UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ELISA BARGETTO,

Plaintiff,

v.

WALGREEN CO.,

Defendant.

Case No. 22-cv-02639-TLT

ORDER ON MOTION TO DISMISS

Re: ECF No. 33, 34

I. INTRODUCTION

Defendant Walgreen Co. moves to dismiss Plaintiff Elisa Bargetto's second amended class action complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), respectively. ECF No. 33. Having considered the moving papers and the oral arguments presented by counsel, the motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**.

II. STANDARD OF REVIEW

Under Rule 12(b)(1), a party may move to dismiss for lack of subject matter jurisdiction. "[L]ack of Article III standing requires dismissal for lack of subject matter jurisdiction under [Rule] 12(b)(1)." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). The "irreducible constitutional minimum" of standing requires that a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins* ("*Spokeo II*"), 136 S. Ct. 1540, 1547 (2016). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements," which at the pleadings stage means "clearly . . . alleg[ing] facts demonstrating each element." *Spokeo II*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S.

490, 518 (1975)).

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), a plaintiff's "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014). 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). But "allegations in a complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt*, 765 F.3d at 1135 (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014)). "A claim has facial plausibility 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. "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." *Id.* (quoting *Twombly*, 550 U.S. at 556).

III. REQUEST FOR JUDICIAL NOTICE

As a preliminary matter, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' request for judicial notice. ECF No. 34.

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). Judicial notice is appropriate for facts "not subject to reasonable dispute." *Id.*; *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001).

//

Defendant requests that the Court take judicial notice of its Exhibit A, which includes two links to the CalRecycle website. The first webpage is entitled "Certified Reusable Grocery Bag Producer Details" and provides company details for Novolex. It also lists various business entities, including "Walgreens Resuable Bag 40% PCR JER". (Hereafter, "Exhibit A-1").

The second webpage is also entitled "Certified Reusable Grocery Bag Producer Details" but provides company details for IPS Industries, Inc. The webpage contains a table without any discernable reference to Defendant. (Hereafter, "Exhibit A-2").

The Court may take judicial notice of public documents, records, and reports of government bodies. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). Judicial notice may be taken of publications introduced to "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Heliotrope Gen. Inc. v. FordMotor Co.,* 189 F.3d 971, 981 n. 118 (9th Cir. 1999) [taking judicial notice "that the market was aware of the information contained in news articles submitted by the defendants."].

Plaintiff does not oppose Defendant's request as to Exhibit A and, as such, the Court GRANTS judicial notice of Exhibit A-1—not for the truth of the matters asserted—but for the purpose of indicating "what was in the public realm at the time[.]" *Id.*; *see also* Fed. R. Evid. 802. As to Exhibit A-2, the Court DENIES Defendant's request as the information for which it is put forth cannot "be accurately and readily determined". Fed. R. Evid. 201(b).

Plaintiff filed a request that the Court take judicial notice of her Exhibit 1 and Exhibit 2 in support of the opposition to the motion to dismiss. ECF No. 41. The Court GRANTS Plaintiff's.

Exhibit 1 is a press release from the Attorney General Rob Bonta published on the California Office of the Attorney General website on November 2, 2022. The press release states that the Attorney General sent letters to manufacturers of plastic bags asking them to substantiate their claims that the bags are recyclable. Exhibit 2 is a letter sent from the Office of the Attorney General to Novolex, one of Defendant's plastic bag manufacturers, asking it to substantiate its claims that its bags are "recyclable in the state."

Defendant objects to Plaintiff's request to the extent that the Court not "take as true any of the statements in the documents relating to disputed issues in this case." Def.'s Obj. to Pl.'s Req.

for Judicial Notice ("RFJN"), p. 1-2. Under Rule 201, a court may take judicial notice of information published on a publicly available government entity websites when neither party disputes the authenticity, nor the accuracy of the information displayed therein. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010). The Court GRANTS judicial notice of Exhibits 1 and 2, not for the truth of the matters asserted but for the purpose of indicating "what was in the public realm at the time[.]" *Heliotrope Gen. Inc.*, 189 F.3d at 981 n. 118; *see also* Fed. R. Evid. 802.

