UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

HAWYUAN YU,

Plaintiff,

v.

DR PEPPER SNAPPLE GROUP, INC., et al.,

Defendants.

Case No. 18-cv-06664-BLF

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT LEAVE TO AMEND

[Re: ECF 47]

For the second time, Plaintiff Hawyuan Yu brings a complaint against Defendants Dr Pepper Snapple Group, Inc. ("Dr. Pepper") and Mott's, LLP (collectively, "Defendants") on behalf of a putative class. Defendants have filed another motion to dismiss the complaint, advocating for outright dismissal with prejudice or, alternatively, a stay. *See* Mot., ECF 47.

Plaintiff's main allegation remains the same: Defendants mislead consumers by selling apple juice and applesauce products with the representation "Natural" and/or "All Natural Ingredients" that nonetheless contain trace amounts of a pesticide. The same five causes of action are back again as well. The only thing that has changed is that Plaintiff has added two generic surveys to the allegations the Court already held insufficient once. Since the Ninth Circuit has recently made clear that this addition alone will not do, the Court GRANTS Defendant's motion to dismiss. Because Plaintiff has already received a second chance at stating a claim upon which relief could be granted, the Court finds further amended futile and dismisses the complaint WITHOUT leave to amend.

I. BACKGROUND

Plaintiff, an individual consumer, is a citizen of the City and County of San Francisco

California. Am. Compl. ("FAC") ¶ 27. Defendant Dr. Pepper is incorporated in Delaware with its principal place of business in Plano, Texas. Id. ¶ 31. Defendant Mott's is a subsidiary of Dr. Pepper and is incorporated in Delaware with its principal place of business in Rye Brook, New York. *Id.* ¶ 32. Defendants sell several applesauce and apple juice products ("the Products"), including Mott's Natural Unsweetened Applesauce, Mott's Healthy Harvest Applesauce, Mott's Natural 100% Juice Apple Juice, and other varieties of Mott's brand applesauce and apple juice products that include the representation "Natural" and/or "All Natural Ingredients" on the product package or label. See id. ¶¶ 1, 5, 7. Defendants sell these products nationwide. Id. ¶¶ 10, 33.

Plaintiff purchased Mott's Natural Applesauce and Natural Apple Juice on multiple occasions from a Costco Warehouse in Sunnyvale, California, and a Safeway Store in San Jose, California. FAC ¶ 28. Plaintiff alleges that in deciding to make these purchases, Plaintiff saw, relied upon, and reasonably believed Defendants' representations that the products were "Natural" and made of "All Natural Ingredients." *Id.* ¶ 29. Plaintiff further alleges that he was "willing to pay more for Defendants' Products because he expected the Products to be free of insecticides and other unnatural chemicals." *Id.* ¶ 30.

According to the complaint, though, Defendants' applesauce and apple juice products contain acetamiprid, a "synthetic and unnatural chemical." *See* FAC ¶¶ 10, 11. Acetamiprid is a synthetic insecticide used in treating and harvesting crops, including fruits and vegetables. *Id.* ¶¶ 12, 13. Acetamiprid may be hazardous to human development and to other animals, including the honeybee. *Id.* ¶ 12. Acetamiprid is "legal" in connection with food products, insofar as its use is not precluded and certain amounts of residuals are permitted to remain on fruits and vegetables. *Id.* ¶ 13. Plaintiff's primary theory of liability is not that the acetamiprid present in Defendants' products exceeds the legal limit, but instead that "[r]easonable consumers who see Defendants' representations that the Products contain 'All Natural Ingredients' or are 'natural' expect the Products to meet a higher standard than competing products not advertised as 'natural,' and do not expect the Products to contain traces of a synthetic insecticide." *Id.* ¶¶ 14, 15.

