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Superior Court of California
County of Los Angeles
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David W. Slayton, Executive Officer/Clerk of Court
By: N. Navarro, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BUNTARN LUN, individually and on behalf of all others similarly situated, Plaintiff, vs. LOWELL FARMS, INC. and CYPRESS MANUFACTURING COMPANY, Defendants.	Case No.: 22STCV38886 ORDER OVERRULING DEFENDANTS' DEMURRER IN PART AND SUSTAINING IN PART Date: July 31, 2023 Time: 10:00 a.m. Dept.: SSC 17

I. INTRODUCTION

This is a putative class action by Buntarn Lun (Plaintiff) against Lowell Farms Inc. (Lowell) and Cypress Manufacturing Company (Cypress) (together Defendants) alleging Defendants mislabeled their cannabis products with inflated "THC" percentages to sell products at a premium price. The operative Complaint alleges causes of action for (1) violation of the Unfair Competition Law (UCL), Bus. & Prof. Code §§ 17200 et seq.; (2) violation of the False Advertising Law (FAL), Bus. & Prof. Code §§ 17500 et seq.; (3)

violation of the Consumer Legal Remedies Act (CLRA), Civil Code §§ 1770 et seq.; (4) breach of express warranty; (5) negligent misrepresentation; (6) intentional misrepresentation; and (7) unjust enrichment.

Defendants demur to all causes of action, arguing that Plaintiff lacks standing because he did not test the THC percentage in the product(s) he purchased and thus cannot show he has injury in fact. Plaintiff opposes, observing that he alleges he tested the type of product he purchased (albeit he not allege he tested the exact product or batch) and that the testing showed the THC percentage was lower than the label claimed.

Having considered the briefing, matters judicially noticed, and oral argument on July 31, 2023, the demurrer is OVERRULED IN PART AND SUSTAINED IN PART. The demurrer is SUSTAINED as to the seventh cause of action for unjust enrichment. Leave to amend is denied as Plaintiff stated at oral argument that he did not seek leave to amend as to the cause of action for unjust enrichment. The demurrer is OVERRULED as to the remaining claims. Defendant shall answer within twenty (20) days.

II. APPLICABLE LAW

A. Law Regarding Demurrers

Code Civ. Proc., section 430.10, subdivision (e) authorizes a demurrer to a complaint for failure to state a cause of action. Before filing a demurrer, the moving party must meet and confer with the pleading party "for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." Code Civ. Proc., § 430.41(a). The moving party must submit a declaration describing those meet and confer efforts. Code Civ. Proc., § 430.41(a)(3).

A demurrer "test[s] the legal sufficiency of a complaint." *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994. When considering demurrers, courts read the allegations liberally and in context, and "treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." *Serrano v. Priest* (1971) 5 Cal.3d 584, 591. Courts "also consider matters which may be judicially

noticed." *Ibid.* "The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747. Leave to amend should be granted if there is "a reasonable possibility any defect identified . . . can be cured by amendment." *Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.

B. Standing Under the UCL, FAL, and CLRA

Defendants' primary contention is that Plaintiff lacks standing to bring his UCL and FAL claims. Actions under the UCL "shall be prosecuted exclusively in a court of competent jurisdiction by," as relevant here, "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code § 17204. Actions "for injunctions under" the FAL may be brought "by any person who has suffered injury in fact and has lost money or property as a result of a violation of this chapter." Bus. & Prof. Code § 17535.

Our Supreme Court interpreted the standing requirements for claims under the UCL and FAL in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310 (*Kwikset*). There the Court found standing exists only where plaintiffs "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." *Id.* at 322.

The *Kwikset* Court gave the phrase "injury in fact" the "well-settled meaning" accorded to by federal courts as a requirement for "federal standing under article III, section 2 of the United States Constitution." *Id.* at 322. "Under federal law, injury in fact is 'an invasion of a legally protected interest which is (a) concrete and particularized, [citations]; and (b) 'actual or imminent, not 'conjectural' or 'hypothetical,' ' [citations].' [Citations.]" *Ibid.* " 'Particularized' in this context means simply that 'the injury must affect the plaintiff in a personal and individual way.' " *Id.* at 323.

