UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 17-3010-DMG (AJWx)**	Date	August 21, 2019
Title	***Michelle Robinson, et al. v. Unilever United States, Inc.***	Page	1 of 8

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS - ORDER RE DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT [42]

On April 10, 2019, Plaintiff Jessica Bercow filed a Third Amended Class Action Complaint ("TAC") against Defendant Unilever United States, Inc., alleging the following state law causes of action: (1) violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*; (2) violation of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; (3) violation of the False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*; (4) breach of express warranty; (5) unjust enrichment; and (6) common law fraud.[1] [Doc. # 41.] On May 1, 2019, Defendant moved to dismiss the TAC ("MTD TAC"). [Doc. # 42.] The motion has since been fully briefed. [Doc. ## 43, 44.] Having duly considered the parties' written submissions, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion to dismiss **without leave to amend**.

I.
FACTUAL BACKGROUND[2]

In its prior Orders dismissing portions of the First Amended Class Action Complaint ("FAC") and Second Amended Class Action Complaint ("SAC"), the Court provided a factual summary of the case that need not be repeated here. *See* Order re Def.'s MTD FAC at 2–4 [Doc. # 30];[3] Order re Def.'s MTD SAC at 2 [Doc. # 40]. The TAC adds certain factual allegations regarding Plaintiff's purchase history and Defendant's marketing strategies that warrant

[1] This Order incorporates by reference the procedural history included in the Court's two prior Orders. *See* Order re Def.'s MTD FAC at 1 [Doc. # 30]; Order re Def.'s MTD SAC at 1 [Doc. # 40].

[2] The Court accepts all material facts alleged in the TAC as true solely for the purpose of deciding the motion to dismiss.

[3] All page references herein are to page numbers inserted by the CM/ECF system.

discussion.[4]

Between 2014 and 2015, Plaintiff purchased particular St. Ives Products that had labels on the front packaging that included the following text: "100% Natural Moisturizers"; "100% Natural Exfoliant"; or "100% Natural Extracts."[5] *See* TAC at ¶ 16 [Doc. # 41]. Specifically, Plaintiff purchased the following products during that time period: (1) St. Ives Collagen Elastin Body Lotion; (2) St. Ives Vitamin E Body Lotion; (3) St. Ives Oatmeal & Shea Butter Body Lotion; and (4) St. Ives Oatmeal & Shea Butter Body Wash. *See id.* at ¶¶ 13–14, 16. Between 2016 and 2017, Plaintiff purchased those four St. Ives Products, along with St. Ives Coconut & Orchid Body Wash. *See id.* at ¶ 17. During that timeframe, each of these products contained labels on the front packaging that included the following text: "Made with 100% Natural Moisturizers"; "Made with 100% Natural Exfoliant"; or "Made with 100% Natural Extracts."[6] *See id.*

Further, the TAC provides dictionary definitions of the terms "moisturizer" and "exfoliant" in an effort to show that Defendant's use of these terms could lead consumers to conclude that such ingredients are "representative" of the contents of the products at issue. *See id.* at ¶¶ 34–35. In addition, the TAC alleges that "because '100% natural' is and has always been key to the St. Ives brand[,] [t]argeted consumers familiar with the St. Ives brand would have no reason to construe the tiny words saying 'made with' as a disclosure that the products contained synthetic ingredients." *See id.* at ¶ 36.

II.
LEGAL STANDARD

The Court's prior Order that dismissed portions of the FAC set forth the appropriate legal standards governing motions to dismiss, which need not be repeated here. *See* Order re Def.'s MTD FAC at 4–5 [Doc. # 30].

III.
DISCUSSION

At bottom, Defendant advances the following arguments: (1) all of Plaintiff's claims based

[4] The TAC also notes that, "[i]n 2015, 'natural' labeling litigation was in full swing with enforcement actions across the country against large companies for false or misleading representations." *See* TAC at ¶ 32 [Doc. # 41].

[5] This Order refers to these labels as the "older labels."

[6] This Order refers to these labels as the "post-2015 labels."

on the post-2015 labels fail because no reasonable consumer would be misled by them, (2) Plaintiff's decision to purchase products bearing the post-2015 labels establishes that all of her claims based on the older labels fail, and (3) Plaintiff's request for injunctive relief should be dismissed because Defendant no longer uses the older labels.[7] *See* MTD TAC at 9–17 [Doc. # 42]. To the extent relevant and necessary to the disposition of the instant motion, the Court addresses each of these arguments in turn.