III. DISCUSSION

A. Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id*. citing, *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 11, 1 L.Ed. 718 (1799) and *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182–183 (1936) (internal citations omitted).

Plaintiff has sufficiently plead subject matter jurisdiction based on diversity jurisdiction pursuant to the Class Action Fairness Act ("CAFA"). 28 U.S.C. § 1332(d)(2)(A). CAFA permits the Court's exercise of minimal diversity which only requires that a single member of the class be of diverse citizenship from named defendant. *Id*. Plaintiff is a resident of California, while Walgreens was incorporated under the laws of Illinois, where it also maintains its principal place of business. Second Amended Complaint ("SAC"), paras. 7-8.

The Court does not, however, have subject matter jurisdiction over Plaintiff's claim brought pursuant to California's Unfair Competition Law, (California Bus. & Prof. Code § 17200, et seq.) alleging that Walgreens' reusable plastic bags violate SB 270 because they are not "recyclable in this state" thereby constituting unlawful business practices. SAC, para. 56. The doctrine of exhaustion of administrative remedies "generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Darby v. Cisneros*, 509 U.S.

137, 144 (1993) citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985) (superseded by statute on other grounds).

The plaintiff did not avail herself of the remedy available to consumers provided under SB 270. The statute grants to a private citizen the right to object to the certification of a reusable grocery bag producer by filing an action for review in the "superior court of a county that has jurisdiction". Cal. Pub. Res. Code § 42282(f)(1). "The court shall determine if the reusable grocery bag producer is in compliance with requirements of this article." *Id*. A plain reading of the statute indicates that a superior court's determination of compliance would include a determination of whether the bags are recyclable in California within the meaning of SB 270. Cal. Rub. Res. Code § 42281 (b)(1)(C)).

Moreover, the pending investigation by the Attorney General of California reflects that this Court's determination of whether Walgreen's reusable bags are recyclable within the state under the meaning of SB 270 may be premature and unripe. Pl.'s RFJN, Ex 1. The basic rationale of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated on other grounds*.

The language of SB 270 grants to local and state government authorities the power to enforce the statute by imposing civil liability on a person or entity that knowingly violates the statute. Cal. Pub. Res. Code § 42285. Any civil penalties collected are paid to the office of the government attorney that brought the action. *Id*. As of November 2, 2022, the California Attorney General is investigating whether the reusable plastic bags manufactured and sold pursuant to SB 270 are in fact recyclable in California. Pl.'s RFJN, Ex. 1.

At oral argument, neither counsel for Plaintiff nor Defendant disputed that SB 270 has yet to be challenged in state court by a private citizen's objection to the certification of a reusable plastic bag or by an enforcement action brought by a government entity. As such, the court finds that Plaintiff's claims of violation of SB 270 are not ripe and jurisdiction could result in judicial

interference with state interests. *Abbott Lab'ys*, 387 U.S. at 148–49.

The Court GRANTS Defendant's motion to dismiss as to Plaintiff's UCL claim alleging violation of SB 270.

B. Primary Jurisdiction

The Court does not find that the doctrine of primary jurisdiction applies to the facts at hand. "Primary jurisdiction is not a doctrine that implicates the subject matter jurisdiction of the federal courts. Rather, it is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). Based on the plain language of SB 270, civil actions by private citizens and local and state attorneys may be brought in state court. Such claims are not presented to a government agency for a determination as is the case in most instances where the doctrine of primary jurisdiction is implicated.

C. Failure to state a claim upon which relief may be granted.

Plaintiff has sufficiently pled claims upon which relief may be granted by alleging that the markings on Walgreen's reuseable plastic bags indicating their recyclability are misleading because the bags are not recyclable.

Defendant avers that SB 270 is the only remedy available to Plaintiff because it was under this statute that Walgreens started selling its reusable plastic bags, including the markings on the bags that allegedly represent to consumers that the bags can be recycled in California. *See* Mot. to Dismiss, p. 1. However, Walgreen's alleged compliance with one law does not obviate its responsibility to comply with any other concurrent laws. In fact, the plain language of SB 270 requires that the reusable plastic bags comply with the Code of Federal Regulations related to recyclable claims "if the reusable grocery bag producer makes a claim that the reusable grocery back is recyclable." Cal. Public Resources Code § 42281 (a)(6); 16 C.F.R. § 260.12. Nor is the Court persuaded that the language of SB 270 reflects a legislative intent to eliminate consumer remedies, such the Environmental Marketing Claims Act, or this Court's authority to rule on whether certain conduct complies with federal legislation.

