UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

STEVEN PRESCOTT and LINDA CHESLOW, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NESTLE USA, INC,

Defendant.

Case No. 19-cv-07471-BLF

ORDER GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND

[Re: ECF 27]

Plaintiffs Steven Prescott and Linda Cheslow bring this putative class action against Defendant Nestle USA, Inc., seeking to assert state law consumer claims on behalf of persons who purchased "Nestle Toll House's Premier White Morsels" (the "Product"). Plaintiffs claim that Nestle's labeling and advertising misleads consumers into believing that the Product contains white chocolate when in fact it does not.

Nestle moves to dismiss the operative first amended complaint ("FAC") for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court has considered the briefing of the parties and the oral argument of counsel presented at the hearing on May 7, 2020.

For the reasons discussed below, the motion is GRANTED WITH LEAVE TO AMEND.

I. BACKGROUND

Plaintiffs filed this action in the Santa Cruz County Superior Court on September 19, 2019. *See* Notice of Removal Exh. 1, ECF 1-1. Nestle removed the action to federal district court pursuant to the Class Action Fairness Act, 18 U.S.C. § 1332(d). *See* Notice of Removal, ECF 1. Nestle moved to dismiss the complaint under Rule 12(b)(6), and Plaintiffs responded by filing the operative FAC. *See* Motion to Dismiss, ECF 10; FAC, ECF 13. After the FAC was filed, the

Court terminated the motion to dismiss the original complaint. *See* Order, ECF 22.

Plaintiffs devote many paragraphs of the FAC to the history of chocolate production from 1400 B.C. to the present; the introduction of white chocolate by Nestle in the 1930s; and regulations issued by the Food and Drug Administration ("FDA") defining white chocolate. *See* FAC ¶¶ 5-16. Plaintiffs do not allege that they were aware of any of these facts at the time they purchased the Product, other than to allege generally that they "understand that 'white chocolate' contains chocolate derived from cocoa or cacao." FAC ¶ 14.

Plaintiffs claim that they purchased the Product in the belief that it was white chocolate, and that in making their purchases they "reasonably relied upon the labeling, advertising, and placement of the Product." FAC ¶¶ 50-51. Specifically, Plaintiffs allege they "believed the Product contained real white chocolate because the name of the Product included the term 'White.'" FAC ¶¶ 50-51. Plaintiffs also allege that the word "premier" misleads "consumers into thinking that the Product contains premier ingredients, not fake white chocolate." FAC ¶ 19. In addition, Plaintiffs claim that they "reasonably believed the Product was white chocolate because it was displayed side-by-side next to other chocolate morsel products." FAC ¶¶ 50-51. "Had Plaintiffs known the Product did not contain white chocolate, then they would not have purchased it." FAC ¶ 64.

Plaintiffs seek to represent a nationwide class or, alternatively, a California class of persons who purchased the Product. FAC ¶ 67. The FAC contains three state law claims: (1) unfair competition under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; false advertising under California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*; and violation of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.* Plaintiffs seek an injunction prohibiting Nestle from labeling or advertising its Product as white chocolate[1]; reasonable attorneys' fees; costs of suit; and such other relief as the Court may deem appropriate. FAC Prayer, ECF 13.

[1] The Court notes that Plaintiffs do not allege that Nestle currently labels its Product as "white chocolate," and thus it does not appear on the face of the FAC that such injunctive relief would be

II. LEGAL STANDARD

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim." *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quotation marks and citation omitted). While a complaint need not contain detailed factual allegations, it "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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

When evaluating a Rule 12(b)(6) motion, the district court must consider the allegations of the complaint, documents incorporated into the complaint by reference, and matters which are subject to judicial notice. *Louisiana Mun. Police Employees' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1063 (9th Cir. 2016) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

III. DISCUSSION

Nestle seeks dismissal of all claims in the FAC on the grounds that: (1) Plaintiffs have not plausibly alleged that the Product's labeling is false or misleading; (2) Plaintiffs lack statutory standing under the UCL, FAL, and CLRA because they have not plausibly alleged reliance; (3) the FAC does not meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b); (4) Plaintiffs' claim that the Product is falsely labeled as "Premier" fails because the word "Premier" is non-actionable puffery; and (5) Plaintiffs lack standing to pursue injunctive relief. In opposition, Plaintiffs contend that they plausibly have alleged the false and misleading nature of Nestle's labeling and advertising of the Product, they have statutory standing to pursue their claims, they have satisfied the heightened pleading requirements of Rule 9(b), and they have standing to seek injunctive relief.

