UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TASNEEM L. MOHAMED, on behalf of herself and those similarly situated,

Plaintiff,

v.

KELLOGG COMPANY,

Defendant.

Case No. 14-cv-2449 L (MDD)

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR JUDMENT ON THE PLEADINGS [ECF NO. 20]

Pending before the Court is Defendant's fully briefed motion for judgment on the pleadings under FED. R. CIV. P. 12(c). The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the motion.

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I. BACKGROUND

According to the First Amended Complaint, Defendant Kellogg Company's ("Kellogg") Gardenburger product is packaged, marketed, distributed and sold as being "Made with Natural Ingredients" and "real good ingredients," despite the fact that Gardenburgers include ingredients containing Hexane. (FAC ¶¶ 10, 11, 15-19, ECF No. 1.) Gardenburgers contain "Hexane Processed Soy Ingredients" including soy lecithin and soy proteins, rendering Kellogg's claims that Gardenburgers are "Made With Natural Ingredients" false and misleading. (*Id.*¶ 11.)

Plaintiff Tasneem Mohamed "regularly purchased Gardenburger food products at grocery stores in California . . . [and] believe the Gardenburger food products she purchased were natural and relied on this representation in making purchases." (FAC ¶ 4.) On July 29, 2014, Ms. Mohamed filed a class action complaint in San Diego County Superior Court. On September 11, 2014, Ms. Mohamed filed the operative First Amended Complaint, which seeks relief on a class-wide basis for (1) violation of the UCL, (2) violation of the FAL, violation of the CLRA, and (4) breach of express warranty.

On October 13, 2014, Kellogg filed its answer to the FAC. On October 14, 2014, Kellogg removed the case to this Court. On November 21, 2014, Kellogg filed the instant motion for judgment on the pleadings. (MJP, ECF No. 20.) The motion is now fully briefed. (Opp'n, ECF No. 31; Reply, ECF No. 32.)

II. LEGAL STANDARD

Motion For Judgment on the Pleadings

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). A motion for judgment on the pleadings is evaluated under the same standard applicable to motions to dismiss brought pursuant to Rule 12(b)(6). *See Enron Oil Trading & Trans. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir. 1997). Accordingly, the standard articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009), and *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 556 (2007), applies to a motion for judgment on the pleadings. *Lowden v. T-Mobile USA Inc.*, 378 Fed. App'x. 693, 694 (9th Cir. 2010) ("To survive a Federal Rule of Civil Procedure 12(c) motion, a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)).

When deciding a motion for judgment on the pleadings, the Court should assume that the allegations in the complaint are true and construe them in the light most favorable to the plaintiff. *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir. 1994). A judgment on the pleadings is appropriate when, accepting the allegations made in the complaint as true, the moving party is entitled to judgment as a matter of law. *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1042 (9th Cir. 2005).

III. DISCUSSION

A. Standing

Kellogg first argues that Ms. Mohamed fails to plausibly allege that she suffered an injury-in-fact due to her purchase of Gardenburgers, and thus lacks Article III standing. (MJP 4-6.) Specifically, Kellogg claims that "beyond conclusory and speculative assertions, she does not allege that she suffered any injury as a result of these purchases. (*Id.* at 5.) Ms. Mohamed counters, suggesting that she has adequately plead injury-in-fact because she spent money on Gardenburgers that she otherwise would not have spent absent the assertions that the product was "Made With Natural Ingredients." (*Id.* at 4-9.)

To establish standing to bring a claim under these statutes, plaintiffs must meet an economic injury-in-fact requirement, which demands no more than the corresponding requirement under Article III of the U.S. Constitution. *Hinojos v. Kohl's Corp.,* 718 F.3d 1098, 1104 (9th Cir. 2013). In a false advertising case, plaintiffs meet this requirement if they show that, by relying on a misrepresentation on a product label, they "paid more for a product than they otherwise would have

paid, or bought it when they otherwise would not have done so." *Id.* at 1104 n. 3, 1108; *see also POM Wonderful LLC v. Coca–Cola Co.,* —– U.S. ——–, 134 S.Ct. 2228, 2234 (2014) ("A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III...."). Ms. Mohamed undoubtedly satisfied this individual reliance requirement, as she alleged that she would not have been willing to pay as much, or anything, for Gardenburgers, if she had not been misled by Kellogg's misrepresentations about Gardenburgers' ingredients. The motion on this ground is **DENIED**.

