UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:19-cv-05526-SVW-GJS	Date	1/9/2020
Title	*Angela Diamos v. Walmart Inc.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz		N/A
Deputy Clerk		Court Reporter / Recorder
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
N/A		N/A

Proceedings: ORDER DENYING DEFENDANT'S MOTION TO DISMISS [29]

I. Introduction and Background

Plaintiff Angela Diamos ("Plaintiff") filed this putative class action lawsuit against Walmart Inc. ("Walmart") on June 25, 2019 alleging that Walmart has violated California's Consumer Legal Remedies Act ("CLRA"), Cal. Bus. & Prof. Code § 17500, *et seq.*, Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*, and False Advertising Law ("FAL"), Cal. Civ. Code § 1750 *et seq.* Dkt. 1. Plaintiff also asserts breach of contract and unjust enrichment/restitution claims against Walmart on behalf of the putative class. *Id.*

Plaintiff's Complaint alleges that she purchased a bottle of Spring Valley Glucosamine Sulfate via Walmart's website. *Id.* ¶ 20. She alleges that the bottle's label stated that each pill in the bottle contained "1000 milligrams" of Glucosamine Sulfate. Plaintiff alleges that she purchased the bottle for joint pain, and that she did so because she was expressly told that Glucosamine *Sulfate* was superior to Glucosamine *Hydrochloride* in promoting joint health. *Id.* ¶ 21. Plaintiff then alleges that she gave the bottle to her counsel, who tested it using Fourier-transform infrared spectroscopy, which she alleges established that the bottle contained only Glucosamine Hydrochloride, and no Glucosamine Sulfate. *Id.* ¶¶ 22-23. Plaintiff additionally alleges that there is a large and growing market for Glucosamine generally as a joint health supplement, that Glucosamine Sulfate is generally considered superior to Glucosamine Hydrochloride for this purpose, and that private manufacturers frequently promote Glucosamine Sulfate's advantages to the public. *Id.* ¶¶ 11-15.

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On August 16, 2019 Walmart filed a motion to dismiss in this action. Dkt. 29. Walmart argues that because Plaintiff's claims center on alleged mislabeling of a supplement product covered by the Food, Drug, and Cosmetic Act ("FDCA"), any state statutory claims are preempted by the FDCA's labeling requirements. Dkt. 29 at 4-7. Walmart additionally asserts that Plaintiff's other statutory claims also fail to state a claim for relief, and that Plaintiff's standalone claim for unjust enrichment does not exist under California law. *Id.* at 11-12.

II. Legal Standard

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff's 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)). A claim is facially plausible "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. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. When evaluating the sufficiency of a pleading under Fed. R. Civ. P. 12(b)(6), a court may consider only the allegations in the complaint and any attachments or documents incorporated by reference. *Koala v. Khosla*, 931 F.3d 887, 894 (9th Cir. 2019); s*ee also United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003).

When a plaintiff's claim sounds in fraud, the complaint must also comply with Federal Rule of Civil Procedure 9(b)'s heightened pleading standard. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d

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1097, 1103 (9th Cir. 2008); *Bly-Magee v. Cal.*, 236 F.3d 1014, 1018 (9th Cir. 2001). Rule 9(b) requires the party alleging fraud to "state with particularity the circumstances constituting fraud," Fed. R. Civ. P. 9(b), including "the who, what, when, where, and how of the misconduct charged." *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (internal quotation marks omitted); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

III. Analysis

a. Preemption

The FDCA grants the Food and Drug Administration ("FDA") the authority to regulate food labels. 21 U.S.C. § 393(b)(2)(A). The Nutrition Labeling and Education Act ("NLEA"), which amended the FDCA, expressly preempts any state laws that implement labeling requirements "not identical to the requirement of section 343(q)." 21 U.S.C. § 343-1(a)(4). The NLEA "does not preempt any state law unless the law is 'expressly preempted.'" nor does it "preempt state law-based causes of action that are identical to the federal labeling requirements." *Hawkins v. Kroger Co.*, 906 F.3d 763, 770 (9th Cir. 2018) (citations omitted).

