UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LAUREN SOUTER, individually, and on behalf of others similarly situated,

Plaintiff,

v.

EDGEWELL PERSONAL CARE COMPANY; EDGEWELL PERSONAL CARE BRANDS, LLC; and EDGEWELL PERSONAL CARE, LLC,

Defendants.

Case No.: 20-CV-1486 TWR (BLM)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(ECF No. 58)

Presently before the Court is Defendants Edgewell Personal Care Company; Edgewell Personal Care Brands, LLC; and Edgewell Personal Care, LLC's Motion to Dismiss Plaintiff's First Amended Complaint ("Mot.," ECF No. 58). Plaintiff Lauren Souter has filed a Response in Opposition to ("Opp'n," ECF No. 59) and Defendant has filed a Reply in Support of ("Reply," ECF No. 60) the Motion. The Court heard oral argument on the Motion on December 8, 2021. (*See generally* ECF No. 61.) Having carefully considered Plaintiff's First Amended Complaint ("FAC," ECF No. 55), the Parties' arguments, and the law, the Court **GRANTS** Defendants' Motion.

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FACTUAL ALLEGATIONS

Plaintiff initiated this putative class action against the Defendants based on allegedly misleading representations associated with their antibacterial hand wipes known as "Wet Ones," which Plaintiff purchased multiple times during the class period. (*See* FAC ¶¶ 2, 17.) Plaintiff alleges that the misleading representations violate California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and California Consumer Remedies Act ("CLRA"). (*See generally* FAC.) Plaintiff further alleges breach of express warranty and quasi-contract. (*See generally id.*) Two representations are at issue: (1) that the hand wipes kill 99.99 percent of germs (the "Efficacy Representations"), and (2) that the hand wipes are "hypoallergenic" and "gentle" (the "Skin Safety Representations"). (*See id.* ¶¶ 25, 82.) According to Plaintiff, these representations were false and misleading and would likely deceive reasonable consumers. (*See id.* ¶¶ 8, 9.) In buying the hand wipes, Plaintiff alleges that she relied on the Efficacy and Skin Safety Representations on the product label. (*See id.* ¶ 10.) If she had known the truth, Plaintiff claims, she would not have purchased the hand wipes or would have purchased them on different terms. (*See id.* ¶ 12.)

I. The Efficacy Representations

With respect to the Efficacy Representations, Plaintiff argues that Defendants' hand wipes do not kill 99.99 percent of germs, as stated on the product label. (*See* FAC ¶ 27.) According to Plaintiff, the active ingredient in these hand wipes, benzalkonium chloride ("BAC"), is ineffective against certain viruses, bacteria, and spores, which comprise more than 0.01 percent of germs and can cause serious diseases. (*See id.* ¶¶ 29, 41.) Some of those diseases include norovirus, human papillomavirus, picornavirus, crypotosporidium, and clostridium difficile. (*Id.* ¶¶ 41, 43.) Plaintiff also claims that the hand wipes are ineffective against COVID-19. (*See id.* ¶ 55–57.) Further, Plaintiff alleges that Wet Ones cannot be assumed to prevent the listed viruses, bacteria, and spores because these illnesses are transmissible by hands and/or surfaces. (*See id.* ¶¶ 46, 48, 52, 58, 68, 71.)

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1 Plaintiff does not claim that Wet Ones were purchased with the intention to prevent
2 the illnesses listed in the First Amended Complaint or that Wet Ones failed to protect her
3 from contracting any of the listed illnesses. (*See id.* ¶ 35–36.) Instead, Plaintiff claims
4 that if she had known that the Efficacy Representation was false, she would have paid
5 less for Wet Ones or would not have purchased them at all. (*See id.*)

6 **II. The Skin Safety Representations**

7 In addition, Plaintiff claims Defendants' product label is false and misleading by
8 stating that the hand wipes are "hypoallergenic" and "specifically formulated to be tough
9 on dirt and germs, yet gentle on the skin." (*See* FAC ¶ 83.) Contrary to this
10 representation, Plaintiff contends, the hand wipes allegedly contain ingredients that are
11 "known allergens or skin irritants." (*See id.* ¶ 88–104.)