B. Plausibility of "Likely to Deceive" Allegation

Next, Kellogg argues that Ms. Mohamed's UCL, FAL, CLRA, and breach of warranty claims fail because she has failed to allege that "Kellogg made statements likely to deceive a reasonable consumer." (MJP 7.) Specifically, Kellogg contends that "the accurate statement 'Made with Natural Ingredients" is not likely to deceive a reasonable consumer" because Gardenburgers are made with natural ingredients and because Ms. Mohamed fails to provide a plausible definition of the word "natural" in the context of packaged foods. (*Id.* 8-13.)

Ms. Mohamed's claims under these California statutes are governed by the "reasonable consumer" test. *Williams v. Gerber Products, Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citing *Freeman v. Time, Inc.,* 68 F.3d 285, 289 (9th Cir. 1995) ("[T]he false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer." (citation omitted))); *Lavie v. Procter & Gamble Co.,*105 Cal. App. 4th 496, 506–07, (Cal. App. 2003) ("[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer.").

Under the reasonable consumer standard, a plaintiff must "show that 'members of the public are likely to be deceived.'" *Freeman,* 68 F.3d at 289 (quoting *Bank of West v. Superior Court,* 2 Cal. 4th 1254, 1267 (1992)). The California Supreme Court has recognized "that these laws prohibit '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.'" *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002)(quoting *Leoni v. State Bar,* 39 Cal. 3d 609, 626 (1985)).

Whether a reasonable consumer would be deceived by a product label is generally a question of fact not amenable to determination on a motion to dismiss. *See e.g., Linear Technology Corp. v. Applied Materials, Inc.,* 152 Cal. App. 4th 115, 134–35 (2007) ("Whether 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 demurrer." (quoting *McKell v. Washington Mutual, Inc.,* 142 Cal.App.4th 1457, 1472 (Cal. App. 2006))); *Committee on Children's Television Inc. v. General Foods Corp.,* 35 Cal.3d 197, 213-14 (1983) (finding demurrer inappropriate in case where parents alleged deceptive advertising of sugar cereals). However, in rare situations a court may determine, as a matter of law, that the alleged violations of the UCL, FAL, and CLRA are simply not plausible. *See, e.g.,Werbel ex rel. v. Pepsico, Inc.,* No. 09–cv–04456–SBA, 2010 WL 2673860, at *3 (N.D. Cal. July 2, 2010) (a reasonable consumer would not be deceived into believing that cereal named "Crunch Berries" derived significant nutritional value from fruit).

The allegations here do not present the rare situation in which granting a motion to dismiss or motion for judgment on the pleadings is appropriate. Here, Kellogg's claims that Gardenburgers are "Made With Natural Ingredients" could be interpreted by consumers as a claim that all the ingredients in the product were natural, which is allegedly false. Moreover, customers could interpret the term "Made With Natural Ingredients" as a claim that Gardenburgers are processed with only natural ingredients.

Further, the "question is not whether [Ms. Mohamed] provides a plausible definition for ["natural"], but whether a reasonable consumer would expect to find

[Hexane] in [Gardenburgers] that are labeled ["Made With Natural Ingredients"]." *See Ham v. Hain Celestial Group Inc.*, 70 F. Supp. 3d 1188, 1193 (N.D. Cal. October 3, 2014). Ms. Mohamed's allegations are simple: a reasonable consumer would not expect that a Gardenburger labeled "Made With Natural Ingredients" either contains or was processed with Hexane, because Hexane is not a natural agreement. This argument is plausible. The motion on this ground is **DENIED**.

