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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAANDREW GASSER, et al.,
Plaintiffs,
v.
KISS MY FACE, LLC,
Defendant.Case No. [17-cv-01675-JSC](#)**ORDER RE: MOTION TO DISMISS**

Re: Dkt. Nos. 85 & 87

Plaintiffs allege that Defendant Kiss My Face's representations on its products' labels are likely to deceive a reasonable consumer into thinking the products do not contain any synthetic ingredients. Defendant's motion to dismiss Plaintiffs' third amended complaint ("TAC") is pending before the Court. (Dkt. No. 85.) After considering the parties' briefs, and having had the benefit of oral argument on September 6, 2018, the Court GRANTS IN PART and DENIES IN PART Defendant's motion to dismiss.

The background and procedural history of this matter are discussed in detail in the Court's previous order on Defendant's motion for judgment on the pleadings. (See Dkt. No. 73.) On April 24, 2018, Plaintiff filed its TAC, bringing eight claims: (1) California's Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et seq. ("CLRA"), (2) California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. ("UCL"), (3) California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 et seq. ("FAL"), (4) New York's Deceptive Acts or Practices, N.Y. Gen. Bus. Law § 350 ("GBL"), (5) New York's False Advertising Law, N.Y. GBL § 350, (6) breach of express warranty, (7) unjust enrichment, and (8) fraud. (Dkt. No. 74 at ¶¶ 52-105.) On July 16, 2018, Defendant filed the instant motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). Pursuant to Rule 12(b)(6), Defendant moves to dismiss

1 Plaintiffs’: (a) Body Wash claims; (b) Body Lotion claims; (c) Sunscreen claims; and (d) breach of
2 express warranty, unjust enrichment, and fraud claims. Pursuant to Rule 12(b)(2), Defendant
3 moves to dismiss all claims as to the putative nationwide class of consumers for lack of personal
4 jurisdiction. (Dkt. No. 85 at 2:3-19.)

5 **REQUEST FOR JUDICIAL NOTICE**

6 When considering a motion to dismiss, a court does not normally look beyond the
7 complaint in order to avoid converting a motion to dismiss into a motion for summary judgment.
8 *Ngoc Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022, 1024 (N.D. Cal. 2010). However,
9 a court may take judicial notice of material that is submitted as part of the complaint or is
10 necessarily relied upon by the complaint, as well as matters of public record. *Lee v. City of L.A.*,
11 250 F.3d 668, 688-89 (9th Cir. 2001). Under Federal Rule of Evidence 201(b), a “judicially
12 noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known
13 within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready
14 determination by resort to sources whose accuracy cannot reasonably be questioned.”

15 Defendant requests that the Court take judicial notice of the following in support of its
16 motion to dismiss the TAC: (1) the Declaration of Heather Halpern, exhibits A to U, (Dkt. No.
17 89); and (2) the Declaration of Stephen Paffrath, exhibit A, (Dkt. No. 88). (See Dkt. No. 86.)

18 Several of the claims in Plaintiffs’ TAC “necessarily rely” upon information contained in
19 the exhibit to the Declaration of Stephen Paffrath; specifically—a “true and correct copy of a print
20 out” of the webpage cited in the TAC, which defines the composition of caprylic/capric
21 triglycerides. (Dkt. No. 74 at ¶8, n.7.) Thus, judicial notice of exhibit A to the Paffrath
22 declaration is proper. See *Lee*, 250 F.3d at 688-89. Accordingly, the Court GRANTS Defendant’s
23 request for judicial notice of exhibit A to the Paffrath declaration.

24 The exhibits attached to the Halpern Declaration are not appropriate for judicial notice.
25 Whether the labels contained therein are the only labels that were in use during the class period is
26 not an issue of which the Court can take judicial notice. See Fed. R. Evid. 201(b). Accordingly,
27 the Court DENIES Defendant’s request for judicial notice of the exhibits attached to the
28 Declaration of Heather Halpern.

1 **DISCUSSION**

2 **I. Motion to Dismiss under Rule 12(b)(2)**

3 Defendant moves to dismiss the claims of putative class members pursuant to Rule
4 12(b)(2) for lack of personal jurisdiction.

