



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 10-1217-JST (MLGx)

Date: March 15, 2011

Title: Vi Nguyen v. Innovation Ventures, LLC

Present: **Honorable JOSEPHINE STATON TUCKER, UNITED STATES DISTRICT JUDGE**

Ellen Matheson
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER DENYING DEFENDANT’S
MOTION TO DISMISS (Doc. 17)**

I. INTRODUCTION

Before the Court is Defendant Innovation Ventures, LLC’s Motion to Dismiss Plaintiff Vi Nguyen’s First Amended Complaint pursuant to Federal Rules of Civil Procedure 8, 9(b), 12(b)(1),¹ and 12(b)(6). (Def.’s Not. of Mot., Doc. 17, at 1.) Plaintiff has filed an opposition (Doc. 19), and Defendant has filed a reply (Doc. 20). The Court finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. R. 7-15. Having read the papers and taken the matter under submission, the Court DENIES Defendant’s Motion to Dismiss.

II. BACKGROUND

On a motion to dismiss, the Court accepts as true the factual allegations in the complaint. *Hemi Grp., LLC v. City of New York*, 130 S. Ct. 983, 986-87 (2010). Defendant Innovation Ventures, doing business as Living Essentials, is a Michigan corporation that markets and sells through distributors and retailers a dietary supplement drink known as 5-HOUR ENERGY® (“Product”). (First Amended Complaint, “FAC,” Doc. 14, ¶¶ 6, 11.) The Product’s label features the Product’s name, the silhouette of a

¹ The Court notes that although Defendant has brought the Motion pursuant to Rule 12(b)(1), it has not advanced any arguments as to why the Court lacks subject matter jurisdiction.



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man running up a mountain, and the following statements: “Hours of energy now – No crash later”; “Sugar free”; “Only four calories”; and “Feel it in minutes – lasts for hours.” (*Id.* ¶¶ 12-13.) As to the “No crash later” statement, the Product includes two disclaimers on the back of bottle placed near the nutritional information. The first disclaimer states that “[t]his statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.” (*Id.* ¶ 16.) The second disclaimer states that “‘No crash’ means no sugar crash. 5-Hour Energy contains no sugar. Individual results may vary. See www.5hourenergy.com for more details.” (*Id.*)

Plaintiff Vi Nguyen resides in Orange County, California, and has purchased the Product since its introduction into the market. (*Id.* ¶¶ 5, 22.) Most recently, on April 7, 2010, Plaintiff purchased the “5 Hour Energy Shot, Grape flavor” at the 76/Circle K, located at 5201 W. 1st Street in Santa Ana, California. (*Id.* ¶ 22.)

On August 11, 2010, Plaintiff, on behalf of himself and a class of similarly situated consumers, filed suit against Defendant pursuant the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. section 1332(d). (*Id.* ¶ 1.) In his First Amended Complaint, Plaintiff alleges claims for (1) violations of California’s Unfair Competition Law (“UCL”), California Business and Professions Code sections 17200 *et seq.*, (2) violations of California’s False Advertising Law (“FAL”), California Business and Professions Code sections 17500 *et seq.*, (3) breach of express warranty, and (4) violations of California’s Consumer Legal Remedies Act (“CLRA”), California Civil Code section 1770. (*Id.* ¶¶ 36-81.)

Plaintiff alleges, *inter alia*, that the Product’s labeling presents an untruthful and deceptive “unified message to the consumer: just two ounces of the Product, when ingested, will give them five hours of sustained energy without negative after-effects.” (*Id.* ¶ 18; *see id.* ¶¶ 19-21.) Plaintiff alleges that he reasonably relied on and was misled by Defendant’s deceptive labeling, and suffered actual loss by purchasing the Product only to find that the Product “did not provide a sustained five-hour long surge of energy without negative after-effects” and that the “high levels of caffeine in the Product caused him to suffer the same sort of discomfort he would have suffered from rapid ingestion of coffee with an equivalent amount of the stimulant: he felt shaky and depleted.” (*Id.* ¶



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25.) Plaintiff alleges that he “therefore was deprived of the benefit of his bargain and lost the actual purchase price he paid for the Product when he received a product that did not perform as represented, but it actually cause him to suffer physically.” (*Id.* ¶ 25.)

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). Rule 12(b)(6) is read in conjunction with Federal Rule of Civil Procedure Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). When evaluating a Rule 12(b)(6) motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994).

To survive a motion to dismiss, a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556). The issue on a motion to dismiss for failure to state a claim “is not whether the [claimant] will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims” asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). As the Ninth Circuit recently clarified, a complaint must be (1) “sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it” and (2) “sufficiently plausible that it is not unfair to require the opposing party to be subjected to the expense of discovery.” *Starr v. Baca*, --- F.3d ---, 2011 WL 477094, at *14 (9th Cir. Feb. 11, 2011).