C. Particularity

Kellogg next argues that Ms. Mohamed's claims fail to demonstrate the requisite particularity under Rule 9(b). (MJP 13.) Specifically, Kellogg claims that Ms. Mohamed has failed to specifically allege when and where she purchased the particular food products at issue, and how her purchase decisions were driven by the alleged misrepresentations. (*Id.*) According to Kellogg, Ms. Mohamed has not plead any of this information, including "which ingredients supposedly render the label false or misleading or which 'representations' she allegedly relied on in purchasing Gardenburger products." (*Id.*)

"[T]he heightened Rule 9 pleading standard applies to claims for false or deceptive advertising brought pursuant to the UCL, FAL, or CLRA." *Thomas v. Costco Wholesale Corp.*, 12-CV-02908 EJD, 2013 WL 1435292, * 6 (N.D. Cal. April 9, 2013)(citing *Kearns v. Ford Motor Co.,* 567 F.3d 1120, 1125 (9th Cir. 2009)); *see also Herrington v. Johnson & Johnson Consumer Cos., Inc.,* No. C 09–1597 CW, 2010 WL 3448531, at *7 (N. D. Cal. September 1, 2010) (subjecting UCL, FAL, and CLRA claims which "sound in fraud" to the heightened Rule 9 pleading standards). Because the UCL, FAL, and CLRA claims involve allegations of fraudulent conduct, deception or misrepresentation, the Rule 9 pleading standard applies here. *See Jones v. ConAgra Foods, Inc.,* 912 F. Supp. 2d. 889, 902 (N.D. Cal. 2012)(applying the heightened Rule 9 pleading standard to the complaint in a similar suit); *Colucci v. ZonePerfect Nutrition Co.*, No. 12–2907–SC, 2012 WL 6737800, *8–9 (N.D. Cal. December 28, 2012)(same). As such, Ms. Mohamed is required to aver with

particularity the specific circumstances surrounding the alleged mislabeling, which give rise to her claims. She must state with clarity the "who, what, when, where, and how" of the fraudulent conduct, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003), and provide an unambiguous account of the "time, place, and specific content of the false representations," *Swartz v KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

The FAC satisfies Rule 9(b) because it adequately alleges (i) the who: Kellogg; (ii) the what: "Made With Natural Ingredients" and "real good ingredients" labeling on Gardenburger products containing and or processed with synthetic ingredient Hexane; (iii) the when: purchases made after July 29, 2010; (iv) the where: labels on Gardenburger products, which are included in the FAC; and (v) the how: purchases made with reasonable reliance on the "Made With Natural Ingredients" and "real good ingredients" statement. The motion on this ground is **DENIED**.

D. Lack of Standing for Injunctive Relief

Kellogg next suggests that Ms. Mohamed lacks standing to seek injunctive relief because there is no likelihood that she will suffer future harm because she cannot plausibly argue that she will ever buy Gardenburgers again. (MJP 16-17.) Ms. Mohamed opposes, arguing that a finding of no standing would essentially suggest that plaintiffs who sue for misleading product labels can never obtain injunctive relief. (Opp'n 22.)

To establish that he has standing, a plaintiff must show that (1) he suffered an injury in fact; (2) the injury is "fairly traceable" to the challenged conduct; and (3) the injury is "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To establish standing for prospective injunctive relief, a plaintiff must demonstrate that "he has suffered or is threatened with a 'concrete and particularized' legal harm ... coupled with 'a sufficient likelihood that he will again be wronged in a similar way.'" *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir.2007) (quoting *City of Los Angeles v. Lyons*,

461 U.S. 95, 111 (1983)). A plaintiff must establish a "real and immediate threat of repeated injury." *Bates*, 511 F.3d at 985. Although past wrongs are evidence relevant to whether there is a real and immediate threat of repeated injury, past wrongs do not in and of themselves amount to a real and immediate threat of injury sufficient to make out a case or controversy. *Id.*