A. Plaintiff Fails to State Any Claims Arising Out of the Post-2015 Labels

Plaintiff argues that the TAC includes allegations showing "how 'targeted consumers' (not just the general public) here could be deceived or confused by the current labeling." *See* Opp'n at 6–7 [Doc. # 43]. According to Plaintiff, the TAC "explain[s] the role of package design in consumer purchase decisions and 'cues' of naturalness that companies use to convey the false impression that a product is all natural." *See id.* at 7. She further points out that the TAC alleges that "[t]argeted consumers familiar with the St. Ives Brand would have no reason to construe tiny words saying 'made with' as a disclosure that the products contained synthetic ingredients." *See id.* (quoting TAC at ¶ 36 [Doc. # 41]).

These contentions are simply reformulations of arguments that the Court has already rejected. As the Court previously explained, "[t]he imagery on the labels does not somehow delete the words 'Made with[,]' which restrict the scope of the remainder of the labels' assertions regarding the 100% moisturizers, extracts, and exfoliants therein—*i.e.*, such natural ingredients are merely *contained* inside." *See* Order re Def.'s MTD FAC at 10 [Doc. # 30]. The Court also found that "the depiction of natural ingredients like coconuts" does not "somehow modify the words 'Made with' to mean that the products are made with *only* natural moisturizers, extracts, or exfoliants." *See id.* Moreover, the Court did not hold that the words "Made with" disclose that the products contain synthetic ingredients. Instead, the Court concluded that no reasonable consumer would conclude that Defendant's post-2015 products are comprised of *only* natural ingredients. *See id.* ("[T]he labels in the instant case each single out only one subset of ingredient (*i.e.*, a moisturizer, extract, or exfoliant) such that a reasonable consumer would conclude that the words 'Made with' are synonymous with nonexhaustive words like 'including' and

[7] Arguments (1) and (2) primarily rely upon Defendant's uncontested assertion that "Plaintiff's CLRA, FAL, UCL, and fraud claims . . . in this case fail [(1)] if the label claims at issue are accurate and not misleading to a consumer as a matter of law, or [(2)] if Plaintiff fails to allege with particularity that she suffered economic harm as a result of (*i.e.*, in reliance on) the alleged deception." *See* MTD TAC at 10 [Doc. # 42].

'containing.'").[8] Lastly, the Court dispensed with Plaintiff's concern regarding the size of the words "Made with" when it observed that the labels "are approximately the same font size as the words 'Natural Moisturizers[,]' 'Natural Extracts[,]' and 'Natural Exfoliant[.]'" *See id.*; *see also* TAC at ¶ 28 (exemplar post-2015 label) [Doc. # 41].

Plaintiff nonetheless insists that a reasonable consumer's interpretation of the post-2015 labels is a question of fact that cannot be resolved on a motion to dismiss.[9] *See* Opp'n at 8–11 [Doc. # 43]. Specifically, Plaintiff contends that "while lawyers and judges might be quick to discern subtle turns of phrase, 'the reasonable consumer standard does not demand that consumers interpret advertisements the same way a judge interprets statutes.'" *See* Opp'n at 9 (quoting *Friends of Earth v. Sanderson Farms, Inc.*, No. CV 17-03592-RS, 2018 WL 7197394, at *4 (N.D. Cal. Dec. 3, 2018)). No degree of sophistication is required to understand that the words "Made with" refer to only a subset of the ingredients of the product. Even a consumer with only a rudimentary understanding of the English language would know that this text is "synonymous with nonexhaustive words like 'including' and 'containing.'" *See* Order re Def.'s MTD FAC at 10 [Doc. # 30].

Plaintiff's reliance on *Jou v. Kimberly-Clark Corp.*, No. C-13-03075-JSC, 2013 WL 6491158 (N.D. Cal. Dec. 10, 2013), fares no better. *Jou* stated that "[w]hether a reasonable consumer would agree [that] . . . 'natural' means no non-natural ingredients or [that] . . . 'natural' means at least one natural ingredient among other, possibly non-natural ingredients . . . or with neither is not a question that can be resolved on a Rule 12(b)(6) motion." *See id.* at *7. *Jou* interpreted a label that contained the terms "pure & natural." *See id.* It did not concern a label that included language restricting the scope of those representations to only a subset of the product (*e.g.*, the product was "made with 100% pure & natural" components). *See id.* Thus, *Jou* is inapposite. *See also id.* at *8 ("[T]he use of 'natural' may be deceptive in some instances, but not in others."). It follows that district court decisions holding that the phrase "100% naturally-sourced

[8] The quoted text from this prior Order also disposes of Plaintiff's argument that the definitions of the terms "moisturizer" and "exfoliant" demonstrate that Defendant's products "contain only natural ingredients." *See* TAC at ¶¶ 34–35 [Doc. # 41].