The FDA has also created testing protocols for compliance with its food labelling regulations. These regulations require nutrient analyses to consist of 12 subsamples taken from "12 different randomly chosen shipping cases, to be representative of a lot." 21 C.F.R. § 101.9(g). Nutrient analyses of the 12 subsamples must then follow the "'[o]fficial methods of analysis of the AOAC International' or, if no AOAC method is available or appropriate, . . . other reliable and appropriate analytical procedures." *Id.*

Neither party in this case disputes that given the NLEA's amendments to the FDCA, Plaintiff will ultimately only be able to establish liability for the allegedly misleading labeling if she demonstrates that the Glucosamine supplement at issue here was deficiently labelled with regard to Glucosamine Sulfate in accordance with the testing procedure in 21 C.F.R. § 101.9(g). Dkt. 29 at 6-7; Dkt. 34 at 6. The dispute between the parties on this issue solely concerns whether the allegations in

Plaintiff's complaint are sufficient to state a claim under state law, without having alleged that she followed the 12 subsample testing protocol.

Walmart argues that because the FDCA expressly preempts non-identical state laws regarding labeling specifications, claims for liability under state law that fail to *specifically allege* that the Plaintiff followed the 12 subsample testing protocol in determining whether a label was inaccurate are preempted by the FDCA's testing protocol. Dkt. 29 at 6-7. Walmart cites to federal district court cases dismissing state law claims for failing to allege testing in compliance with the 12 subsample testing protocol in § 101.9(g). *See Salazar v. Honest Tea, Inc.*, 74 F. Supp. 3d 1304, 1313 (E.D. Cal. 2014); *Rubio v. Orgain, Inc.*, 2019 WL 1578379, at *1 (C.D. Cal. Mar. 5, 2019); *Ochoa v. Church & Dwight Co.*, 2018 WL 4998293, at *5 (C.D. Cal. Jan. 30, 2018); *Parker v. Wal-Mart Stores, Inc.*, 367 F. Supp. 3d 979, 982 (E.D. Mo. 2019).

Although no circuit court appears to have directly addressed the preemption issue with respect to state law claims and FDA labeling standards, the Ninth Circuit has recently addressed the impact of FDA preemption on similar California state law labeling claims. *Durnford v. MusclePharm Corp.*, 907 F.3d 595 (9th Cir. 2018). In *Durnford*, the Ninth Circuit held that the state law theory of misbranding alleged by that plaintiff based on alleged "nitrogen spiking" that artificially inflated a protein supplement's protein content was expressly preempted because the FDA's labeling regime expressly permitted use of nitrogen content as a proxy for protein content. *Id.* at 602-03. However, that plaintiff's separate theory of liability based on a "composition" theory— that defendant's labeling misleadingly implied that all of the protein was based on beef and milk protein (rather than nitrogen compounds allegedly used to spike the overall protein content) sufficed to state a claim even though that plaintiff did not specifically allege that they followed the 12 subsample testing protocol in 21 C.F.R. § 101.9. *Id.* at 603-04. The Ninth Circuit also noted in a footnote that they specifically declined to "address whether plaintiffs are *ever* required to allege, at the pleading stage, that there are tests contradicting the nutrition panel that comply with the FDA's testing protocols," but that "plaintiffs are generally not expected to provide evidence in support of their claims at the pleading stage." *Id.* at 603 n.8.

Here, Plaintiff's theory of liability under the relevant California statutes (UCL, CLRA, FAL) is that the label on the Spring Valley Glucosamine Sulfate supplement is misleading because it contains no Glucosamine Sulfate whatsoever, and instead exclusively contains Glucosamine Hydrochloride. Dkt. 1 ¶

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23. While this theory of liability differs from the "composition" theory that was expressly ruled not preempted in *Durnford*, the Court is persuaded here that the allegations of independent testing via Fourier-transform infrared spectroscopy sufficiently state a claim for relief. This decision is consistent with a variety of other district court decisions on this topic. *See Jackson-Mau v. Walgreen Co.*, 2019 WL 5653757, at *2 (E.D.N.Y. Oct. 31, 2019); *Clay v. Cytosport, Inc.*, 2015 WL 5007884, at *3 (S.D. Cal. Aug. 19, 2015); *Gubala v. CVS Pharmacy, Inc.*, 2016 WL 1019794, at *7-8 (N.D. Ill. Mar. 15, 2016); *Smith v. Allmax Nutrition, Inc.*, 2015 WL 9434768, at *7 (E.D. Cal. Dec. 24, 2015). Moreover, unlike in several of Walmart's cited cases, the misleading labeling claims here are based on the complete absence of the advertised compound from the tested bottle, rather than merely a deviation in an individual bottle from the specific amount advertised on the label. *See Rubio*, 2019 WL 1578379, at *1 (involving independent non-conforming testing showing that the product in question contained between 13 and 15 grams of protein when the label asserted 16 grams); *Ochoa*, 2018 WL 4998293, at *1, 5 (C.D. Cal. Jan. 30, 2018) (alleging that the folic acid supplement in question contained between 1.1 milligrams and 2 milligrams, rather than the 0.8 milligrams on the label).

