facts to be noticed are not relevant to the disposition of the issues before the court." *Kuzmenko v. Lynch*, 606 F. App'x 399 (9th Cir. 2015) (citing *Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 n.13 (9th Cir. 1998)). Accordingly, the Court **DENIES** Defendant's request for judicial notice of the articles and online advertisements.

B. California's FAL, UCL, and CLRA

California's FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof. Code § 17500. The FAL provides, in relevant part:

> No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately

> preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

Cal. Bus. & Prof. Code § 17501. "This statute makes it unlawful for a business to disseminate any statement 'which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading[.]'" *Arevalo v. Bank of Am. Corp.*, 850 F. Supp. 2d 1008, 1023–24 (N.D. Cal. 2011) (internal citation omitted). "The statute has been interpreted broadly to encompass not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. . . . Consequently, even a perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under this section." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012) (internal citations, quotations, and alterations omitted).

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The UCL provides a separate theory of liability under each of the three prongs: "unlawful," "unfair," and "fraudulent." *Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212, 1222 (C.D. Cal. 2012) (citing *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007)). "The UCL expressly incorporates the FAL's prohibition on unfair advertising as one form of unfair competition." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1103 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013). Accordingly, any violation of the FAL also violates the UCL. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citing *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002)).

Finally, California's CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770. Specifically, the CLRA prohibits, among other things, "[a]dvertising goods or services with intent not to sell them as

advertised" and "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions." Cal. Civ. Code § 1770(a)(9), (13).

C. The Reasonable Consumer Test

To state a claim under the FAL, UCL, or the CLRA, the plaintiff must allege the defendant's purported misrepresentations are likely to deceive a reasonable consumer. *See Williams*, 552 F.3d at 938 (explaining that unless the advertisement at issue targets a particularly vulnerable group, courts must evaluate claims for false or misleading advertising from the perspective of a reasonable consumer); *see also Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) ("It is true that violations of the UCL, FAL, and CLRA are evaluated from the vantage point of a 'reasonable consumer.'"); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 967 (S.D. Cal. 2012) ("To state a claim under the [UCL and FAL] one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'"). "A reasonable consumer is 'the ordinary consumer acting reasonably under the circumstances.'" *Davis*, 691 F.3d at 1161–62 (quoting *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682 (2006)). "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." *In re Sony*, 903 F. Supp. 2d at 967 (citing *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003)). Instead, "the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be mislead [sic]." *Id.* "In determining whether a statement is misleading under the statute, the primary evidence in a false advertising case is the advertising itself." *Bruton v. Gerber Products Co.*, 961 F. Supp. 2d 1062, 1092 n.20 (N.D. Cal. 2013) (quoting *Colgan*, 135 Cal. App. 4th at 679) (internal quotation marks omitted).

Finally, courts have recognized that "[w]hether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires consideration and weighing of

evidence from both sides and which usually cannot be made on [a motion to dismiss]." *Williams*, 552 F.3d at 939 (internal quotations removed) (citing *Linear Technology Corp. v. Applied Materials, Inc.*, 61 Cal. Rptr. 3d 221, 237 (2007)). However, in some cases, courts have found, at the motion to dismiss stage, that a plaintiff's allegations that a reasonable consumer is likely to be deceived are implausible. *See Carrea v. Dreyer's Grand Ice Cream, Inc.*, 2011 WL 159380 at *5 (N.D. Cal. Jan. 10, 2011), *aff'd*, 475 F. App'x 113 (9th Cir. 2012); *Ross v. Sioux Honey Ass'n, Co-op*, No. C–12–1645 EMC, 2013 WL 146367 (N.D. Cal. Jan. 14, 2013).

D. Plaintiff's Noncompliance with Civil Local Rule 15.1(c)

In Defendant's reply brief, Defendant argued for the first time that the FAC should be dismissed due to Plaintiff's noncompliance with Civil Local Rule 15.1(c) and the Court's subsequent Discrepancy Order requesting that Plaintiff comply with the rule. Rule 15.1(c) requires that, after the Court grants a motion to dismiss with leave to amend, any amended pleading subsequently filed must be filed with a version of the pleading that shows "through redlining, underlining, strikeouts, or other similarly effective typographical methods" how that pleading is different from the previous. Rule 15(c) does not authorize dismissal as a sanction. Further, Plaintiff communicated to the Court that its noncompliance with the Court's subsequent request for compliance was due to inadvertence. Accordingly, the Court finds dismissal inappropriate and **DENIES** Defendant's motion to dismiss insofar as it is based on those grounds.