The "proof of injury in fact will in many instances overlap" with proof the plaintiff "lost money or property," i.e., suffered "some form of economic injury." *Id.* at 323. Economic injury is shown where a plaintiff "(1) surrender[s] in a transaction more, or acquire[s] in a transaction less, than he or she otherwise would have; (2) [has] a present or future property interest diminished; (3) [is] deprived of money or property to which he or she has a cognizable claim; or (4) [is] required to enter into a transaction . . . that would otherwise have been unnecessary." *Ibid.*

Finally, the "economic injury [must] come 'as a result of' the unfair competition or a violation of the false advertising law." *Id.* at 326. "The phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection or reliance on the alleged misrepresentation." *Ibid.* UCL and FAL claims "based on a fraud theory" require allegations showing reliance on the defendant's misrepresentations because " 'reliance is the causal mechanism of fraud.' " *Ibid.*

To have standing under the CLRA a plaintiff must be a "consumer who suffers any damage as a result of" acts proscribed by Civil Code section 1770. Civ. Code, § 1780(a). "[I]n order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result." *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 641. The "Legislature . . . set a low but nonetheless palpable threshold of damage" as a requirement for CLRA standing. *Id.* at 646. In short, the consumer must suffer some ("any") damage that is caused by an unlawful practice proscribed by Civil Code section 1770.

C. Plaintiff's Additional Claims

A claim for breach of warranty requires plaintiffs to prove (1) the seller's statements constitute an " 'affirmation of fact or promise' " or a " 'description of the goods' "; (2) the statement was " 'part of the basis of the bargain' "; and (3) the warranty was breached. *Weinstat v. Dentsply Int'l, Inc.* (2010) 180 Cal.App.4th 1213, 1227; *McVicar v. Goodman Global, Inc.* (C.D. Cal. 2014) 1 F.Supp.3d 1044, 1056-1057.

The elements of negligent misrepresentations are "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *National Union Fire Ins. Co of Pittsburgh, PA v. Cambridge Integrated Services Grp., Inc.* (2009) 171 Cal.App.4th 35, 50. The elements of intentional misrepresentation are "(1) a misrepresentation; (2) knowledge of falsity; (3) intent to induce reliance; (4) actual and justifiable reliance; and (5) resulting damage." *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-31, citing *Lazar v. Sup. Ct.* (1996) 12 Cal.4th 631, 638. Intentional misrepresentation is a species of fraud. "Each element of a fraud count must be pleaded with particularity so as to apprise the defendant of the specific grounds for the charge and enable the court to determine whether there is any basis for the cause of action . . ." *Chapman, supra*, 220 Cal.App.4th at 231.

The scope of an unjust enrichment claim was defined by the Court of Appeal in *LeBrun v. CBS Studios, Inc.* (2021) 68 Cal.App.5th 199 (*LeBrun*). The doctrine is an equitable one. The claim is cognizable " 'where plaintiffs, having no enforceable contract, nevertheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances which make it inequitable for the defendant to retain the benefit without paying for its value.' " *Id.* at 209, quoting *Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 938.

III. SUMMARY OF RELEVANT ALLEGATIONS

The Complaint alleges:

> Complaint ¶ 4. Tetrahydrocannabinol (commonly known as "THC") is the primary active ingredient in cannabis. THC "is the chemical responsible for most of marijuana's psychological effects."
>
> Complaint ¶ 5. DCC [California Department of Cannabis Control] regulations require that the label of cannabis products include a declaration of the product's THC content. Depending on the nature of the product, the THC content can be expressed as a percentage (for example, 30% THC) or

in milligrams (for example, 550mg). Further, the THC content on the label must be within 10% of what is actually in the package.

Complaint ¶ 6. Defendants Lowell Farms Inc. and Cypress Manufacturing Company make, sell, distribute, and market the "Lowell Herb Co." brand, including "preroll" products. A "preroll" consists of cannabis that has been "rolled" in paper so that it can be smoked out of the box (as opposed to "loose" cannabis, such as flower, which a consumer must roll into a joint or consume in some other way).

Complaint ¶ 7. As required by DCC regulations, each of Defendants' products include a label that purportedly identifies the THC content of the product. For Defendants' products, the labels include the THC content expressed as a percentage.

Complaint ¶ 8. The THC content declared on the label of Defendants' cannabis products has an upper range that is typically very high (such as 30% for non-infused flower prerolls and in excess of 40% for infused flower pre-rolls). Because cannabis consumers generally prefer and are willing to pay more for high-THC cannabis products, declaring that their products have a very high THC content allows Defendants to charge premium rates for their cannabis products.

