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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RENEE WALKER,

12 Plaintiff,

13 v.

14 NESTLE USA, INC.,

15 Defendant.
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Case No.: 3:19-cv-723-L-BGS

CLASS ACTION

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

[ECF No. 32]

17 Pending before the Court in this putative consumer class action alleging deceptive
18 product labeling is Defendant's motion to dismiss for failure to state a claim. (ECF no.
19 32). Plaintiff filed an opposition, and Defendant replied. (ECF nos. 40 ("Opp'n"), 41.)
20 The Court decides the motion on the briefs without oral argument. *See* Civ. L. R.
21 7.1(d)(1). For the reasons stated below, Defendant's motion is granted with leave to
22 amend.

23 **I. BACKGROUND**

24 According to the operative complaint, Defendant is the world's largest food
25 company and is best known for its chocolate products. It purchases approximately
26 414,000 tons of cocoa annually. Plaintiff claims that the statements on Defendant's
27 chocolate product labels are deceptive because they falsely lead consumers to believe that
28 the products were produced in accordance with environmentally and socially responsible

standards, when they were not. (ECF no. 15 (“FAC”) at 3.)¹ This includes references to the “Nestle Cocoa Plan,” “UTZ Certified” and “Sustainably Sourced,” and representations that Defendant “Support[s] farmers” and “help[s] improve the lives of [cocoa farmers.” (*Id.* at 4, 6.) Plaintiff alleges she purchased Defendant’s chocolate products in reliance on the social and environmental benefits prominently featured on the packaging and would not have purchased the products had she known the representations were false. (*Id.* at 3-4.) According to Plaintiff, the labels are deceptive because Defendant sources its cocoa from West African plantations which rely on child labor and child slave labor, contribute to deforestation, and use other practices harmful to the environment. (*Id.* at 2, 4-5, 7-16.)

Plaintiff alleges violations of the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (“CLRA”), and the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (“UCL”), on her own behalf as well as on behalf of a putative nationwide class. She seeks damages, restitution, disgorgement of profits, and injunctive relief. The Court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d). Defendant moves for dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

A motion under Rule 12(b)(6) tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).² Dismissal is warranted where the complaint lacks a cognizable legal theory. *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). Alternatively, a complaint may be dismissed where it

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¹ All page citations in this Order refer to those generated by the Court’s CM/ECF system.

² Unless otherwise noted, internal quotation marks, citations, and footnotes are omitted.

1 presents a cognizable legal theory yet fails to plead essential facts under that theory.
2 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

3 In reviewing a Rule 12(b)(6) motion, the Court must assume the truth of all factual
4 allegations and construe them most favorably to the nonmoving party. *Huynh v. Chase*
5 *Manhattan Bank*, 465 F.3d 992, 997, 999 n.3 (9th Cir. 2006). However, legal
6 conclusions need not be taken as true merely because they are couched as factual
7 allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Similarly,
8 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a
9 motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

10 Generally, a plaintiff must allege only “a short and plain statement of the claim
11 showing that the pleader is entitled to relief.” Fed. R. Civ. Proc. 8(a)(2); *see also Bell*
12 *Atl. Corp.*, 550 U.S. at 555. However, Rule 9(b) requires that “[i]n alleging fraud . . . a
13 party must state with particularity the circumstances constituting fraud Malice,
14 intent, knowledge, and other conditions of a person’s mind may be alleged generally.”
15 “Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily
16 constitute fraud (even if the word ‘fraud’ is not used.)” *Vess v. Ciba-Geigy, Corp. USA*,
17 317 F.3d 1097, 1105 (9th Cir. 2003). “Where fraud is not an essential element of a claim,
18 only those allegations of a complaint which aver fraud are subject to Rule 9(b)’s
19 heightened standard.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009).
20 “To the extent a party does not aver fraud, the party’s allegations need only satisfy
21 requirements of Rule 8(a)(2).” *Kearns*, 567 F.3d at 1124.

22 Defendant moves to dismiss the complaint for failure to allege Plaintiff’s claims
23 with the specificity required by Rule 9(b). The rule applies to Plaintiff’s consumer
24 protection claims because they are grounded in fraud. *See Kearns*, 567 F.3d at 1125,
25 1127 (applying Rule 9(b) to UCL and CLRA claims). Plaintiff’s claims are premised on
26 Defendant’s alleged deceptive labeling of chocolate products. (*See* FAC at 29 (violations
27 of Cal. Civ. Code § 1770(a)(5), (7), (9) (together “CLRA Violations”)); *id.* at 31 (UCL
28 violations based on CLRA Violations and violation of Cal. Bus. & Prof. Code § 17580.5

1 (prohibiting deceptive environmental marketing claims)); *id.* at 33 (fraudulent business
2 practices in violation of UCL); *id.* at 34 (unfair business practice by fraudulent marketing
3 in violation of UCL.) Accordingly, Plaintiff’s claims are “grounded in fraud.” *See*
4 *Kearns*, 567 F.3d at 1125. Rule 9(b) therefore applies to Plaintiff’s pleading as a whole.
5 *See id.* Plaintiff does not dispute this. (*See* Opp’n at 11-14.)