E. Plaintiff's Exposure to Defendant's Advertisements

During the motion hearing regarding Defendant's motion to dismiss Plaintiff's original Complaint, the Court concluded that the Complaint did not allege which advertisements Plaintiff viewed and relied on with the specificity required by Federal Rule of Civil Procedure 9(b). The Complaint described several physical and online advertisements, but did not describe the physical location of any physical advertisements, nor indicate whether Plaintiff viewed any of the advertisements. The Complaint did not specifically describe which advertisements or statements Plaintiff viewed, but rather

stated that Plaintiff relied on "Chipotle's prominently displayed ad campaign to utilize 'Only NON-GMO Ingredients.'" Compl. ¶ 35. To satisfy Rule 9(b)'s heightened pleading standard, the plaintiff must describe "the who, what, when, where, and how" of the misconduct charged. *Vess*, 317 F.3d at 1106–07; *see also Ham v. Hain Celestial Group, Inc.*, 70 F. Supp. 3d 1188, 1197 (N.D. Cal. 2014) (describing the "what" as the labels on the subject product). In other words, the plaintiff must specify the time, place, and *content* of the alleged fraudulent or mistaken misconduct. *See id.* Here, it is particularly important that Plaintiff state which representation(s) she saw and relied on because "the primary evidence in a false advertising case is the advertising itself." *Brockey v. Moore*, 107 Cal.App.4th 86, 100 (2003). Further, the representations Plaintiff describes are variable in content. For example, Plaintiff alleges Defendant stated it was 'literally dropping' the letters G, M, and O from its menu, and that "genetically modified ingredients don't make the cut." FAC ¶ 26, 29. Plaintiff also describes a statement that Defendant's "meat [is] 'raised without antibiotics or added hormones.'" FAC ¶ 30.

In the FAC, Plaintiff only states that she relied on "Chipotle's prominently displayed ad campaign, *including but not limited to seeing all of the storefront and in-store billboards and signs used by Chipotle at its downtown location*, to utilize 'Only NON-GMO Ingredients . . . .'" FAC ¶ 35 (emphasis added). Plaintiff includes all of the same descriptions of the advertisements that she included in the original Complaint, but again does not include the locations of the physical advertisements. Thus, as pleaded, the FAC only sufficiently states false advertising claims based on Defendant's purported statement that it utilizes only non-GMO ingredients. Otherwise, the Court cannot infer that Plaintiff viewed any of the other listed advertisements or statements because Plaintiff does not allege she viewed any online advertisements, and has not alleged that the described physical advertisements appeared at Defendant's downtown location.

Because Plaintiff does not adequately plead that she saw or relied on any other representations, Plaintiff does not adequately demonstrate she has standing to challenge other representations. "A party does not have standing to challenge statements or

advertisements that she never saw." *Ham*, 70 F. Supp. 3d at 1197; *Meisterlin v. California Land Title Assn.*, No. B231308, 2011 WL 5588742, at *5 (Cal. Ct. App. Nov. 17, 2011) ("A person who never saw the allegedly false advertisement or who rejected the offer made in it lacks standing to pursue a claim for false advertising."). For the foregoing reasons, insofar as Plaintiff's FAL, UCL, and CLRA claims are based on Defendant's representation that it utilizes only non-GMO ingredients, the Court **DENIES** Defendant's motion to dismiss. Insofar as Plaintiff's claims are based on any other statements, the Court **GRANTS** Defendant's motion to dismiss and **DISMISSES** with prejudice and without leave to amend Plaintiff's FAL, UCL, and CLRA claims based on any other statements. "In deciding whether justice requires granting leave to amend, factors to be considered include the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). Here, the Court provided Plaintiff a chance to cure the deficiencies in the initial Complaint, and Plaintiff has failed to do so in the FAC. Further, Plaintiff has not requested leave to amend her claims, and has not indicated, in writing or orally at the motion hearing, that she could make any additional factual allegations in attempt to cure the deficiencies.

F. Plaintiff's Claims Based on Meat and Dairy Products

Defendant contends that Plaintiff's claims based on meat and dairy products should be dismissed with prejudice because Plaintiff has not sufficiently pleaded a likelihood that reasonable consumers would be deceived by its statements regarding those products. Defendant contends that Plaintiff has not alleged a likelihood that reasonable consumers would equate "non-GMO ingredients" with ingredients not derived from animals that have eaten genetically modified feed. Plaintiff argues that whether a reasonable consumer would be deceived by a statement is a question of fact inappropriate for resolution at the motion to dismiss stage.