The Court is persuaded that in this context, where a plaintiff's allegations state that independent testing has confirmed the complete absence of the advertised dietary supplement, failure to specifically allege testing in conformance with 21 C.F.R. § 101.9(g) does not expressly preempt such a claim at the pleading stage. Defendant's motion to dismiss is DENIED on these grounds.

b. Non-Economic Loss Doctrine

Walmart also argues that because Plaintiff pleads the existence of a contract, and also alleges a breach of contract claim, Dkt. 1 at 14, California's non-economic loss doctrine bars Plaintiff's non-contract causes of action. Dkt. 29 at 10. Walmart cites to several district court cases, arguing that they hold that plaintiffs may not recover on non-contract claims when they also allege a breach of contract. *Niagara Bottling, LLC v. Rite-Hite Co., LLC*, 2019 WL 1768875, at *11 (C.D. Cal. Feb. 11, 2019); *Casden Builders Inc. v. Entre Prises USA, Inc.*, 2010 WL 2889496, at *6 (C.D. Cal. July 21, 2010).

These cases are substantially outnumbered by other district court cases in the Ninth Circuit indicating that claims under California's UCL and CLRA are not subject to the economic loss doctrine. *Kacsuta v. Lenovo (United States) Inc.*, 2013 WL 12126775, at *5 (C.D. Cal. July 16, 2013) (collecting

cases) ("Given the broad scope of the UCL and CLRA, and their function as consumer protection statutes, it is highly unlikely that the legislature intended for them to be limited in such a way."); *Belle v. Chrysler Grp., LLC*, 2013 WL 949484, at *4 (C.D. Cal. Jan. 29, 2013); *Corson v. Toyota Motor Sales, U.S.A., Inc.*, 2013 WL 10068136, at *7 (C.D. Cal. July 18, 2013). Additionally, the California Supreme Court has expressly differentiated the UCL from a traditional tort claim for compensable damages. *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 173 (2000) ("the UCL is not 'an all-purpose substitute for a tort or contract action'"). The Court DENIES Walmart's motion to dismiss the UCL, CLRA, and FAL claims on this basis.

c. Unjust Enrichment and/or Restitution

Plaintiff's Complaint includes a cause of action for "Unjust Enrichment and/or Restitution", on behalf of a nationwide class or in the alternative, the California class. Dkt. 1 ¶¶ 69-76. Plaintiff alleges that Walmart's misleading labeling regarding Glucosamine Sulfate caused Walmart to receive "wrongful benefits" and resulted in Walmart being "unjustly enriched at the expense of . . . Plaintiff and members of the Classes." *Id.* Walmart argues that under California law, unjust enrichment does not constitute a standalone cause of action. Dkt. 29 at 12. In opposition, Plaintiff argues that the claim for unjust enrichment is "necessarily in the alternative" to her breach of contract claim, and brings this claim on behalf of a nationwide class. Dkt. 34 at 21-22.

"To allege unjust enrichment as an independent cause of action, a plaintiff must show that the defendant received and unjustly retained a benefit at the plaintiff's expense." *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1038–39 (9th Cir. 2016); *see also Bruton v. Gerber Prod. Co.*, 703 F. App'x 468, 470 (9th Cir. 2017) (noting that an independent claim for unjust enrichment exists under California law). When a plaintiff alleges unjust enrichment, a court may "construe the cause of action as a quasi-contract claim seeking restitution." *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015)

The Court is satisfied that the factual allegations in Plaintiff's Complaint adequately alleges unjust enrichment at this early stage. *See Ochoa*, 2018 WL 4998293, at *5 (C.D. Cal. Jan. 30, 2018) (applying similar analysis to conclude that a standalone claim for unjust enrichment existed in a mislabeling case, though ultimately finding it preempted by the FDCA). Alternatively, the Court

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construes these allegations as sufficiently stating a claim under quasi-contract for the nationwide class that cannot sue under California consumer statutes that would otherwise provide for restitution. *See Astiana*, 783 F.3d at 762. To the extent that this cause of action is duplicative of Plaintiff's claims under California statutory law (the UCL, CLRA, and FAL) which also seek restitution, Plaintiff is permitted to plead claims in the alternative. *See Saidian v. Krispy Kreme Doughnut Corp.*, 2017 WL 945083, at *4 (C.D. Cal. Feb. 27, 2017) (citing *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 832 (D. Ariz. 2016)).

IV. Conclusion

Defendant's motion to dismiss is DENIED with respect to each of Plaintiff's causes of action.

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