[9] Plaintiff also argues that she "is not required to prove how all or even a majority of people construed the labeling." *See* Opp'n at 9–10 [Doc. # 43]. This contention is as noncontroversial as it is irrelevant. In reviewing the sufficiency of Plaintiff's prior pleadings, the Court assessed whether there was "a probability 'that a significant portion of the consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'" *See* Order re Def.'s MTD FAC at 9 (quoting *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016)) [Doc. # 30]; Order re Def.'s MTD SAC at 3 (relying upon this standard) [Doc. # 40]. Plaintiff concedes that this is the proper legal standard. *See* Opp'n at 9–10 [Doc. # 43].

sunscreen ingredients" satisfies the reasonable consumer standard are of no assistance to Plaintiff either. *See Langan v. Johnson & Johnson Consumer Cos., Inc.*, 95 F. Supp. 3d 284, 289 (D. Conn. 2015) ("[I]t seems perfectly reasonable to me that a typical consumer might interpret the phrase '100% naturally-sourced sunscreen ingredients' on a sunscreen product to mean that the whole product was natural."); *Fagan v. Neutrogena Corp.*, No. CV 13-01316-SVW (OPx), 2014 WL 92255, at *2 (C.D. Cal. Jan. 8, 2014) ("Defendant's argument that the representations are literally true because the term '100%' only applies to the ingredients in the products that provide protection from the sun (and not to other ingredients in the lotions that serve other purposes) rests on one possible interpretation of the language, but it is not the only possible interpretation.").

Since the TAC's allegations regarding the post-2015 labels fail to satisfy the reasonable consumer standard, Plaintiff's CLRA, FAL, UCL, and common-law fraud claims do not survive Defendant's motion. *See supra* note 7. For that same reason, Plaintiff's express warranty claims arising out of the post-2015 labels fail as a matter of law because such products do not make any affirmation of fact or promise that they were comprised of solely natural ingredients. *See Weinstat v. Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1227 (2010) ("[T]o prevail on a breach of express warranty claim, the plaintiff must prove [(*inter alia*)] the seller's statements constitute an '"affirmation of fact or promise"' or a '"description of the goods[.]"'" (quoting *Keith v. Buchanan*, 173 Cal. App. 3d 13, 20 (1985))). Likewise, as no reasonable consumer could be deceived by the post-2015 labels, the TAC's unjust enrichment claims concerning those products also fail. *See Hernandez v. Lopez*, 180 Cal. App. 4th 932, 938 (2009) ("The doctrine [of unjust enrichment] applies where the plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on the defendant which the defendant has knowingly accepted *under circumstances that make it inequitable for the defendant to retain the benefit* without paying for its value." (emphasis added)); TAC at ¶ 81 ("Retention of [revenues from the sales of the St. Ives products] under these circumstances is unjust and inequitable *because of Defendant's misrepresentations about the Products* . . . . (emphasis added)) [Doc. # 41]. Accordingly, the Court **DISMISSES** all claims that are predicated on the post-2015 labels.

B. Defendant Has Not Shown That Claims Arising Out of the Older Labels Are Subject to Dismissal

As for the older labels, the Court previously concluded that such ambiguous labeling "could have misled reasonable consumers." *See* Order re Def.'s MTD FAC at 9 [Doc. # 30]. Defendant nonetheless argues that because Plaintiff continued to purchase St. Ives products even after Defendant clarified that they are "Made with" certain natural ingredients, she has "pleaded herself out of court" such that all of her remaining claims fail. *See* MTD TAC at 12–16 [Doc. # 42]. Specifically, Defendant contends "there are only two reasonable inferences that can be drawn from Plaintiff's allegations: (1) that the label claim was not material to her purchase decision, therefore the clarification made no difference, in which case her reliance allegation is false, or (2) she relied on the label claim but continued to purchase the products after the clarification due to other features of the products, in which case her injury allegation is false." *See id.* at 13. Defendant advances this syllogism to support its position that Plaintiff cannot allege facts showing actual reliance or that she suffered any economic injury as a result of her purchases of Defendant's products.[10] *See id.* at 6.

