UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SISSY MCCONNON, Plaintiff, v. THE KROGER CO., Defendant.	Case No. 2:24-cv-02601-SB-E ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [DKT. NO. 18]

Plaintiff Sissy McConnon purchased two bottles of Defendant The Kroger Co.'s Private Selection Cold-Pressed Avocado Oil (Avocado Oil). Alleging that the Avocado Oil is not pure avocado oil and is instead adulterated, Plaintiff filed this putative class action for violations of California's False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumers Legal Remedies Act (CLRA), as well as breach of express and implied warranties and intentional misrepresentation. Defendant moves to dismiss all claims, principally arguing that the complaint does not plausibly allege that the Avocado Oil contains anything other than avocado oil or that the label is misleading. On June 7, 2024, the Court heard argument from the parties. Because Plaintiff's conclusory allegations are insufficient to provide the requisite level of notice for Defendant to defend itself, Defendant's motion is granted.

I.

Defendant operates grocery stores throughout the country, advertising and selling third-party products alongside its own. Dkt. No. 1-1 ¶¶ 11–12. One such product is its Avocado Oil, which it sells in various sizes, including 17 fluid ounces, one liter, and two liters. *Id.* ¶ 15. The front of the bottle identifies the product as "Private Selection Cold-Pressed Avocado Oil." *Id*. at 4. On the back of the product, the ingredient list consists of one item: avocado oil. *Id*.

Around August 2023, Plaintiff purchased two one-liter bottles of Avocado Oil. *Id*. ¶ 8. Plaintiff believed that the Avocado Oil was "pure" avocado oil based on the label on the front and the ingredient list on the back of the bottle. *Id*. ¶¶ 16–17. Thereafter, two third-party laboratories tested a sample of the Avocado Oil, the results of which Defendant attaches to its reply.[1] The tests allegedly determined that the "fatty acid and sterol profiles" of the Avocado Oil are inconsistent with "pure" avocado oil. *Id*. ¶ 18.[2] Plaintiff thus concludes that the product is "adulterated." *Id*. Plaintiff alleges that she and the proposed putative class would not have bought the Avocado Oil or would have paid less for it had they known that it was adulterated. *Id*. ¶¶ 8, 22, 56, 68, 77.

Plaintiff brings six claims under California law against Defendant: (1) a violation of the FAL; (2) a violation of the UCL; (3) a violation of the CLRA; (4) a breach of express warranty; (5) a breach of implied warranty; and (6) intentional misrepresentation. Defendant moves to dismiss each of these claims asserting, among other things, that Plaintiff failed to comply with the pleading requirements of Federal Rules of Civil Procedure 8(a) and 9(b).

II.

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must allege "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 has "facial plausibility" if the facts pleaded "allow[] 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). In resolving a Rule 12(b)(6) motion, a court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555). Assuming the veracity of well-pleaded factual allegations, a court must "determine whether they plausibly give rise to an

[1] The complaint references the test results, Dkt. No. 1-1 ¶ 18, and the results otherwise "form[] the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Court therefore finds the test results to be incorporated by reference into the complaint. *See id*.

[2] Defendant points out that one test was conducted months prior to Plaintiff's purchasing the Avocado Oil. The second test, however, appears to have been conducted after Plaintiff purchased the Avocado Oil.

entitlement to relief." *Id.* at 679. There is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.*

III.

A.

Plaintiff brings claims under the FAL, CLRA, and UCL for an allegedly misleading label. The FAL prohibits dissemination of a statement concerning a product "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." Cal. Bus. & Prof. Code § 17500. The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices . . . undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer," including representing that a good is "of a particular standard, quality, or grade" if it is not. Cal. Civ. Code § 1770(a). And the UCL prohibits business practices that are unlawful, unfair, or fraudulent. Cal. Bus. & Prof. Code § 17200. Each prong under the UCL provides a separate theory of liability. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007).

In this case, Plaintiff alleges claims under each prong of the UCL. Dkt. No. 1-1 ¶¶ 40–47. The same allegedly deceptive advertising serves as the basis for each prong, and the FAL and CLRA serve as the predicate unlawful conduct under the UCL. Thus, all three of the consumer-protection claims rise and fall together. *See Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1089, 1094–95, (N.D. Cal. 2017) ("Because the same standard for fraudulent activity governs all three statues, courts often analyze the three statues together.") (collecting cases).