1. Unlawful acts, unfair acts and practices, and violation of California Consumer Legal Remedies Act.

Claims under California's Unfair Competition Law (UCL), False Advertising Law, and Consumers Legal Remedies Act (CLRA) are governed by the reasonable consumer test, whereby a plaintiff must show that members of the public are likely to be deceived. *See Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008); *see* also Cal. Bus. & Prof. Code §§ 17200, 17500 (West 2022); Cal. Civ. Code § 1770 (West 2022).

"[W]hether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." *Williams*, 552 F.3d at 938. However, plaintiff must allege "more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Brod v. Sioux Honey Ass'n, Co-op*, 927 F.Supp.2d 811, 828 (N.D. Cal. 2013) (citing *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 508, 129 Cal.Rptr.2d 486 (2003)). Rather, the reasonable consumer standard requires a probability "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie*, 105 Cal.App.4th at 508, 129 Cal.Rptr.2d 486. *Hadley v. Kellogg Sales Co.*, 273 F. Supp. 3d 1052, 1079 (N.D. Cal. 2017). When a claim under the unlawful prong of California's Unfair Competition Law (UCL) is grounded in fraud, the plaintiff must meet the heightened pleading standard for fraud claims. *Eidmann v. Walgreen Co.*, 2021 WL 764121 (N.D.Cal.2021).

When a complaint alleges consumer environment claims brought pursuant to the UCL and CLRA, a reasonable consumer could find a manufacturer's representation of recyclability untruthful, deceptive, or misleading, despite the presence of disclaiming language that the product was not recyclable in all communities and the directive to 'check locally' to determine recyclability at local municipal recycling facilities. *Smith v. Keurig Green Mountain, Inc. (Keurig)*, 393 F.Supp.3d 837 (2019).

Defendant asserts that *Keurig* is factually distinguishable and neither binding nor persuasive. Mtn. to Dismiss, p. 17. The Court disagrees. In *Keurig*, the court found that plaintiff had sufficiently alleged facts that Keurig's coffee pods were not recyclable, overcoming

defendant's motion to dismiss. *Keurig*, 393 F.Supp.3d at 847. Kathleen Smith brought a putative class action alleging that she purchased coffee pods "in reliance on [Keurig]'s false representations that the [Pods] are recyclable. Had Plaintiff known the Pods were not recyclable, she neither would have purchased them, nor would have paid the amount she did for them" *Id.* at 842. Similarly to the case at hand, Smith brought causes of action alleging violation of the California Consumers Legal Remedies Act, and California's Unfair Competition Law based on fraudulent acts and practices, unlawful acts, unfair acts and practices, breach of express warranty and unjust enrichment.

Defendant argues that *Keurig* is distinguishable because, in that case, "the complaint alleged that the disputed product [sic] were *incapable* of being recycled and were 'not recyclable *at all.*'" Motion, p. 17. Defendant construes the present complaint as alleging that Walgreen's reusable plastic bags are not impossible to recycle, [r]ather, she alleges that most recyclers are not inclined to do so—at least not in high volumes—because demand for recycled bags is low." *Id.* What is omitted in Defendant's argument is that Plaintiff's allegations are the same as those in *Keurig*—misrepresentation of recyclability claims.

The Environmental Marketing Claims Act includes by reference the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission (the "Green Guides"). While SB 270 does not define "recyclable" the Green Guides do as follows:

> It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. *A product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.*

16 C.F.R. § 260.12(a) (West 2022) (emphasis added).

More to the point, the Green Guides state that "[i]f any component significantly limits the ability to recycle the item, any recyclable claim would be deceptive. An item that is made from recyclable materials, but, because of its shape, size, or some other attribute, is not accepted in recycling programs, should not be marked recyclable. *Id* at 260.12(d).