6 Under Rule 9(b), fraud allegations must be “specific enough to give defendants
7 notice of the particular misconduct . . . so that they can defend against the charge and not
8 just deny that they have done anything wrong.” *Vess*, 317 F.3d at 1106. Therefore, a
9 complaint must include “the who, what, when, where, and how of the misconduct
10 charged.” *Id.* In this regard, a plaintiff “must set forth *more* than the neutral facts
11 necessary to identify the transaction.” *Kearns*, 567 F.3d at 1124 (emphasis in orig.).

12 Defendant claims that Plaintiff has not alleged which products she purchased and
13 when, what label statements she saw, and why she relied on them. In *Kearns*, the
14 plaintiff alleged Ford Motor Company “knowingly misrepresent[ed] to the public that
15 [the certified pre-owned] vehicles [were] safer and more reliable, with an intent to induce
16 reliance and defraud consumers.” *Kearns*, 567 F.3d at 1127. However, he did not allege

17 what the television advertisements or other sales material specifically stated.
18 Nor did *Kearns* specify when he was exposed to them or which ones he
19 found material. *Kearns* also failed to specify which sales material he relied
20 upon in making his [purchasing] decision *Kearns* [alleged] that he was
21 specifically told ‘[the] vehicles were the best used vehicles available as they
22 were individually hand-picked and rigorously inspected used vehicles with a
23 Ford-backed extended warranty.’ *Kearns* [did] not, however, specify who
made this statement or when this statement was made. *Kearns* failed to
articulate the who, what, when, where, and how of the misconduct alleged.

24 *Id.* at 1126. Based on this analysis, the Court held that the complaint did not comply with
25 Rule 9(b). *Id.* at 1127-28.

26 Contrary to Plaintiff’s protestations (*see* Opp’n at 12), the complaint does not
27 identify the products she purchased. Plaintiff alleged the following:

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1 Plaintiff purchased Defendant Nestlé’s chocolate products labeled with the
2 “Nestlé Cocoa Plan” “UTZ Certified” “Certified through UTZ” and
3 “Sustainably Sourced” labels on them purporting to, among other things,
4 “Support[] farmers for better chocolate” and “help improve the lives of
5 []cocoa farmers.” Plaintiff relied upon Nestlé’s misrepresentations about the
6 social and environmental benefits of the products in making her decision to
7 purchase the products. Plaintiff suffered injury in that she would not have
8 bought the UTZ/Nestlé Cocoa Plan/Sustainability-labeled products had she
9 known that the products were not sourced from sustainable farming practices
10 but rather off the backs of child and slave labor.

11 (FAC at 4.) Plaintiff also provided four photographs of product packages bearing these
12 labels. (*Id.* at 7.) However, nowhere in the operative complaint does Plaintiff identify
13 the product she purchased. She does not allege that she purchased any of the products
14 shown in the photographs. Without this information it is impossible to infer what was
15 stated on the labels of the products she purchased, and how the statements were presented
16 on the labels. *See Hill v. Roll Int’l Corp.*, 195 Cal. App. 4th 1295, 1304-05 (2011)
17 (context of the challenged statement is important); *see also Williams v. Gerber*, 552 F.3d
18 934, 939 & n.3 (9th Cir. 2008). Plaintiff’s allegations are too general to identify the
19 transaction at issue, *a fortiori*, they are insufficient to meet the heightened pleading
20 standard under Rule 9(b).

21 Plaintiff requests leave to amend. (Opp’n at 12, 14, 25.) Rule 15 advises leave to
22 amend shall be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). “This
23 policy is to be applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*,
24 316 F.3d 1048, 1051 (9th Cir. 2003).

25 In the absence of any apparent or declared reason – such as undue delay, bad
26 faith or dilatory motive on the part of the movant, repeated failure to cure
27 deficiencies by amendments previously allowed, undue prejudice to the
28 opposing party by virtue of allowance of the amendment, futility of the
amendment, etc. – the leave sought should, as the rules require, be freely
given.

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1 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Because Plaintiff may be able to identify the
2 products she purchased, and when and where she purchased them, leave to amend is
3 granted.

4 **III. CONCLUSION**

5 Defendant's motion to dismiss is granted with leave to amend. Plaintiff shall file
6 an amended complaint, if any, no later than April 19, 2021. Defendant shall file a
7 response to the amended complaint, if any, no later than the time set forth in Federal Rule
8 of Civil Procedure 15(a)(3).

9 **IT IS SO ORDERED.**

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11 Dated: March 30, 2021

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13 Hon. M. James Lorenz
14 United States District Judge
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