Plaintiff's consumer-protection claims "are governed by the 'reasonable consumer' test." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (FAL, UCL, and CLRA claims governed by reasonable consumer test). To satisfy this test, "Plaintiff must show that members of the public are likely to be deceived." *Id.* (cleaned up). The mere possibility that a few consumers viewing the labeling in an unreasonable manner would be misled is insufficient. *Id*. Instead, there must be a probability "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id*. (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496 (2003)). "This is not a negligible burden." *Moore v. Trader Joe's Co.*, 4 F.4th 874, 882 (9th Cir. 2021).

When claims under the UCL, FAL, and CLRA "are all grounded in fraud, the [complaint] must satisfy the traditional plausibility standard of Rules 8(a) and 12(b)(6), as well as the heightened pleading requirements of Rule 9(b)." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) ("[W]e have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL."). "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "In fraud cases, plaintiffs must set forth what is false or misleading about a statement, and why it is false." *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019) (cleaned up). The fraud allegations must contain enough specificity to provide notice of the particular misconduct that constitutes the fraud charged. *Id.*

Plaintiff alleges that Defendant mislabeled the Avocado Oil because it is not "pure" avocado oil—despite the front label referring to the product as "Cold-Pressed Avocado Oil"—and the back label listing "avocado oil" as the only ingredient. Dkt. No. 1-1 ¶¶ 16–17. Plaintiff further alleges that third-party laboratory testing confirms that "the fatty acid and sterol profiles" of the Avocado Oil show that it is adulterated and not pure avocado oil. *Id.* ¶ 18. These allegations fail to plausibly state a claim for relief under Rule 8(a), much less any applicable Rule 9(b) heightened standard.

To begin, Plaintiff imports the term "pure"—which is nowhere to be found on the bottle—into the Avocado Oil label. Plaintiff conclusorily asserts that the Avocado Oil is advertised as pure because the labeling "conveys the unequivocal message" of purity. But the label says only that the product contains avocado oil, and Plaintiff fails to plausibly allege in a nonconclusory manner that this is false or deceptive. *See Gudgel v. Clorox Co.*, 514 F. Supp. 3d 1177, 1186 (N.D. Cal. 2021) (rejecting claim that label was misleading where the "phrase does not appear on the product's label"); *Myers-Taylor v. Ornua Foods N. Am., Inc.*, No. 3:18-CV-01538, 2019 WL 424703, at *4 (S.D. Cal. Feb. 4, 2019) (rejecting the contention that label that said "Milk From Grass-Fed Cows" is the same as stating that the cows are 100 percent grass-fed).

But even if the Court were to accept Plaintiff's conclusory assertion that the labeling conveys the message that the Avocado Oil is "pure," Plaintiff fails to define that term. *See Tran v. Sioux Honey Ass'n, Coop.*, 471 F. Supp. 3d 1019, 1028 (C.D. Cal. 2020) (stating that the term pure "has no fixed meaning"). Without a definition, neither Defendant nor the Court can evaluate the merits of the

claim: Does pure mean that the only ingredient used to make the oil was avocados? Does it mean that Defendant neglected to clean impurities introduced through the oil-making process? Was a different oil or other ingredient introduced that rendered the product impure? The failure to define the allegedly misleading term warrants dismissal. *See Figy v. Frito-Lay N. Am., Inc.*, 67 F. Supp. 3d 1075, 1089–90 (N.D. Cal. 2014) (dismissing a claim where the Plaintiff failed to plead what "All Natural" meant); *Sioux Honey*, 471 F. Supp. 3d at 1025–26 (C.D. Cal. 2020) (collecting cases where courts dismissed complaints where products were labeled as natural despite having small amounts of other ingredients).[3]

In short, the pleading provides insufficient detail from which Defendant can discern how its label is allegedly misleading. Plaintiff has not adequately alleged that the Avocado Oil is anything other than what it claims to be: cold-pressed avocado oil. *See Moore*, 4 F.4th at 882 (finding the label not misleading where the front label listed the product as "100% New Zealand Manuka Honey" and the only ingredient listed was "Manuka Honey" when pollen from flowers other than the Manuka flower was used to make the honey as well). Here, "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679. Accordingly, Plaintiff's UCL, FAL, and CLRA claims are dismissed. *See Svensrud v. Frito-Lay N. Am., Inc.*, No. 8:20-CV-00714-JLS, 2020 WL 8575056, at *4 (C.D. Cal. Dec. 21, 2020) (holding that the plaintiff failed to adequately allege claims under the UCL, FAL, and CLRA where the complaint did not allege "what [the plaintiff] believed the Product's labels to mean or how exactly she was allegedly misled").