Ninth Circuit district courts disagree over the issue of whether a plaintiff, who is seeking to enjoin alleged false or misleading misrepresentations about products previously purchased by the plaintiff, must be able to establish that he would likely purchase the item again to establish standing. However, in a recent and well-reasoned opinion, Judge Moskowitz clarified this issue. *Mason v. Nature's Innovation, Inc.*, 12-cv-3019 BTM (DHB), 2013 WL 1969957 (S.D. Cal. May 13, 2013). In the opinion, the court surveyed case law from Ninth Circuit district courts and concluded that a plaintiff who does not intend to purchase a product in the future lacks standing in these cases. Specifically, Judge Moskowitz held that:

> this Court agrees with the courts that hold that a plaintiff does not have standing to seek prospective injunctive relief against a manufacturer or seller engaging in false or misleading advertising unless there is a likelihood that the plaintiff would suffer future harm from the defendant's conduct—i.e., the plaintiff is still interested in purchasing the product in question.

Id. at *4. This Court agrees, and adopts the reasoning in the *Mason* opinion.

The *Mason* opinion also addressed the main reasons why other courts have held that plaintiffs have standing to seek injunctive relief when they do not intend to purchase the product in the future. The two main arguments are that (1) preventing suits of this nature would thwart the objective of consumer protection laws and that (2) finding no standing in such cases would lead to perverse results, such as never allowing injunctive relief in false advertising cases. Judge Moskowitz reminds us that "as important as consumer protection is, it is not within the Court's authority to carve out an exception to Article III's standing requirements to further the purpose of California consumer protection laws." *Id.* at *5. Moreover, plaintiffs may always seek injunctive relief in state court, where Article III does not apply. *Id.* at *5.

In this case, it is does not appear from the FAC that Ms. Mohamed has any intention of buying Gardenburger products again[1]. Therefore, she has not established a likelihood of future injury from the alleged misrepresentations and thus lacks Article III standing to seek injunctive relief. The injunctive relief claims are **DISMISSED WITH LEAVE TO AMEND.**

E. Lack of Standing to Challenge Website

Lastly, Kellogg argues that Ms. Mohamed lacks standing to challenge the content of the Gardenburger website because "Plaintiff never alleges that she visited the Gardenburger website and, accordingly, never alleges that she read or relied upon the supposedly misleading material" on the website. (MJP 17.) Ms. Mohamed does not contest the fact that she has not plead that she visited the site, but instead argues that her allegations about the website are material to the commonality prong of Rule 23 as well as the absent class members' reliance on Defendant's promotional materials.

Ms. Mohamed's admission that she did not allege that she relied on the websites dooms her argument. She is required to establish standing in her own right to bring substantially similar claims on behalf of others. *See Murray v. Elations Co.*, 13-cv-2357-BAS (WVG), 2014 WL 3849911, * 11 (S.D. Cal. August 4, 2014); *see also McCrary v. Elations Co.*, No. EDCV 13-0242 JGB (Opx), 2013 WL 6403073, at * 8 (C.D. Cal. July 12, 2013) ("Plaintiff did not actually rely on any website statements and does not have standing to bring [UCL and CLRA] claims based on those statements."); *Durell v. Sharp Healthcare,* 183 Cal. App. 4th 1350, 1363 (2010) (affirming dismissal of UCL claim where plaintiff did not claim that he ever visited the defendant's website which contained the alleged misrepresentations). Therefore, Ms. Mohamed's claims are **DISMISSED WITH LEAVE TO AMEND**,

[1] Injunctive relief may be available "where a consumer would still be interested in purchasing the product if it were labeled properly—for example, if a food item accurately stated its ingredients. *Mason*, 2013 WL 1969967, at * 4.

to the extent they challenge materials she has not alleged she read or relied upon.

IV. CONCLUSION & ORDER

The Court **GRANTS IN PART** and **DENIES IN PART** the motion, **WITH LEAVE TO AMEND**, as specified above. If Ms. Mohamed chooses to file an amended complaint, she must do so on or before **August 31, 2015**.

IT IS SO ORDERED.

DATED: August 19, 2015

M. James Lorenz
United States District Judge