"At the motion to dismiss phase, the trial court must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff." *Tracht Gut, LLC v. L.A. Cty. Treasurer & Tax Collector*, 836 F.3d 1146, 1150 (9th Cir. 2016). Defendant concedes that one could reasonably infer that Plaintiff at least *initially* relied upon the "100% Natural Moisturizer" (or extract or exfoliant) representations made on the older labels. *See* MTD TAC at 13 [Doc. # 42]; *see also id.* at 15 ("[T]he only reasonable inferences given the Court's ruling on the current labels are: (1) the label claim was either immaterial to the purchase, or (2) *other features of the product were sufficient to justify her later purchases*." (emphasis added)). Thus, the TAC plausibly alleges that Plaintiff "would not have bought" at least some of the products bearing the older labels "had she known that the labeling she relied on was false, misleading, deceptive and unfair." *See* TAC at ¶ 18 [Doc. # 41]. That Plaintiff may have later developed an affinity for the products does not negate the plausibility of her allegation that she paid a price premium in reliance on the older labels. *See id.* (alleging that Plaintiff purchased Defendant's products "at a substantial price premium"); *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im*plausible."). Accordingly, Defendant

[10] This Order assumes *arguendo* that these are essential elements of Plaintiff's remaining claims.

has failed to establish that Plaintiff's claims arising out of the older labels fail as a matter of law.[11] *See* Fed. R. Civ. P. 7(b)(1)(B).

C. Plaintiff Lacks Article III Standing to Seek Injunctive Relief

Like the SAC, the TAC "does not allege any facts showing that there exists a 'realistic[] threat[]' that Defendant will resort to using the older labels once again." *See* Order re Def.'s MTD SAC at 6–7 (quoting *Campion v. Old Republic Home Prot. Co., Inc.*, 861 F. Supp. 2d 1139, 1147 (S.D. Cal. 2012)) [Doc. # 40]. Further, all of Plaintiff's claims arising out of the post-2015 labels fail. *See supra* Part III.A. Therefore, Plaintiff lacks standing to seek injunctive relief. *See* Order re Def.'s MTD SAC at 6–7 ("A plaintiff requesting declaratory or injunctive relief must establish that he or she is 'realistically threatened by a repetition of the violation' in order to establish that such relief would redress the alleged injuries." (quoting *Campion*, 861 F. Supp. 2d at 1147) [Doc. # 40]. Consequently, the Court **DISMISSES** Plaintiff's claims for injunctive relief **without prejudice**. *See Fleck & Assocs., Inc. v. Phoenix, City of, an Ariz. Mun. Corp.*, 471 F.3d 1100, 1106–07 (9th Cir. 2006) (holding that a "dismissal for want of standing must be 'without prejudice'" (citing *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216–20 (10th Cir. 2006))).

D. Leave to Amend

Valid reasons for denying leave to amend include undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, and futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292–93 (9th Cir. 1983) (holding that while leave to amend shall be freely given, the court need not allow futile amendments). On three occasions, Plaintiff has failed to show that the post-2015 labels could lead a reasonable consumer to believe that Defendant's products are wholly comprised of natural ingredients. *See supra* Part III.A; Order re Def.'s MTD FAC at 9–10 [Doc. # 30]; Order re Def.'s MTD SAC at 3–4 [Doc. # 40]. Further, Plaintiff has repeatedly failed to establish her standing to seek injunctive relief. *See supra* Part III.C; Order re Def.'s MTD SAC at 6–7 [Doc. # 40]. Therefore, granting Plaintiff leave to remedy these

[11] Defendant supports its argument with citations to *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001), and *Kamboh v. Bac Home Loans Servicing*, No. CV 10-01107-SVW (OPx), 2010 WL 11595708 (C.D. Cal. Oct. 7, 2010). *See* MTD TAC at 12–13 [Doc. # 42]. Defendant's reply clarifies, however, that it relies upon these authorities simply for the proposition that an allegation may be disregarded if it contradicts another averment in a pleading. *See* Reply at 13 n.3 ("Plaintiff attempts to distinguish *Kamboh* and *Sprewell* on factual grounds, stating the cases are not on point. However, [Defendant] never argued the claims were similar, only that contradictory allegations can be disregarded.") [Doc. # 44]. For the reasons discussed in the textual paragraph accompanying this footnote, that general principle is does not apply to the instant case.

deficiencies would be an exercise in futility.

IV.
CONCLUSION

In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion to dismiss **without leave to amend**. Defendant shall file its Answer to the TAC's remaining claims **within 15 days** from the date of this Order.

IT IS SO ORDERED.