Plaintiff is correct that "[w]hether a practice is deceptive, fraudulent, or unfair is

generally a question of fact" that courts typically do not resolve on a motion to dismiss. *Williams*, 552 F.3d at 939. However, in some cases, courts have found, at the motion to dismiss stage, that a plaintiff's allegations that a reasonable consumer would likely be deceived are implausible. *See e.g.*, *Carrea v. Dreyer's Grand Ice Cream, Inc.*, No. C 10-01044 JSW, 2011 WL 159380, at *5 (N.D. Cal. Jan. 10, 2011), *aff'd*, 475 F. App'x 113 (9th Cir. 2012) ("[D]ismissal of such claims is appropriate [upon a motion to dismiss] where the plaintiff fails to show the likelihood that a reasonable consumer would be deceived."); *Ross v. Sioux Honey Ass'n, Co-op*, No. C–12–1645 EMC, 2013 WL 146367 (N.D. Cal. Jan. 14, 2013) (dismissing false advertising claims where the plaintiff alleged she was misled into purchasing honey that pollen had been removed from, and that reasonable consumers were likely to think that a product labeled "honey" contained pollen); *Werbel ex rel. v. Pepsico, Inc.*, No. C 09-04456 SBA, 2010 WL 2673860, at *3 (N.D. Cal. July 2, 2010); *see also Balser v. Hain Celestial Grp.*, No. 13-cv-05604-MR, 2013 WL 6673617, at *1 (C.D. Cal. Dec. 18, 2013)

For example, a court concluded that a plaintiff did not adequately allege a likelihood that reasonable consumers would be deceived by "Original" and "Classic" labels on ice cream bars into thinking the ice cream bars were more wholesome and healthy than other frozen desserts not labeled as such, or that "Original" meant the company used the original recipe from 1928. *Carrea*, 2011 WL 159380 at *5. The court found "as a matter of law that a reasonable consumer would not likely be deceived." *Id.* at *6. Similarly, in *Pelayo v. Nestle USA, Inc.*, the Court dismissed the plaintiff's claims with prejudice and without leave to amend because the plaintiff had "failed to allege either a plausible objective definition of the term 'All Natural' or her subjective definition of the term 'All Natural' that is shared by the reasonable consumer." *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 980 (C.D. Cal. 2013). The plaintiff had alleged that the "All Natural" labeling on the pasta products was deceptive because the pasta products contained two unnatural, artificial, or synthetic ingredients. *Id.* The plaintiff offered several varying definitions of "All Natural," but the court found all of them either

implausible or not deceptive in the context of pasta. *Id.* at 978–79. For example, the court stated that the Webster's Dictionary definition of "natural" as "produced or existing in nature" was not deceptive in the context because "the reasonable consumer is aware that Buitoni Pastas are not 'springing fully-formed from Ravioli trees and Tortellini bushes.'" *Id.* at 978.

Likewise, Plaintiff has failed to allege a plausible objective definition of the term "non-GMO" that would deceive reasonable consumers in this context, or that reasonable consumers would share her interpretation. Plaintiff does not provide a definition of the prefix "non-" but defines GMO as a genetically modified organism, or "any organism whose genetic material has been altered using [certain] genetic engineering techniques." FAC ¶ 14.[3] "Non-" is defined by Merriam-Webster's Dictionary as: not, other than, reverse of, or absence of.[4] Thus, non-GMO would mean not genetically altered, or in the absence of genetically altered organisms. Yet, Plaintiff claims she interpreted "non-GMO" to mean not derived from animals that have consumed GMO-containing feed. Plaintiff does not allege that by eating feed with genetically modified ingredients, animals themselves become genetically modified organisms. Also, the FAC does not allege, as the original Complaint did,[5] that Defendant's meat and dairy products necessarily contain GMOs because the animals from which they are derived ate feed containing GMOs. Accordingly, Plaintiff's subjective definition of "non-GMO" is implausible and Plaintiff has failed to demonstrate a likelihood that "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances" would be misled by Defendant's description of its ingredients as not genetically modified. *See In re Sony*, 903 F. Supp. 2d at 967. The Court **GRANTS**

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[3] Plaintiff does not alter her definition of GMO from that included in the original Complaint.

[4] *See* Merriam-Webster's Learner's Dictionary, http://www.merriam-webster.com/dictionary/non-?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Aug. 25, 2016).

[5] The original Complaint alleged that because Defendant's meat and dairy products are derived from animals that have been fed GMOs, the food products "are necessarily made with ingredients containing GMOs." Compl. ¶ 45.

Defendant's motion to dismiss as to Plaintiff's FAL, UCL, CLRA claims that are based on Defendant's meat and dairy products, and **DISMISSES** those claims with prejudice and without leave to amend. Plaintiff failed to cure the deficiencies noted by the Court regarding those claims, and has not requested leave to amend nor indicated that she could cure the deficiencies. Further, amendment appears futile based on the Court's conclusion that Plaintiff's subjective interpretation of "non-GMO" is implausible and unlikely to be shared by reasonable consumers.