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IV. DISCUSSION

A. UCL, FAL, and CLRA Claims

1. Rule 9(b)'s Heightened-Pleading Standard

Defendant argues that Plaintiff's First Amended Complaint should be subject to the heightened pleading requirements of Rule 9(b). (Def.'s Mot. at 10-11.) When a plaintiff alleges a "unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim . . . the claim is said to be grounded in fraud or to sound in fraud, and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (internal quotation marks omitted); *see* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). "In other cases, however, a plaintiff may choose not to allege a unified course of fraudulent conduct in support of a claim, but rather to allege some fraudulent and some non-fraudulent conduct." *Id.* at 1104. "In such cases, only the allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements" because Rule 9(b) "does not require that allegations supporting a claim be stated with particularity when those allegations describe non-fraudulent conduct." *Id.*

Here, Plaintiff's UCL, FAL, and CLRA claims fall under Rule 9(b) because they are based entirely on the Product's label's "scheme of deceptive representations." (FAC ¶ 25; *see, e.g., id.* ¶¶ 42, 49, 78.) "Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Kearn v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting *Vess*, 317 F.3d at 1106) (internal quotation marks omitted). This requires a plaintiff to provide the "who, what, when, where, and how of the misconduct charged." *Id.* (quoting *Vess*, 317 F.3d at 1106).

The Court finds that Plaintiff has set forth allegations of the circumstances constituting the alleged fraud with sufficient particularity to satisfy Rule 9(b). Plaintiff



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has alleged the “who,” (Defendant), the “what,” “where,” and “how” (the Product and its label’s representations), and the “when” (most recently, Plaintiff’s purchase of the Product on April 7, 2010). Thus, the Court turns to whether Plaintiff has sufficiently alleged his UCL, FAL, and CLRA claims.

2. UCL Claim

The UCL’s “purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.” *Kwikset Corp. v. Superior Court*, --- Cal. Rptr. 3d ---, 2011 WL 240278, at *3 (Cal. Jan. 27, 2011) (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949 (Cal. 2002)) (internal quotation marks omitted). The UCL prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Cal. Bus. & Profs. Code § 17200. “Each of these three adjectives captures ‘a separate and distinct theory of liability.’” *Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010) (quoting *Kearns*, 567 F.3d at 1127). Under the unlawful prong, the statute “borrows violations from other laws by making them independently actionable as unfair competitive practices.” *Korea Supply Co. v. Lockheed Martin Corp.*, 131 Cal. Rptr. 2d 29, 37 (Cal. 2003) (citing *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 1999)) (internal quotation marks omitted). Under the unfair prong, “(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.” *Camacho v. Auto. Club. of S. Ca.*, 48 Cal. Rptr. 3d 770, 777 (Cal. Ct. App. 2006); *Davis v. Ford Motor Credit Co.*, 101 Cal. Rptr. 3d 697, 708 (Cal. Ct. App. 2009) (adopting *Camacho*’s definition of “unfair”); *Webb v. Carter’s Inc.*, --- F.R.D. ---, 2011 WL 3439631, at *12 (C.D. Cal. Feb. 3, 2011) (same); *In re Sony Grand Wega*, --- F. Supp. 2d ---, 2010 WL 4892114, at *7 (S.D. Cal. Nov. 30, 2010) (same); *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1137 (N.D. Cal. 2010) (same). Alternatively, for an act to be unfair, the alleged conduct must “offend[] an established public policy [tethered to specific constitutional, statutory or regulatory provisions],” or be “immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” *Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255,



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1268, 1272 (Cal. Ct. App. 2006) (acknowledging the split within California circuit courts over the definition of “unfair” in the context of the UCL). Finally, to state a claim under the fraudulent prong, Plaintiff must allege conduct that would likely deceive members of the public, i.e. a “reasonable consumer.” *See McKell v. Wash. Mut., Inc.*, 49 Cal. Rptr. 3d 227, 239 (Cal. Ct. App. 2006); *Bardin*, 136 Cal. App. 4th at 1274; *see Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 989 (N.D. Cal. 2009).

Plaintiff alleges that the Product’s label’s misrepresentations violate all three prongs of the UCL. (FAC ¶¶ 38, 42-44.) Plaintiff bases his “unlawful” claim on Defendant’s alleged violations of the FAL and CLRA. (*Id.* ¶ 44.) Because Plaintiff has sufficiently alleged FAL and CLRA claims, he has stated a UCL claim under the unlawful prong. *See infra* Section IV.A(3), (4). This is sufficient to allege a UCL claim. As noted before, however, Plaintiff also alleges claims under the unfair and fraudulent prongs in that “Defendant’s acts and practices related to the marketing, advertising and/or labeling of the Product for the purpose of selling its Product . . . constitute unfair and/or deceptive business practices within the meaning of [the UCL].” (*Id.* ¶ 43.) Because these allegations, and Defendant’s arguments pertaining to them, bear on whether Plaintiff has sufficiently alleged FAL and CLRA claims, the Court addresses them.