Complaint ¶ 9. The declarations of THC content on Defendants' labels, however, are false. Testing by independent labs reveals that the true THC content of Defendants' products is materially less than the amount listed on the label. Moreover, the difference is far greater than the 10% margin of error that DCC regulations permit. Defendants are systematically overstating the THC content to deceive consumers into thinking that the effects of their prerolls are more potent than they truly are. This is false and misleading. And, it violates DCC regulations, and California law.

Complaint ¶ 28. Defendants make, sell, distribute, and market the Lowell Herb Co. brand of infused and non-infused preroll products (the "Lowell Products" or "Products"). In California, "Lowell Herb Co products now accounts for over 10% of the total non-infused pre-roll market." Defendants' Lowell Products include the following:

- Lowell Smokes Classic Preroll Packs (including but not limited to The Wake Up Sativa, The Relaxing Indica, The Zen Hybrid, The Indica Blend and The Happy Hybrid);
- Lowell Smokes Individual Prerolls (including but not limited to Grease Monkey, Eight Daze Indica, Triple Sour OG, Disco Mints, Original Gorilla, Mother's Milk, and Cherry Glaze);

- Lowell Smokes Infused Prerolls (including but not limited to Hash Wrapped Disco Mints, Hash Wrapped Smoke Sour Diesel, Hash Wrap, and OG Blueberry Creme); and
- Lowell Smokes Quicks Eighth Packs (including but not limited to The Social Sativa, The Relaxing Indica, The Chill Indica, The Passion Hybrid, The Wake-Up Sativa, and The Vivid Sativa)

Complaint ¶ 32. Independent laboratory testing of Lowell Products reveals that the actual THC content of the products is materially less (well below the allowable 10% margin of error) than what was declared on the label.

Complaint ¶ 33. For example, the Lowell Smokes – The Relaxing Indica – 6 Premium Pre-Rolls Pack was listed as having 29.68% THC on the label. Lab testing showed, however, that the actual THC content of the product was substantially lower, at 18.69% THC. Thus, the THC content was overstated by 37%—substantially more than the 10% margin of error allowed under the California regulations.

Complaint ¶ [I]n September 2022, cannabis publication Weed Week published an article after testing several California preroll brands to see whether the THC contents listed on the labels were accurate. Their tests revealed that, for prerolls, "potency inflation is close to ubiquitous." The reference to this article is hyperlinked in the Complaint and considered thereby incorporated.

Complaint ¶ 44. Defendants' false and misleading labeling allows Defendants to charge higher prices for their products. As explained above, the THC content drives the sales of cannabis products—including the price at which the products sell for, how quickly they sell, and whether they sell at all.

Complaint ¶ 45. If Defendants told the truth— that is, that their products' THC content is substantially lower than represented on the label— the price of their Products would fall dramatically. If consumers knew the truth— that the Products contain substantially less THC than the label says— Defendants could not sell their Products for its current prices. Indeed, as explained above, cannabis products with lower declared amounts of THC content sell for substantially less than ones with higher declared amounts of THC content. Accordingly, if Defendants told the truth about the THC content of their products, they would have had to lower the price, and Plaintiff and class members would have paid less. Similarly, if Plaintiff and class members had known that Defendants systematically overstate the THC content of their products, they would not have purchased the products, or would have paid less for them.

Complaint ¶ 48. On June 10, 2022, Buntarn Lun purchased the Lowell Smokes – the Relaxing Indica Preroll 6-Pack from the Catalyst dispensary in Long Beach, California. He read and relied on the accuracy of the THC content of the product. If he had known the truth, he would not have purchased the product, or would have paid less for it.

IV. REQUEST FOR JUDICIAL NOTICE AND DECLARATIONS

Defendants request judicial notice of (1) Cal. Code of Regulations, Title 4, § 17407(a) (Ex. 1); (2) Cal. Code of Regulations, Title 4, § 15307.1 (Ex. 2); (3) California Department of Cannabis Control, Testing Laboratories Summary of Regulations, https://cannabis.ca.gov/licenses/testing-laboratories/ (Ex. 3); and (4) Cal. Code of Regulations, Title 4, § 15307(a) (Ex. 4). These are proper subjects of judicial notice.