B.

In light of the finding that the complaint does not plausibly allege Plaintiff was misled, none of Plaintiff's remaining claims survives.

Plaintiff asserts a breach of express warranty under California law. "Any affirmation of fact or promise made by the seller to the buyer which relates to the

[3] Defendant also points out several issues with Plaintiff's testing, including that the resulting reports do not state whether the product was adulterated but instead indicate only that the fatty acids and sterols fell outside the range of an undefined "proposed" standard. Dkt. No. 29-1 at 10, 13. Plaintiff fails to explain the significance of the purportedly high level of fatty acids and sterols, rendering the complaint subject to dismissal.

goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Cal. Com. Code § 2313(1)(a); *see also id*. § 2313(1)(b) ("Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."). To state a claim for breach of express warranty, the plaintiff must allege that "(1) the seller's statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached." *Weinstat v. Dentsply Int'l., Inc.*, 180 Cal. App. 4th 1213, 1227 (2010) (cleaned up).

Plaintiff's express-warranty claim rests on the same alleged misrepresentation—i.e., that the Avocado Oil is pure, unadulterated avocado oil. This claim therefore suffers from the same flaws afflicting the consumer claims. *Weiss v. Trader Joe's*, 838 F. App'x 302, 303 (9th Cir. 2021) ("Although the reasonable consumer standard technically does not apply to the warranty claims, those claims still require some sort of actionable representation."); *see also Robinson v. Unilever United States, Inc.*, No. 17-CV-3010-DMG, 2019 WL 8012687, at *3 (C.D. Cal. Aug. 21, 2019) (dismissing express warranty claims for the same reason it dismissed CLRA, FAL, and UCL claims). Plaintiff's express warranty claim thus fails as well.

Plaintiff's implied-warranty claim fares no better. Although there are multiple theories under which such a claim may be brought, Plaintiff alleges that Defendant breached the implied warranty because the Avocado Oil failed to "[c]onform to the promises or affirmation of fact made on the container or label." Dkt. No. 1-1 ¶ 73 (quoting Cal. Com. Code § 2314(2)(f)).[4] Where this provision serves as the basis for the claim, the implied warranty claim "rises and falls with express warranty claims brought for the same product." *Hadley*, 243 F. Supp. 3d at 1106 (citing *Hendricks v. StarKist Co.*, 30 F. Supp. 3d 917, 933 (N.D. Cal. 2014)). Like Plaintiff's express warranty claim, Plaintiff's implied-warranty claim fails because she has not adequately alleged an actionable misrepresentation.

Finally, for the reasons the FAL, UCL, and CLRA claims were dismissed, Plaintiff's sixth cause of action for intentional misrepresentation fails as well. *See Kim v. Bluetriton Brands, Inc.*, No. 22-56063, 2024 WL 243343, at *1 (9th Cir.

[4] Because Plaintiff's implied warranty claim relies on § 2314(2)(f), the Court does not address the other provisions of the statute.

Jan. 23, 2024) (fraudulent misrepresentation claim, along with the FAL, UCL, and CLRA claims, governed by the reasonable consumer test).

IV.

Plaintiff requests leave to amend. Dkt. No. 28 at 16. "The court should freely grant leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Leave may be denied, however, for reasons 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, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Plaintiff has not previously amended her pleading. Because leave to amend is to be liberally granted, and because it is not clear that Plaintiff would be unable to cure the deficiencies identified above, Plaintiff is granted leave to amend. Plaintiff shall file a First Amended Complaint (FAC) no later than June 28, 2024. Prior to any such filing, the parties shall meet and confer to address the amended pleading.

V.

Defendant's motion to dismiss the complaint is granted. All claims are dismissed without prejudice and with leave to amend. If Plaintiff elects to amend, she shall file her FAC no later than June 28, 2024, attaching as an exhibit a version of the FAC highlighting in redline all changes from the original complaint. If filed, the FAC should address all possible flaws raised by Defendant's motion to dismiss, including those not addressed in this order. Plaintiff should not expect another opportunity to amend based on omitted facts that could have been included in the FAC. Failure to timely file the FAC will be deemed consent to dismissal with prejudice of all Plaintiff's claims. Defendant shall answer or otherwise respond to the FAC no later than July 12, 2024.

Date: June 21, 2024

Stanley Blumenfeld, Jr.
United States District Judge