G. Plaintiff's Claims Based on Corn, Flour, and Soy Products

First, Defendant argues Plaintiff's claims based on corn, flour, and soy products should be dismissed because they exceed the scope of leave to amend that the Court granted. Rule 15 governs amendment of pleadings. It states that a party may amend his or her pleading once as a matter of course within twenty-one days of serving it, or after service of a responsive pleading or motion if one is required, whichever is earlier. Fed. R. Civ. P. 15(a). Otherwise, a party may amend his or her pleading only with the opposing party's written consent, or leave of court. Fed. R. Civ. P. 15(a)(2). Accordingly, Plaintiff should have sought Defendant's consent or leave of court. While many courts have stricken or dismissed without prejudice claims in analogous situations, *see Benton v. Baker Hughes*, No. CV 12-07735 MMM MRWX, 2013 WL 3353636, at *3 (C.D. Cal. June 30, 2013), many courts have been reluctant to "as long as the claims are not 'wholly specious' and do not cause the party 'undue prejudice,'" *see Smith v. Cty. of Los Angeles*, No. CV 11-10666 DDP PJWX, 2015 WL 1383539, at *3 (C.D. Cal. Mar. 25, 2015). *See also Allen v. Cty. of Los Angeles*, No. CV 07-102-R (SH), 2009 WL 666449, at *2 (C.D. Cal. Mar. 12, 2009) ("Exceeding the scope of a court's leave to amend is not necessarily sufficient grounds for striking a pleading or portions thereof.").

Defendant does not argue Plaintiff's claims are unduly prejudicial or wholly specious and the Court does not find them to be. The Court finds instructive a Northern District of California decision wherein the court stated:

> [J]udicial economy counsels against dismissing these new claims on procedural grounds. There is no indication that Defendants would be prejudiced by the assertion of these new claims, especially since no discovery has yet taken place. Thus, if the claims were now dismissed on procedural grounds, Plaintiffs could raise them again through a Rule 15 motion and the Court would need to address the substantive issues raised in Defendants' motion to dismiss at a later date. This would be unfair to the parties, including Defendants, who would need to brief the substantive issues on Plaintiffs' new claims for a second time.

Circle Click Media LLC v. Regus Management Group LLC, No. 12-04000 SC, 2013 WL 1739451, at *4 (N.D. Cal. Apr. 22, 2013).

Here, the parties have likewise not yet taken discovery. Further, the standard on a motion for leave to amend the pleadings prior to any scheduling order deadline is liberal. Rule 15(a)(2) states that "[t]he court should freely give leave when justice so requires." "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Circle Click*, 2013 WL 1739451, at *3 (stating "the Ninth Circuit has stressed Rule 15's policy of favoring amendments"). Accordingly, the Court declines to dismiss Plaintiff's claims on the basis that Plaintiff exceeded the scope of leave to amend.

Second, Defendant argues that Plaintiff has not provided sufficient factual support for her allegations regarding corn, flour, and soy products. Defendant takes issue with Plaintiff's apparent reliance on statistics in making the allegation that Defendant's corn, soy, and flour products contain GMOs. *See* Doc. No. 15-1 ("Plaintiff seems to assume the presence of GMOs in Chipotle's tortillas, chips and cooking oils based on her allegation that, as of 2015, '94% of the planted area of soybeans' and '92% of corn were genetically modified varieties" in the United States.'"). However, the Court does not

determine the veracity of a plaintiff's allegations on a motion to dismiss. Rather, the Court must accept the allegations in the FAC as true in deciding the motion. *See Hosp. Bldg. Co.*, 425 U.S. at 740. Thus, the Court must accept as true Plaintiff's factual allegation that Defendant's corn, flour, and soy products contain GMOs. Further, Plaintiff does not allege that she makes this allegation in reliance on—let alone exclusive reliance on—the statistics she cites in the FAC. Thus, the Court **DENIES** Defendant's motion to dismiss as to Plaintiff's FAL, UCL, and CLRA claims based on Defendant's corn, flour, and soy products.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's motion to dismiss as to Plaintiff's FAL, UCL, and CLRA claims based on any statements allegedly made by Defendant aside from Defendant's purported statement that it utilizes only non-GMO ingredients and dismisses those claims with prejudice and without leave to amend. Further, the Court **GRANTS** Defendant's motion to dismiss as to Plaintiff's FAL, UCL, and CLRA claims based on dairy and meat products and dismisses those claims with prejudice and without leave to amend. Lastly, the Court **DENIES** Defendant's motion to dismiss as to Plaintiff's FAL, UCL, and CLRA claims based on flour, corn, and soy products.

IT IS SO ORDERED.

Dated: August 31, 2016

Hon. Michael M. Anello
United States District Judge