UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRENDAN PEACOCK, on behalf of himself and all others similarly situated,

Plaintiff,

v.

PABST BREWING COMPANY, LLC,

Defendant.

No. 2:18-cv-00568-TLN-CKD

ORDER

This matter is before the Court on Defendant Pabst Brewing Company, LLC's ("Defendant") Motion to Dismiss. (ECF No. 31.) Plaintiff Brendan Peacock ("Plaintiff") opposes Defendant's Motion. (ECF No. 33.) Defendant filed a reply. (ECF No. 35.) For the reasons set forth below, the Court hereby DENIES Defendant's Motion to Dismiss.

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I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant, a Delaware limited liability company, owns Olympia Beer. (ECF No. 30 at 2.) Originally, the Olympia Brewing Company brewed Olympia Beer in Tumwater, Washington, which borders Olympia, Washington. (*Id.* at 3.) Defendant acquired the Olympia Brewing Company in 1999 and closed the Olympia brewery in 2003. (*Id.*) Defendant now contract-brews Olympia Beer at several mega-breweries throughout the country, including a location in Irwindale, California. (*Id.* at 4.)

Plaintiff alleges Defendant deceives consumers by marketing Olympia Beer in a way that "falsely create[es] the impression" the beer is brewed using artesian water from the Olympia area of Washington. (*Id.* at 2.) More specifically, Plaintiff points to Defendant's advertising on the beer can itself. (*Id.* at 4–5.) Plaintiff alleges the product name "The Original Olympia Beer" coupled with the slogan "It's the Water" and an image of a cascading waterfall (a reference to the site of the original brewery) creates the impression that Olympia beer is brewed with water from the Olympia area of Washington. (*Id.* at 4–5.) Plaintiff alleges Defendant reinforces this misrepresentation with a post on Defendant's official Facebook page — a picture showing the product and a waterfall in the background with the caption "It really is the water #OlympiaBeer." (*Id.* at 6.) Lastly, Plaintiff alleges that a description of the beer on Defendant's website similarly misleads consumers. (*Id.* at 5–6.)

On March 15, 2018, Plaintiff filed a putative class action alleging Defendant violated California's Unfair Competition Law ("UCL"), codified at California Business & Professions Code § 17200. (ECF No. 1.) Defendant filed a motion to dismiss the complaint on April 27, 2018. (ECF No. 12.) Thereafter, Plaintiff filed an amended complaint ("FAC") on May 18, 2018. (ECF No. 14.) Defendant filed a motion to dismiss the FAC on May 31, 2018. (ECF No. 19.) At a hearing on August 20, 2019, the Court granted Defendant's motion with leave to amend. (ECF No. 29.) Plaintiff filed the operative Second Amended Complaint ("SAC") on September 19, 2019. (ECF No. 30.) Defendant filed the instant Motion to Dismiss the SAC on October 3, 2019. (ECF No. 31.)

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II. STANDARD OF LAW

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure ("Rule") 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Rule 8(a) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Under notice pleading in federal court, the complaint must "give the defendant fair notice of what the claim...is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

On a motion to dismiss, the factual allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court must give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. 544, 556 (2007)).

Nevertheless, a court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume the plaintiff "can prove facts that it has not alleged or that the defendants have violated the...laws in ways that have not been alleged[.]" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459

U.S. 519, 526 (1983).

Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 697 (quoting *Twombly*, 550 U.S. at 570). Only where a plaintiff fails to "nudge[ ] [his or her] claims...across the line from conceivable to plausible[,]" is the complaint properly dismissed. *Id.* at 680. While the plausibility requirement is not akin to a probability requirement, it demands more than "a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. This plausibility inquiry is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

If a complaint fails to state a plausible claim, "'[a] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 484, 497 (9th Cir. 1995)); *see also Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in denying leave to amend when amendment would be futile). Although a district court should freely give leave to amend when justice so requires under Rule 15(a)(2), "the court's discretion to deny such leave is 'particularly broad' where the plaintiff has previously amended its complaint[.]" *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir. 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004)).

III. ANALYSIS

Defendant moves to dismiss Plaintiff's UCL claim for four reasons: (1) Plaintiff fails to allege Defendant's representations are likely to deceive a reasonable consumer; (2) Plaintiff fails to allege an unlawful predicate act; (3) Plaintiff fails to allege his claim with specificity pursuant to Rule 9(b); and (4) Plaintiff lacks standing to seek injunctive relief. (ECF No. 31-1 at 13, 19, 20, and 22.) The Court addresses each argument in turn.

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A. The Reasonable Consumer Test

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Plaintiff alleges Defendant's deceptive advertising is unlawful, unfair, and fraudulent in violation of all three prongs of the UCL. (ECF No. 30 at 11–12.) The UCL's "unlawful" prong permits a cause of action if a "business act or practice" violates some other law. *Kaski v. Nike, Inc.*, 27 Cal. 4th 939, 949 (2002) (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999). Here, Plaintiff predicates his "unlawful" UCL claim on Defendant's alleged violation of California's False Advertising Law ("FAL"), codified at California Business & Professions Code § 17500, which prohibits any "untrue or misleading" advertising. (ECF No. 30 at 11.) *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1016 (9th Cir. 2020) (quoting Cal. Bus. § Prof. Code § 17500). However, a violation of the FAL is also a *per se* violation of the UCL. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

Claims under the UCL and FAL are governed by the "reasonable consumer test." *Id.* Under this test, a plaintiff must show that members of the public are likely to be deceived. *Id.* (quoting *Freeman v. Time*, 68 F.3d 285, 289 (9th Cir. 1995) (internal quotation marks omitted). "California courts . . . have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." *Id.* at 938. Because this determination requires consideration and weighing of evidence, courts rarely grant a motion to dismiss under the reasonable consumer test. *Id.* at 939.

Plaintiff alleges Defendant violated the UCL and FAL through its false and misleading advertising of Olympia Beer. (ECF No. 30 at 11.) Defendant's labeling at the top of the Olympia Beer can displays the phrase "The Original Olympia Beer." (*Id.* at 4–5.) Beneath this text is an image depicting waterfalls similar to those at the site of the original brewery in Washington. (*Id.* at 5.) At the bottom of the can is the slogan "It's the Water." (*Id.* at 4–5.) Taken together, Plaintiff alleges he was deceived by the labeling on the can that Olympia Beer is brewed with water from the Olympia area of Washington. (ECF No. 30 at 8.)

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