5 Defendant relies on Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773 (2017),
6 arguing that because Plaintiffs have alleged no connection between the non-resident proposed
7 class members’ claims and Defendant’s activity in the forum, specific jurisdiction is lacking for
8 the unnamed class members residing outside California or New York. (Dkt. No. 87 at 19:18-19.)
9 Defendant insists that “it is not enough the claims of the non-resident proposed class members are
10 similar to those asserted by the resident.” (Dkt. No. 87 at 20:18-20.)

11 Plaintiffs counter that, pursuant to Rule 12(g)(2), Defendant waived any challenge to
12 personal jurisdiction by failing to assert it in Defendant’s initial motion to dismiss. Plaintiff
13 further argues that here, specific jurisdiction is not based on the claims of absent class members
14 for two reasons: (1) the Court has specific personal jurisdiction over the nonresident, unnamed
15 class members’ claims by virtue of its jurisdiction over the named-Plaintiffs’ claims; and (2)
16 Bristol-Myers contemplated a mass tort and is inapposite to the subject class action. (Dkt. No.
17 91.)

18 It is undisputed that the Court has personal jurisdiction of the named plaintiffs from
19 California and New York. As explained at oral argument, the Court does not understand how it
20 can lack personal jurisdiction of persons who are not yet (and may never be) parties to this action,
21 that is, the putative class members. See Chernus v. Logitech, Inc., No. 17-673, 2018 WL 1981481,
22 at *8 (D.N.J. Apr. 27, 2018) (“At this stage of litigation, no class has been certified, and therefore,
23 to determine whether this Court has specific jurisdiction over Defendant with respect to the claims
24 of the unnamed class members prior to class certification would put the proverbial cart before the
25 horse.”) Given that it is premature to raise a personal jurisdiction issue as to putative class
26 members, it is likewise premature to conclude that Defendant waived its ability to challenge the
27 personal jurisdiction of the putative class members. Bristol-Myers does not compel a different
28 result as there all nonresident plaintiffs were named plaintiffs, that is, parties to the action. 137 S.

1 Ct. at 1778. Accordingly, at this stage of the litigation, where Defendant has brought three
2 motions to dismiss and a motion for judgment on the pleadings, the issue of whether Plaintiffs can
3 and/or should represent consumers outside of New York and California is an issue to be raised at
4 class certification. See *Campell v. Freshbev, LLC*, No. 1:16-cv-7119, 2018 WL 3235768, at *2
5 (E.D.N.Y. July 2, 2018) (“Given the unsettled nature of the law following *Bristol-Myers*, the
6 Court will defer on [the issue of specific jurisdiction over plaintiff’s proposed out-of-state class
7 members] until the plaintiffs brings a motion for class certification).

8 The Court therefore DENIES Defendant’s 12(b)(2) motion to dismiss.

9 **II. Motion to Dismiss Under Rule 12(b)(6)**

10 Defendant argues that Plaintiffs’ CLRA, UCL, FAL, and GBL claims must be dismissed
11 because Plaintiffs fail to allege plausible misrepresentation under the reasonable consumer
12 standard. Furthermore, Defendant insists that Plaintiffs’ breach of express warranty, unjust
13 enrichment, and fraud claims should be dismissed for failure to allege the applicable state law
14 under which the claims are brought.

15 **A. Plaintiffs’ Body Wash and Body Lotion Claims**

16 In its April 4, 2018 order granting in part Defendant’s motion for judgment on the
17 pleadings, the Court held that “‘nourish naturally’ cannot be construed as a representation that the
18 product contains only natural ingredients, the crux of Plaintiffs’ falsity allegation.” (Dkt. No. 73 at
19 8:17-19.) “[A]s the Court previously held, a reasonable consumer would interpret ‘nourish
20 naturally’ to mean that the product contains natural ingredients, rather than only natural
21 ingredients.” (Dkt. No. 73 at 8:4-6.) The Court therefore concluded that Plaintiffs did not
22 plausibly allege that the Body Wash and Body Lotion label phrase “nourish naturally with our
23 botanical blends” is likely to deceive a reasonable consumer. (Dkt. No. 73 at 8:17-27.)