Defendant argues that Plaintiff’s UCL, FAL, and CLRA claims fail *as a matter of law* because members of the public are not likely to be deceived by the Product’s label. (Def.’s Mot. at 7.) Defendant argues that “no reasonable consumer could be misled by the Product label when considered as a whole or even under plaintiff’s selected reading of it.” (Def.’s Mot. at 8.) Contrary to Defendant’s argument, “California courts, however, have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on [a motion to dismiss].” *Williams v. Gerber Products. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1126 (C.D. Cal. 2010). To satisfy the reasonable consumer standard on a motion to dismiss, Plaintiff need only “show that members of the public are likely to be deceived . . . [by] not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.” *Williams*, 552 F.3d at 938 (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)).



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Here, Plaintiff has sufficiently alleged facts showing the Product's label has a capacity, likelihood, or tendency to deceive or confuse the public. As Plaintiff alleges,

Every element on the [label], with the exception of the depiction of the fruit that denotes the flavor, from the name of the Product, 5-Hour Energy, to the image of the man running up and through the mountains, as well as the claims made in large yellow font preceded by the check marks works effectively with the other elements to present a unified message to the consumer: just two ounces of the Product, when ingested, will give the five hours of sustained energy without negative after-effects.

(FAC ¶ 18.) Plaintiff further alleges that these representations are “untruthful as admitted in the disclaimer: ‘No crash’ means no sugar crash . . . Individual results may vary.” (*Id.* ¶ 19.) The Product's label clearly displays the statements, for example, “5-hour Energy,” and “Hours of energy now - No crash later.” (FAC ¶ 11.) Plaintiff has alleged that these statements are false and deceptive because when he ingested the Product, he did not experience a “five-hour long surge of energy.” (*Id.* ¶ 25.) Defendant does not disagree that the representations, standing alone, are untrue. Instead, Defendant relies on the Product's disclaimers, such as “individual results may vary,” which are located above the nutritional facts on the back of the Product's bottle, to cure the label's alleged misrepresentations. However, such disclaimers are insufficient to protect a manufacturer from an allegedly misleading label. *Williams*, 552 F.3d at 939-40 (“We disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.”). Because Plaintiff has stated sufficiently claims under the unlawful and fraudulent prongs of the UCL, the Court need not determine whether Plaintiff has stated a claim under the unfair prong.



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3. FAL Claim

California’s FAL prohibits “any person, firm, corporation, or association or any employee thereof with the intent directly or indirectly to dispose of real or personal property or to perform services” from making or disseminating “any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.” Cal. Bus. & Profs. Code § 17500. FAL claims are also governed by the reasonable consumer test. *See Williams*, 552 F.3d at 938 (“Appellants’ claims under [the UCL, FAL, and CLRA] are governed by the ‘reasonable consumer’ test.” (citing *Freeman*, 68 F.3d at 289)). Thus, to state an FAL claim, Plaintiff need only allege that members of the public are likely to be deceived by Defendant’s representations. *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (Cal. 2009) (“To state a claim under either the UCL or the [FAL], based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.” (quoting *Kasky*, 27 Cal. 4th at 951)); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, --- F. Supp. 2d ----, 2010 WL 4867562, at *21 (C.D. Cal. Nov. 20, 2010).

Plaintiff has alleged Defendant’s “representations are likely to deceive, and continue to deceive, reasonable consumers,” and that “Defendant knew or should have known that the statements were misleading.” (FAC ¶¶ 51-52.) Based on these allegations, and for the same reasons outlined above for the UCL claim, the Court finds that Plaintiff has satisfied the reasonable consumer standard, and has therefore sufficiently alleged an FAL claim.

4. CLRA Claim

The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or practices.” Cal. Civ. Code § 1770. The CLRA allows recovery by “[a]ny consumer who suffers any damage as a result of the use or employment by any person” of an unfair or deceptive business practice. Cal. Civ. Code § 1780(a); *see id.* § 1770(a). To state a claim under the CLRA, Plaintiff must “show not only that a defendant’s conduct was deceptive but that the deception caused them harm.” *Mass. Mutual Life Ins. Co. v.*



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Superior Court, 97 Cal. App. 4th 1282, 1292 (Cal. Ct. App. 2002); *see* Cal Civ. Code § 1780(a) (stating that plaintiff can recover only if he suffers damage “as a result of” conduct forbidden by the statute). Deceptive acts under the CLRA include “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have” Cal. Civ. Code § 1770(a)(5). They also include “[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another,” or “[a]dvertising goods or services with the intent not to sell them as advertised.” *Id.* § 1770(a)(7), (9). A CLRA claim based on false advertising is also governed by the reasonable consumer test. *See Williams*, 552 F.3d at 938; *Peviani v. Natural Balance, Inc.*, --- F.R.D. ---, 2011 WL 754958, at *3 (S.D. Cal. Feb. 24, 2011); *Yumul*, 733 F. Supp. 2d at 1125.