//

Here, Plaintiff alleges that "[she] had known that the Products were sold unlawfully in California because they are not recyclable, she would not have purchased the Products and would have instead sought reusable bags made from other materials, such as paper or cloth bags." SAC, para. 5. Furthermore, she asserts that "[b]ecause consumers do not have access to recycling programs that accept the Products, because the Products cannot be separated or recovered from the general waste stream and stored into the correct materials bale by material recovery facilities ("MRFs"), and because there are no end markets to reuse the Products or to concert the Products into a material that can be reused in manufacturing or assembling another item, the Products are not recyclable." *Id*. These allegations are not mere conclusions but supported with particularity. SAC, 35-44.

Defendant asserts that it is required to display the chasing arrow symbol, under the Environmental Marketing Claims Act ("EMCA"), which is an absolute defense to Plaintiff's complaint. Mtn. to Dismiss, p. 21. The EMCA provides that "displaying a chasing arrows symbol or otherwise directing a consumer to recycle a consumer good shall not be considered misleading if the good is required by any federal or California law or regulation to display a chasing arrows symbol…" Cal. Bus. & Prof. Code §17580(e). SB 270 states that if a store chooses to sell or distribute a reusable grocery bag that is recyclable in the state, "the bag shall include the chasing arrows recycling symbol or the term 'recyclable,' consistent with the Federal Trade Commission guidelines use of that term, as updated." Cal. Pub. Res. Code § 42281(a)(4)(D). As discussed in more detail above, the term "recyclable" is defined by the FTC as a product that "can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item." 16 C.F.R. § 260.12(a) (West 2022).

Defendant posits that the EMCA can apply to give it an absolute defense but that the EMCA cannot give rise to Plaintiff's consumer claim. Even if that were true, SB 270 separately requires that the reusable plastic bags comply with the Code of Federal Regulations related to recyclability claims. Cal. Pub. Res. Code § 42281 (a)(6); 16 C.F.R. § 260.12.

//

Furthermore, the Court disagrees that Walgreen's is required to display the chasing arrow symbol. The language of SB 270 is permissive. Cal. Pub. Res. Code § 42281(a)["…a store…may sell or distribute a reusable grocery bag to a customer at the point of sale…"]; see also *Id.* at 42281(c) [A store may sell reusable grocery bags that are made of plastic film or from any other natural or synthetic fabric.] Walgreens could have chosen not to sell bags pursuant to SB 270 or could have opted to sell cloth or paper bags. Yet, Walgreens chose to sell reusable plastic bags.

The Court finds that Plaintiff has plead a claim for which relief may be granted surmounting the higher pleading requirements for claims based in fraud. *Eidmann v. Walgreen Co.*, 2021 WL 764121 (N.D.Cal.2021).

2. Breach of Express Warranty

The California Commercial Code explicitly states that, "[a]ny affirmation of fact or promise made by the seller to buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Cal. Com. Code § 2313(1)(a). To state a claim for breach of express warranty under California law, a plaintiff must allege: (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury. *Minkler v. Apple, Inc.*, 65 F.Supp.3d 810 (N.D. Cal. 2014). Here, Plaintiff alleges that the reusable plastic bags are not recyclable and thus do not conform to Walgreen's express representations to the contrary. SAC, para. 101. Additionally, Plaintiff alleges reasonable reliance on Walgreen's representations. SAC, para. 5.

As such, Plaintiff has sufficiently plead a cause of action for which relief may be granted.

3. Unjust Enrichment

"In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.'" *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 (1997). "The common count is a general pleading which seeks recovery of money without specifying the nature of the claim." *Title Ins. Co. v. State Bd. of Equalization* 4 Cal.4th 715, 731 (1992). "In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are (1) the

statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment. (Farmers Ins. Exchange v. Zerin (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

Plaintiff has sufficiently plead a common count for unjust enrichment.

IV. CONCLUSION

Defendant's motion to dismiss is GRANTED as to Plaintiff's cause of action alleging the commission of unlawful acts based on Defendant's alleged violation of SB 270. As to the balance of Plaintiff of claims, Defendant's motion is DENIED.

IT IS SO ORDERED.

Dated: December 19, 2022

TRINA L. THOMPSON
United States District Judge