Plaintiff submits a Declaration by Plaintiff's counsel Christin Cho. Defendants filed no objections but Cho's Declaration cannot be considered and is not discussed because in ruling on a demurrer the Court may only consider the challenged pleading and matters judicially noticed.

Defendants also offer the Declaration of defense counsel Joel M. Athey describing Defendants' pre-filing meet and confer efforts, as discussed below. Athey also offers a "copy of the Weed Week article referenced in the Complaint" but does not request judicial notice of the article. The article is hyperlinked, the electronic equivalent of an attachment.

V. PROCEDURAL REQUIREMENTS

As the moving parties Defendants were required to submit a meet and confer declaration in support of the demurrer. Code Civ. Proc., § 430.41(a). Defense counsel Athey testifies that he informed Plaintiff's counsel Rick Lyon of "the grounds for the demurrer related to his client's lack of standing" and testifies the attorneys "spoke about this for some period of time" without reaching "any compromise that would obviate the need for the demurrer." Athey Dec., ¶ 2. On May 25, 2023, eight days before filing the Demurrer, Athey emailed Lyon asking "whether he thought further meeting and conferring would be of any benefit" and testifies Lyon confirmed the parties had already fully

discussed the matter. Athey Dec., ¶ 3, Ex. A (email exchange). The meet and confer declaration is sufficient.

VI. ANALYSIS

A. The First through Sixth Causes of Action Are Sufficiently Pled

Defendants assert "[t]here is no allegation that Plaintiff tested the product that he purchased to determine its THC%." Demurrer, p. 12. They urge that without such testing of the product—or the batch from which the product was made –Plaintiff does not and cannot allege that he purchased a product that was mislabeled. Defendants argue the UCL, FAL, and CLRA claims fail because (1) Plaintiff cannot establish an injury-in-fact from purchasing a mislabeled product without testing the product and (2) Plaintiff cannot establish Defendants' conduct caused his injury because he cannot show Defendants mislabeled his product without testing it. Demurrer, pp. 14-20. Defendants argue Plaintiff's negligent and intentional misrepresentation claims fail because Plaintiff "cannot allege in a non-conclusory way that the unit of Lowell product that he purchased contained any misrepresentation on the label because he never tested it." Demurrer, p. 22. Defendants argue Plaintiff's unjust enrichment claim fails because Plaintiff cannot "allege in a non-conclusory way that the label of the unit of Lowell product that he bought was 'false and misleading' because he did not test it." Demurrer, p. 23.

Defendants put particular emphasis on the nature of the product and its regulation. They note that unlike many consumer products, there is no "uniformity" as to the product because it is plant based and thus necessarily non-uniform. It is for this reason they argue that California labelling regulations require that each "batch" be separately tested and that the THC label on the product reflect the percentage of THC in the "batch" from which the product was made. Thus, they explain that a "state-certified laboratory tests a random sample of the cannabis products made from a particular production batch and provides a Certificate of Analysis ("COA") identifying the THC% of that production batch (and only that batch). Defendants then use the THC% listed on the COA and label the products made

from that production batch with its THC content. Notably, THC content can vary widely between production batches." Demurrer, p. 10:7-11; 1 Cal. Code Regs. Title 4, § 17407(a) (RFJN Ex. 1). From these facts they contend that Plaintiff must allege that the particular product he purchased understated its THC content and that if he cannot so plead he does not have standing.

Many of the parties' arguments focus on information that cannot be considered on demurrer because it is outside the four corners of the Complaint and not judicially noticable. The only matters properly before the Court are the Complaint and certain judicially noticed cannabis regulations. The Complaint alleges that Plaintiff purchased the "Lowell Smokes – the Relaxing Indica Preroll 6-Pack" and alleges testing of the same type of product Plaintiff purchased showed inflated THC percentages. Complaint, ¶¶ 33, 48. Plaintiff further alleges he "read and relied on the accuracy of the THC of the product" in purchasing it and "would not have purchased the product, or would have paid less for it" if he knew the THC content was mislabeled. Complaint, ¶ 48.