24 In dicta, the Court posited two hypotheticals in which the adverb “naturally” may deceive
25 a reasonable consumer depending on the context of the label, taken as a whole:

26 “[N]ourish naturally” could perhaps reasonably be interpreted as
27 that most of the ingredients are natural; indeed, the statements might
28 be false if there was only one natural ingredient in the product. But
that is not Plaintiffs’ allegation. Or perhaps it could be construed as
a representation that the active, effective ingredients—those that

1 nourish—are natural. Again, Plaintiffs do not allege that such a
2 representation is false.

3 (Dkt. No. 73 at 8:22-27.) The Court granted Plaintiffs leave to amend because “Plaintiffs allege[d]
4 for the first time that ethylhexylglycerin and butyloctyl salicylate are conditioning agents” but
5 otherwise failed to “explain what that means.” (See Dkt. No. 73 at 9:2-5, 9:3-5) (“[T]he Court
6 cannot conclude as a matter of law that [ethylhexylglycerin and butyloctyl salicylate] are not active
7 ingredients that provide the ‘nourishment’ or make the product ‘effective’ simply because
8 Plaintiffs alleged the ingredients are conditioning agents.”)

9 Plaintiffs now allege that the labeling is misleading because ethylhexylglycerin is a
10 “synthetic ingredient that purportedly provides nourishment” and that “butyloctyl salicylate is a
11 ‘synthetically produced ester of salicylic acid and a defined branched C12 alcohol, 2-
12 Butyloctanol,’ and provides ‘a pleasant, moisturizing skin feel.’” (Dkt. No. 74 at ¶¶ 6-7.)
13 Plaintiffs also allege that the natural ingredients Defendant advertises as providing nourishment
14 are “buried” within the product’s ingredient list beneath active, synthetic ingredients such as
15 caprylic/capric triglyceride. (Dkt. No. 74 at ¶ 8.) Plaintiffs further allege, for the first time, that
16 caprylic/capric triglyceride is an active synthetic ingredient that “nourishes” and makes
17 Defendant’s moisturizers and body wash products “effective.” (Dkt. No. 74 at ¶¶ 6-8.)

18 **a) Body Wash Claims**

19 Relying on the exhibits attached to the Declaration of Heather Halpern (Dkt. No. 89), as
20 well as her declaration testimony, Defendant contends that its product labels contradict Plaintiffs’
21 claims. In particular, Defendant argues that the only synthetic ingredient in its Body Wash
22 products is phenoxyethanol—a preservative rather than an active or “nourishing” ingredient.

23 Plaintiffs respond that “Defendant appears to be correct when it states that butyloctyl
24 salicylate and caprylic/capric triglyceride were not included in the Body Wash products.” (Dkt.
25 No. 91 at 12:10-11.) Rather, Plaintiffs “respectfully stand by their position that the presence of
26 phenoxyethanol and ethylhexylglycerin supports their claims,” and “do not seek reconsideration of
27 the Court’s prior ruling on that issue,” but instead “reiterate their position here only to preserve the
28 issue for appeal.” (Id. at 12:11-15.)

1 Accordingly, the Court GRANTS Defendant’s motion to dismiss the Body Wash Claims
2 without leave to amend, but preserving Plaintiffs’ argument that the Court incorrectly ruled that
3 the presence of the preservative alone would not deceive a reasonable consumer.

4 **b) Body Lotion Claims**

5 In the TAC, Plaintiffs allege that caprylic/capric tryglyceride is an active synthetic
6 ingredient that “nourishes” and makes Defendant’s moisturizers and Body Lotion products
7 “effective.” (Dkt. No. 74 at ¶¶ 6-8.)

8 Defendant contends that its Body Lotion products do not contain any synthetic ingredients
9 to the extent that those products’ labels would mislead a reasonable consumer; specifically,
10 Defendant insists that: (1) butyloctyl salicylate is absent in its Body Lotion products; (2)
11 ethylhexylglycerin is present in very small amounts, consistent with its recognized use as a
12 preservative, not a conditioning agent; and (3) Plaintiffs’ complaint cites a source that states
13 caprylic/capric triglyceride is a natural derivative of coconut. (Dkt. No. 87, at 14:8-16:3.)