Before addressing these arguments, the Court takes up Nestle's request for judicial notice as well as its contention that these Plaintiffs have brought similar cases against other companies. The Court then addresses Nestle's asserted grounds for dismissal.

A. Nestle's Request for Judicial Notice

Nestle requests that the Court take judicial notice of high-resolution images of the front of the Product package and the ingredient list on the back of the Product package. *See* Giali Decl. Exh. A, ECF 27-2. Nestle asserts that these images show the Product package more clearly and more completely than the image included in the FAC at paragraph 18. *See* FAC ¶ 18, ECF 13. While Plaintiffs state in their opposition brief's table of contents that the request for judicial notice should be denied, they do not address the request for judicial notice in the body of their brief. *See* Opp. at i, 22-23, ECF 29.

Under Federal Rule of Evidence 201, a "court may judicially notice a fact that is not subject to reasonable dispute." Fed. R. Evid. 201. Other Courts in this district have taken judicial notice of images that better display the packaging in question, on the ground that "the packaging of defendant's product is publicly available and not subject to reasonable dispute." *Cheslow v. Ghirardelli Chocolate Co.*, No. 19-CV-07467-PJH, 2020 WL 1701840, at *3 (N.D. Cal. Apr. 8, 2020). That reasoning applies here. Nestle's request for judicial notice is GRANTED.[2]

B. Plaintiffs' Participation in Similar Lawsuits

Nestle points out that Plaintiffs have participated in similar, earlier-filed lawsuits. Both Cheslow and Prescott are named plaintiffs in another action pending in this district before Chief Judge Phyllis J. Hamilton, in which they assert putative class claims under California's UCL, FAL, and CLRA based on allegations that Ghirardelli misleads consumers into believing that its "Premium Baking Chips Classic White Chips" product contains white chocolate when it does not. *See Cheslow v. Ghirardelli Chocolate Co.*, No. 19-cv-07467 (N.D. Cal.). Cheslow also submitted a claim in an earlier class action suit against Ghirardelli based on its alleged deceptive labeling of white baking chips. *See Miller v. Girardelli Chocolate Co.*, 12-cv-04936-LB (N.D. Cal.). Prescott previously sued the Kroger Company, alleging that its ChipMates white-chip cookie product is falsely advertised to contain white chocolate. *See Prescott v. The Kroger Co.*, No.

[2] Having granted Nestle's request for judicial notice, the Court need not address Nestle's alternative argument that the images may be considered under the incorporation by reference

19CV004055 (Monterey County Superior Court).

While Plaintiffs' suitability as class representatives may be impacted by their participation in earlier lawsuits alleging false labeling of white chip products, that is an issue for another day. Nestle does not assert that the prior lawsuits give rise to a defense suitable for determination at the motion to dismiss stage. Accordingly, Plaintiffs' participation in the earlier-filed lawsuits is irrelevant to the present motion, except insofar as rulings in those lawsuits constitute persuasive authority. The complaint in *Cheslow* alleged facts similar to those alleged in the FAC here, and Judge Hamilton dismissed the *Cheslow* complaint with leave to amend based on the identical grounds argued by Nestle here. *See Cheslow v. Ghirardelli Chocolate Co.*, No. 19-CV-07467-PJH, 2020 WL 1701840, at *9 (N.D. Cal. Apr. 8, 2020). As discussed below, this Court finds the *Cheslow* decision to be highly persuasive.

C. Allegations that Product's Labeling and Advertising is False or Misleading

Plaintiffs' claims under the UCL (Claim 1), FAL (Claim 2), and CLRA (Claim 3) are grounded in Plaintiffs' assertion that Nestle's labeling, advertising, and placement of the Product in grocery stores deceived them into believing that the Product contains white chocolate. *See* FAC ¶¶ 50-51, 81-85, 93-96, 106-07. Plaintiffs' "claims under these California statutes are governed by the 'reasonable consumer' test." *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). "Under the reasonable consumer standard, [Plaintiffs] must show that members of the public are likely to be deceived." *Id.* Moreover, the "false advertising violations must be premised on some statement or representation by the defendant about the product." *Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163, 1169 (C.D. Cal. 2014), *aff'd*, 649 F. App'x 424 (9th Cir. 2016). A plaintiff's mistaken belief about the product, untethered to a statement or representation by the defendant, is insufficient to state a claim under the UCL, FAL, or CLRA. *See id.*

Application of the reasonable consumer standard involves "questions of fact that are appropriate for resolution on a motion to dismiss only in rare situations." *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) (quotation marks, citation, and alteration omitted); *see also Hamm v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1193 (N.D. Cal. 2014) ("Whether a

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