The gist of Defendants' argument is that because *Kwikset* interpreted the UCL and FAL as requiring plaintiffs show the equivalent of Article III standing to bring their claims Plaintiffs also must comply with federal pleading standards. They cite federal cases applying federal pleading standards, including *Fahey v. Deoleo USA, Inc.* (D.D.C. Nov. 8, 2018) Case No. 18-cv-2047 (CRC), 2018 WL5840664 at *3 (finding plaintiff failed to plead "facts that suggest a plausible right to relief" without relying on unreasonable "assumptions") and *Wallace v. ConAgra Foods, Inc.* (8th Cir. 2014) 747 F.3d 1025, 1030-31 (absent allegations showing "how many packages were tainted with non-kosher beef," it was "pure speculation to say the particular packages sold to the consumers were tainted by non-kosher beef, while it is quite plausible ConAgra sold the consumers exactly what was promised: a higher quality, kosher meat product."). They also cite *Ashton v. J.M. Smucker Co.* (C.D. Cal. Dec. 16, 2020) 2020 WL 8575140, which held that "UCL, FAL, and CLRA claims must meet the heightened pleading standards required by Rule 9" under *Kearns v. Ford Motor Co.* (9th Cir. 2009) 567 F.3d 1120, 1125. *Id.* at *9.

The fact that the federal *standing* requirements apply to the UCL and FAL does not also mean the federal *pleading* requirements apply in state court, particularly the plausibility pleading rule at issue in *Fahey* and *Wallace*. Defendants cite no authority for the proposition that UCL or FAL claims in *state court* require allegations that the product the plaintiff purchased (or even the "batch") was tested and did not conform to its labelling, as was required to make a "plausible" showing of standing in *Fahey* and *Wallace*.

California law requires a "statement of the facts constituting the cause of action, in ordinary and concise language," and a proper "demand for judgment" (the latter is not challenged here). Code Civ. Proc., § 425.10(a). Thus, a "plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619, citing *Committee on Children's Television Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 213-214. No more is required. Plaintiffs' allegations describe "with reasonable particularity" the facts showing Defendants' practice of mislabeling cannabis products, including the type of product Plaintiff purchased.

Plaintiffs' intentional misrepresentation claim is subject to a heightened pleading standard for fraud claims requiring each element "be pleaded with particularity." *Chapman, supra,* 220 Cal.App.4th at 231. "This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered." *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; see *Ashton, supra*, 2020 WL 8575140 at *9 ("litigants bringing deceptive practice claims must allege 'the who, what, when, where, and how' of the supposedly fraudulent conduct.")

The Complaint is sufficient in this regard as well. On June 10, 2022 (the "when"), Plaintiff allegedly bought Defendants' particular product at a particular store (the "where") that Defendants labeled with misrepresentations about the THC content of the product ("how and by what means" fraudulent statements were made). The allegations are sufficient to "apprise the defendant of the specific grounds for the charge" that it

misrepresented the THC content of the product Plaintiff purchased. *Chapman, supra,* 220 Cal.App.4th at 231.

Defendants identify an evidentiary defect, not a pleading defect. If Plaintiffs consumed the preroll pack and are unable to reliably test other products from the same cannabis batch, Plaintiffs may or may not be unable to *prove* the product that they purchased was mislabeled within the meaning of Cal. Code Regs., Tit. 4 §§ 15307 et seq. This is not an issue at the pleading stage—a demurrer does not test the plaintiff's ability to *prove* a case. *McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72, 78 (" '[W]hether the plaintiff will be able to prove the pleaded facts is irrelevant to ruling upon the demurrer.' ")

The demurrer is thus OVERRULED as to the First through Sixth Causes of Action.

B. The Seventh Cause of Action Fails

A claim for unjust enrichment lies in equity when no contract or implied contract may be pled. *LeBrun, supra*, 68 Cal.App.5th at 209. Plaintiff's fourth cause of action is for breach of an express warranty, which is a contract. Plaintiff conceded at oral argument that this claim is not well pled and indicated that Plaintiff did not seek leave to amend. The demurrer to the seventh cause of action is SUSTAINED without leave to amend.

VII. ORDER

For the foregoing reasons, Defendants' Demurrer is OVERRULED as to the first through Sixth Causes of Action and sustained as to the Seventh Cause of Action. Leave to amend is denied. An answer shall be filed within twenty (20) days.

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A further status conference is scheduled for September 15, 2023 at 9:00 a.m. The parties shall file a joint status report 5 court days in advance setting forth a discovery plan and proposed dates for class certification and/or dispositive motions.

Dated: 7/31/2023

MAREN E. NELSON
JUDGE OF THE SUPERIOR COURT