Here, Plaintiff has sufficiently alleged a CLRA claim under California Civil Code sections 1170(a)(5),(7), and (9). Plaintiff has alleged that “Defendant represented that the Product has characteristics, ingredients, uses, and benefits which it does not have” and that the “Product is of a particular standard, quality, or grade, which it is not,” and that “Defendant advertised the product with an intent not to sell the Product as advertised.” (FAC ¶ 78.) Plaintiff supports these allegations throughout the First Amended Complaint by pointing specifically to the allegedly deceptive nature of the Product’s name and its label’s representations regarding its effects. (*See id.* ¶¶ 11-19, 25.) Plaintiff further alleges that these representations caused him to purchase the Product and ultimately caused his financial loss. (*Id.* ¶¶ 24-25.) The CLRA also requires plaintiffs who seek damages to provide notice of their claims to the allegedly offending parties at least thirty days before filing suit. Cal. Civ. Code § 1782(a). Plaintiff has alleged that he provided Defendant with written notice and “demanded that [Defendant] take certain corrective actions within the period proscribed by the CLRA” (FAC ¶ 80.) Thus, Plaintiff adequately states a CLRA claim.

B. Express Warranty Claim

Under California law, “(a) any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates



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an express warranty that the goods shall conform to the affirmation or promise; (b) any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description; (c) any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.” Cal. Com. Code § 2313(1). Thus, to state a claim under a theory of breach of an express warranty, Plaintiff must allege that Defendant (1) made affirmations of fact or promises regarding the Product, (2) those affirmations or promises became part of the basis of the bargain between the parties, (3) the express warranty was breached, and (4) the breach caused injury to Plaintiff. Cal. Com. Code § 2313(1); *see Keith v. Buchanan*, 173 Cal. Appl. 3d 13, 20 (Cal. App. 1985). “A description of the goods can create an express warranty as long as that description became part of the basis of the bargain between the parties.” *McKinniss v. Sunny Delight Beverages Co.*, No. CV 09-02034, 2007 WL 4766525, at *5 (C.D. Cal. Sept. 4, 2007).

Plaintiff alleges that he and each member of the purported class “formed a contract with Defendant at the time Plaintiff and the other members of the class purchased the Product.” (FAC ¶ 72.) Plaintiff alleges that “the terms of that contract include the promises or affirmations of fact made by the Defendant on the Product[’s] [label]” (*Id.*) Plaintiff alleges that the Product’s “deceptive representations became part of the basis of the bargain, and part of a standardized contract between” Plaintiff and Defendant. (*Id.*) Plaintiff also alleges that “[a]s a result of Defendant’s breach of its contract and warranties, Plaintiff and the class have been damaged in the amount of the purchase price of the Product at issue.” (*Id.* ¶ 75.)

Defendant argues that the Plaintiff’s breach of express warranty claim fails because (1) the Product’s label does not contain any express warranties “that were not true,” (2) Plaintiff has not alleged that Defendant breached any express warranty, and (3) Plaintiff did not provide timely notice of the purported breach. (Def.’s Mot. at 9.) The Court is not convinced. First, Defendant’s contention that Plaintiff’s claim fails because the product’s express warranties are “true” is unavailing for the reasons set forth in Sections IV.A(2),(3), and (4). As to the latter two points, Plaintiff plainly alleges that “Defendant breached the terms of this contract, including the express warranties . . . by providing a product that did not (and does not) perform as promised on the [label]”



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(*Id.* ¶ 74.) As to notice, California Commercial Code section 2607(3)(A) states that a “buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.” Cal. Com. Code § 2607(3)(A). “However, timely notice of a breach of an express warranty is not required where the action is against a manufacturer and is brought ‘by injured consumers against manufacturers with whom they have not dealt.’” *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 989 (N.D. Cal. 2009) (quoting *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 61 (Cal. 1963)); see *In re Toyota*, 2010 WL 4867562, at *25.

Thus, the Court finds that Plaintiff has sufficiently alleged a breach of express warranty claim.

V. CONCLUSION

For the aforementioned reasons, the Court DENIES Defendant’s Motion to Dismiss.

Initials of Preparer: jcb