12 Plaintiff does not claim that she or any member of her family suffered an allergic
13 reaction because of using the hand wipes. (*See id.* ¶ 86–87.) Instead, Plaintiff claims that
14 if she had known of the skin irritants and allergens in Wet Ones, she would have paid less
15 for the hand wipes or would not have purchased them at all. (*See id.*)

16 **PROCEDURAL BACKGROUND**

17 Plaintiff filed her initial Complaint on July 31, 2020. (*See generally* ECF No. 1.)
18 On October 6, 2020, Defendants moved to dismiss Plaintiffs Complaint on five grounds:
19 (1) lack of constitutional and statutory standing, (2) failure to satisfy the heightened
20 pleading standard under Federal Rule of Civil Procedure 9(b), (3) failure to satisfy the
21 reasonable consumer test, (4) primary jurisdiction, and (5) preemption. (*See generally*
22 ECF No. 22.) On June 7, 2021, the Court granted Defendants' motion to dismiss on the
23 ground that Plaintiff failed to satisfy the reasonable consumer test, and granted Plaintiff
24 leave to amend. (*See generally* ECF No. 54.)

25 Plaintiff filed the operative First Amended Complaint on July 7, 2021. (*See*
26 *generally* ECF No. 55.) On August 6, 2021, Defendants filed the instant Motion. (*See*
27 *generally* ECF No. 58.)

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1 **LEGAL STANDARDS**

2 **I. Federal Rule of Civil Procedure 12(b)(1)**

3 A party may challenge the court's subject-matter jurisdiction through a motion
4 filed pursuant to Federal Rule of Civil Procedure 12(b)(1). *See* Fed. R. Civ. P. 12(b)(1);
5 *see also White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Because "[f]ederal courts are
6 courts of limited jurisdiction," "[i]t is to be presumed that a cause lies outside this limited
7 jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).
8 Consequently, "the burden of establishing the contrary rests upon the party asserting
9 jurisdiction." *Id.*

10 "Rule 12(b)(1) jurisdictional attacks can be either facial or factual." *White*, 227
11 F.2d at 1242. "A 'facial' attack accepts the truth of the plaintiff's allegations but asserts
12 that they 'are insufficient on their face to invoke federal jurisdiction.'" *Leite v. Crane*
13 *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Safe Air for Everyone v. Meyer*, 373
14 F.3d 1035, 1039 (9th Cir. 2004)). "The district court resolves a facial attack as it would a
15 motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and
16 drawing all reasonable inferences in the plaintiff's favor, the court determines whether
17 the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Id.*
18 (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)).

19 "A 'factual' attack, by contrast, contests the truth of the plaintiff's factual
20 allegations, usually by introducing evidence outside the pleadings." *Id.* (citing *Safe Air*
21 *for Everyone*, 373 F.3d at 1039; *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594
22 F.2d 730, 733 (9th Cir. 1979)). "When the defendant raises a factual attack, the plaintiff
23 must support her jurisdictional allegations with 'competent proof[]'" and "prov[e] by a
24 preponderance of the evidence that each of the requirements for subject-matter
25 jurisdiction has been met." *Id.* (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010);
26 *Harris v. Rand*, 682 F.3d 846, 851 (9th Cir. 2012)). Generally, "if the existence of
27 jurisdiction turns on disputed factual issues, the district court may resolve those factual
28 disputes itself." *Id.* at 1121–22 (citing *Safe Air for Everyone*, 373 F.3d at 1039–40;

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1 *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Thornhill Publ'g*, 594
2 F.2d at 733).

3 "Because standing . . . pertain[s] to a federal court's subject-matter jurisdiction
4 under Article III, [it is] properly raised in a motion to dismiss under Federal Rule of Civil
5 Procedure 12(b)(1)." *White*, 227 F.3d at 1242 (citing *Bland v. Fessler*, 88 F.3d 729, 732
6 n.4 (9th Cir. 1996)).

7 **II. Federal Rule of Civil Procedure 12(b)(6)**

8 "A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to
9 state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'"
10 *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting
11 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). "A district court's dismissal for
12 failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is
13 a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a
14 cognizable legal theory.'" *Id.* at 1242 (quoting *Balistreri v. Pacifica Police Dep't*, 901
15 F.2d 696, 699 (9th Cir. 1988)).

16 "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short
17 and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft*
18 *v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). "[T]he pleading
19 standard Rule 8 announces does not require 'detailed factual allegations,' but it demands
20 more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678
21 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "[a]
22 pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of
23 a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

24 "To survive a motion to dismiss, a complaint must contain sufficient factual
25 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*
26 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff
27 pleads factual content that allows the court to draw the reasonable inference that the
28 defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

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