14 Plaintiffs do not dispute Defendant’s contention that its Body Lotion products are devoid
15 of butyloctyl salicylate. Nor do Plaintiffs dispute Defendant’s contention that ethylhexylglycerin
16 is present in very small amounts, consistent with its recognized use as a preservative, and not as a
17 conditioning agent. Plaintiffs’ main counter argument is that caprylic/capric tryglyceride is
18 synthetic because it is comprised, in part, of glycerin—a substance that Plaintiffs argue is
19 synthetic. Plaintiffs point to a United States Department of Agriculture regulation, 7 C.F.R. §
20 205.2, to support their contention that caprylic/capric triglyceride is a synthetic because it
21 “chemically changes” coconut oil by adding glycerin to it. 7 C.F.R. § 205.2. Plaintiffs argue that
22 whether caprylic/capric triglyceride is a naturally derived substance is a factual dispute not
23 susceptible to resolution on a motion to dismiss. The Court agrees.

24 While the Court took judicial notice of the website attached to the Declaration of Stephen
25 Paffrath, it cannot take judicial notice that the content of the website is true. *Von Saher v. Norton*
26 *Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). To accept the content for
27 the truth of the matter asserted would be improper hearsay. See Fed. R. Evid. 801(c)(2), 802;
28 *DMC Closure Aversion Comm. v. Goia*, No. 14–CV–03636–WHO, 2014 WL 4446831, at *8 n.12

1 (N.D.Cal. Aug. 29, 2014) (“[P]laintiffs' attempt to request judicial notice of newspaper articles and
2 other media accounts a[re] improper hearsay.”). Thus, on this motion to dismiss, the Court must
3 accept as true Plaintiffs’ allegation that caprylic/capric triglyceride is a synthetic ingredient that
4 “nourishes.” Whether the evidence will support that allegation is an issue for summary judgment.

5 It is plausible that a reasonable consumer would interpret the phrase “nourish naturally
6 with our botanical blends” as an advertisement that the product’s nourishing ingredients are all
7 natural. Moreover, the context in which the products’ labels advertise the phrase “nourish
8 naturally”—the depictions of leaves and flowers, statements emphasizing natural ingredients like
9 woodland pine or ginseng, or statements suggesting that the product is suitable for “sensitive
10 skin”—further suggests that the nourishing ingredients are natural. (See Dkt. No. 73 at 8:19-22.)
11 Plaintiffs now allege that caprylic/capric triglyceride is an active synthetic ingredient that
12 “nourishes” and makes Defendant’s moisturizers and body wash products “effective.” (Dkt. No.
13 74 at ¶¶ 6-8.) Thus, Plaintiffs have adequately alleged that Defendant’s Body Lotion Products are
14 likely to deceive a reasonable consumer into thinking the Products’ nourishing ingredients are
15 natural and not synthetic.

16 Accordingly, the Court DENIES Defendant’s motion to dismiss Plaintiffs’ Body Lotion
17 claims.

18 **B. Plaintiffs’ Sunscreen Claims**

19 In its April 4, 2018 order, the Court held that Plaintiffs plausibly alleged that the phrases
20 “100% natural mineral advanced protection” and “100% natural mineral hydrating defense” on the
21 Sunscreen products could deceive a reasonable consumer into believing that the products were
22 100% natural. (Dkt. No. 73 at 9:10-17.)

23 Defendant contends that only two of the eight sunscreen products identified in the TAC
24 contain the “100% natural mineral” labeling Plaintiffs allege. Thus, Defendant argues Plaintiffs’
25 complaint as to these remaining six products should be dismissed: (1) the Sun Spray Lotion Value
26 Size SPF 30 Cool Sport only used the phrase “natural coconut fragrance”; (2) SPF 30 Mineral
27 Sunscreen Lotion Baby’s First Kiss has never been manufactured; (3) neither of the two Baby’s
28 First Kiss Sunscreen products ever carried a “100% natural mineral” claim; and (4) the remaining

1 two products, at various times, included on their labels the “nourish naturally” and “obsessively
2 natural kids” labeling the Court has already determined do not mislead consumers into believing
3 the products are completely without “synthetic” ingredients. Each of Defendant’s contentions ,
4 however, necessarily rely on the testimony in the Declaration of Heather Halpern, which the Court
5 cannot consider on a motion to dismiss.