According to Plaintiff, Defendants' representations that the Products are made of "All Natural Ingredients" and/or are "Natural" are false and misleading because a reasonable consumer

believes that Products that are "natural" do not contain a synthetic and unnatural pesticide, even in residual amounts. FAC ¶ 37. Plaintiff cites a study conducted in January 2019 ("2019 Study") that stated that 68.1 percent of consumers would consider food produced from crops sprayed with synthetic pesticides not natural. FAC ¶ 38; Ex. C, the 2019 Study at 29, ECF 48-3. Plaintiff also cites a 2015 Consumer Reports phone survey ("2015 Consumer Reports Survey") that found that 63 percent of respondents think that the natural label on packaged and processed foods means that "no toxic pesticides were used." FAC ¶ 39; Ex. B, 2015 Consumer Reports Survey at 6, ECF 48-3. The 2015 Consumer Reports Survey also states that "Consumers were asked about their perception of the natural and organic labels. The organic food label is meaningful, is backed by federal regulations, and verified by third-party inspections; the natural label, however, is essentially meaningless (little regulation/verification)." 2015 Consumer Reports Survey at 4.

Plaintiff proposes a nationwide class of consumers who purchased Defendants' Products-in-question, as well as a California subclass. *See* FAC ¶¶ 72–87. Plaintiff asserts five causes of action: (1) Unfair and Deceptive Acts and Practices under the California Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750–1785 (on behalf of the California subclass); (2) Violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq.* (on behalf of the California subclass); (3) Violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.* (on behalf of the California subclass); (4) Breach of Express Warranty (on behalf of the nationwide class); and (5) Unjust enrichment (on behalf of the nationwide class). See id. ¶¶ 88-128.

The Court previously granted Defendants' motion to dismiss the original complaint on all five claims with leave to amend. *See* Order ("Dismissal Order"), ECF 40. The Court also stayed the case through the end of February 2020 under the primary jurisdiction doctrine because of ongoing FDA regulatory proceedings to define the term 'natural' for food labeling. Dismissal Order 8–10. That process has yet to conclude.

II. LEGAL STANDARD

A. Rule 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering such a motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

B. Rule 12(b)(1)

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As such, a federal court has an independent obligation to ensure that it has subject matter jurisdiction over a matter. *See* Fed. R. Civ. P. 12(h)(3); *Snell v. Cleveland, Inc.*, 316 F.3d 822, 826 (9th Cir. 2002). On a motion to dismiss pursuant to Rule 12(b)(1), which challenges a court's subject matter jurisdiction over a claim, the burden is on the plaintiff, as the party asserting jurisdiction, to establish that subject matter jurisdiction exists. *Kokkonen*, 511 U.S. at 377. A facial jurisdictional challenge asserts that even if assumed true, "the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

C. Leave to Amend

In deciding whether to grant leave to amend, the Court must consider the factors set forth by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2009). A district court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment. *Eminence*

Capital, 316 F.3d at 1052. "[I]t is the consideration of prejudice to the opposing party that carries the greatest weight." *Id*. However, a strong showing with respect to one of the other factors may warrant denial of leave to amend. *Id.* Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." *Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1056 (9th Cir. 2007) (internal citations and quotations omitted).

III. Request for Judicial Notice

Defendants request that the Court take judicial notice of A) copies of the Applesauce and Apple Juice Product labels as depicted in paragraphs 5 and 7 of the amended complaint; B) the 2015 Consumer Reports Survey referenced in the amended complaint; C) the 2019 Study referenced in the amended complaint; D) a copy of public statements made by Center for Food Safety and Applied Nutrition (CFSAN) Director Susan T. Mayne; and E) a letter from Scott Gottlieb, former commissioner of the FDA, to U.S. Representative David Valado. Req. for Judicial Notice 1, ECF 48. The Court is unaware of any opposition to Defendants' request for judicial notice.

The Court may take judicial notice of documents referenced in the complaint, as well as matters in the public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002). In the context of food labels, courts regularly take judicial notice of product labels when those product labels form the basis of the relevant causes of action. *See, e.g., Barnes v. Campbell Soup Co.*, 2013 WL 5530017, at *3 (N.D. Cal. July 25, 2013) (taking judicial notice of photocopies of Campbell's "100% Natural" soup labels). In addition, the Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Public records, including judgments and other court documents, are proper subjects of judicial notice. *See, e.g., United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007). However, "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja*

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