6 Accordingly, Defendant’s motion to dismiss Plaintiffs’ claims as to the Sunscreen products
7 is DENIED.

8 **C. Plaintiffs’ Common-Law Claims**

9 Plaintiffs bring their breach of express warranty, unjust enrichment, and fraud claims
10 against Defendant on behalf of the proposed nationwide class, California subclass, and New York
11 subclass. (Dkt. No. 74 at ¶¶ 89-105.) The Court has already determined that Plaintiffs’
12 allegations for its claims grounded in fraud have met the heightened pleading standard for Rule 9.
13 (Dkt. No. 54 at 11:6-16.)

14 Defendant argues that these three common-law claims should be dismissed for failure to
15 allege the state law under which they are brought. (Dkt. No. 87 at 19:6-17.) Defendant’s
16 argument relies on *In re Nexus 6P Products Liability Litigation*, 293 F. Supp. 3d 888 (N.D. Cal.
17 2018), in which the court dismissed class action plaintiffs’ unjust enrichment claim for failure to
18 identify the applicable state law. See *In re Nexus*, 293 F. Supp. 3d at 933 (citing *Romero v.*
19 *Flowers Bakeries, LLC*, No. 14-CV-05189-BLF, 2016 WL 469370, at *12 (N.D. Cal. Feb. 8,
20 2016); and *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 781 F. Supp. 2d 955, 966 (N.D. Cal.
21 2011)).

22 Plaintiffs counter that because Defendant has filed two motions to dismiss, an answer, and
23 one motion for judgment on the pleadings, Defendant is precluded under Rule 12(g)(2) from
24 making this argument in a successive Rule 12 motion for failure to state a claim. Plaintiffs argue
25 that the Court should decline to exercise its discretion to address the new argument at this “late”
26 stage of the proceedings for several reasons: (1) the purported defect could have been cured via
27 amendment in the SAC had Defendant raised the issue before; (2) in the prior motions, both
28 parties and the Court assumed that New York and California law governed the common-law

1 claims; and (3) if Defendant means to argue that Plaintiffs are required to plead the governing law
2 of absent class members outside of New York and California, the choice-of-law issue must be
3 addressed at class certification, not the pleading stage. (Dkt. No. 91 at 18:14-19:12.)
4 Indeed, Defendant only now argues that Plaintiffs' claims of breach of warranty, unjust
5 enrichment, and fraud are deficient for failure to identify the underlying state law. In a prior
6 motion to dismiss, Defendant assumed these three claims were brought under California law. (See
7 Dkt. No. 14 at 22:10-11) (citing California law for breach of warranty claim); 23:18-22 (citing
8 California law for unjust enrichment claim); and 24:8-10 (citing California law for fraud claim.)
9 Rather than dismiss these claims with leave to amend and go through yet another round of Rule 12
10 proceedings, it is in the best interests of all parties to resolve this issue with a contention
11 interrogatory. Thus, Defendant may submit a contention interrogatory requesting that Plaintiffs
12 identify what state law applies to their common-law claims.

13 Accordingly, Defendant's motion to dismiss the common-law claims is DENIED.

14 **CONCLUSION**

15 For the reasons stated above, the Court: (1) GRANTS Defendant's motion for judicial
16 notice of the exhibit attached to the Paffrath Declaration (Dkt. No. 88); (2) DENIES Defendant's
17 motion for judicial notice of the exhibits attached to the Halpern Declaration (Dkt. No. 89); (3)
18 DENIES Defendant's motion to dismiss for lack of personal jurisdiction; (4) GRANTS
19 Defendant's motion to dismiss Plaintiffs' Body Wash claims without leave to amend; (5) DENIES
20 Defendant's motion to dismiss Plaintiffs' Body Lotion claims; (6) DENIES Defendant's motion to
21 dismiss Plaintiffs' Sunscreen claims; and (7) DENIES Defendant's motion to dismiss Plaintiffs'
22 nationwide unjust enrichment, breach of express warranty, and fraud claims.

23 **IT IS SO ORDERED.**

24 Dated: September 21, 2018

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JACQUELINE SCOTT CORLEY
United States Magistrate Judge