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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

STEPHANIE BROWN, on Behalf of
Herself and All Others Similarly
Situated,

Plaintiff,

vs.

DYNAMIC PET PRODUCTS and
FRICK'S MEAT PRODUCTS, INC.,

Defendants.

CASE NO. 17-cv-0659-WQH-DHB

ORDER

HAYES, Judge:

The matter before the Court is the motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (ECF No. 10) filed by Defendants Dynamic Pet Products and Frick's Meat Products, Inc.

I. Background

On March 31, 2017, Plaintiff Stephanie Brown commenced this action on behalf of herself and others similarly situated by filing the Class Action Complaint in this Court. (ECF No. 1). On May 25, 2017, Defendants Dynamic Pet Products ("Dynamic") and Frick's Meat Products, Inc. ("Frick's") filed the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 10). On June 19, 2017, Brown filed a Response to the Motion to Dismiss. (ECF No. 11). On June 26, 2017, Defendants filed a Reply to Brown's Response. (ECF No. 12).

1 **II. Allegations of the Complaint**

2 This is a consumer protection class action arising out of
3 misrepresentations and omissions made by Defendants Dynamic Pet
4 Products, LLC and Frick’s Meat Products, Inc. regarding the Real Ham
5 Bone For Dogs. Frick’s is a meat product manufacturer. In an effort to
6 profit from the waste produced by slaughterhouses and meat
7 manufacturers, Frick’s or its principals created Dynamic to sell waste ham
8 bones to pet owners. Through Dynamic, a wholly owned subsidiary of
9 Frick’s, Defendants manufacture, market, and sell the Real Ham Bone For
10 Dogs as an appropriate and safe chew toy for dogs. Indeed, on each
11 product label and as the name suggests, Defendants explicitly market the
12 Dynamic Real Ham Bone For Dogs as a chew toy for dogs.

13 (ECF No. 1 at ¶ 1) (emphasis omitted).

14 Dynamic and Frick’s are the alter egos of one another and operate
15 as a single business enterprise for the production, marketing, and sale of
16 the Real Ham Bone For Dogs. Dynamic and Frick’s share the same
17 ownership, management and headquarters. . . . Frick’s and Dynamic work
18 in concert with each other to profit off the sale of waste ham bones,
19 marketing them to pet owners as safe and appropriate chew toys for dogs,
20 when they are not.

21 *Id.* at ¶ 13.

22 On each label, Defendants state that the Real Ham Bone For Dogs
23 is “meant to be chewed” and is “for dogs.” In reality, the Real Ham Bone
24 For Dogs is not appropriate for dogs and is not safe for its intended
25 purpose, despite Defendants’ contrary representations. When chewed, the
26 Real Ham Bone For Dogs is prone to splintering into shards and braking
27 into small pieces. When swallowed, these shards slice through dogs’
28 digestive systems and cause severe internal injuries. Thousands of dogs
have suffered a terrible array of illnesses, including stomach, intestinal and
rectal bleeding, vomiting, diarrhea, constipation, and seizures, and have
died gruesome, bloody deaths as a result of chewing Defendants’ Real
Ham Bone For Dogs.

Id. at ¶ 15.

Despite having knowledge that [the] Real Ham Bones For Dogs is
inherently dangerous for dogs, Defendants represent the opposite.
Defendants advertised the Real Ham Bone For Dogs as a safe product for
dogs and failed to warn consumers that the Real Ham Bone For Dogs may
cause serious bodily harm or death to their dogs.

None of the instructions on the product’s packaging or in other

1 marketing informed Plaintiff or other consumers that allowing dogs to
2 chew on the Real Ham Bone For Dogs as instructed on the labeling would
3 pose a significant risk of serious illness or death. Nowhere do Defendants
4 state the truth—that the Real Ham Bone For Dogs is a dangerous product
5 that should not be given to dogs.

6 *Id.* at ¶ 25-26.

7 “On or about December 24, 2014, Plaintiff Brown purchased the Dynamic
8 Real Ham Bones For Dogs from Walmart in Washington, Missouri.” *Id.* at ¶ 17.

9 “She purchased two of the bones, one for each of her dogs” *Id.*

10 On Christmas Day, Ms. Brown gave a Real Ham Bone For Dogs to each
11 of her pit bulls: one to Harley and one to Kya. Plaintiff watched her dogs
12 chew on the Real Ham Bone For Dogs for approximately an hour after
13 which she took the bones away because she noticed they were starting to
14 splinter. That evening, both of her dogs became ill. They were vomiting,
15 had blood in their mouths and in the vomit, and in Harley’s vomit, she also
16 saw bone shards. Plaintiff Brown called her veterinarian who
17 recommended she bring the dogs in immediately, which she did. A
18 veterinarian treated both dogs on an emergency basis, and fortunately both
19 dogs survived and recovered. Had Plaintiff known the truth about the Real
20 Ham Bone For Dogs, Plaintiff would not have purchased the product and
21 would not have given it to her dogs.

22 *Id.* at ¶ 18.

23 The Complaint defines the proposed class as “[a]ll persons who purchased one
24 or more Real Ham Bone For Dogs other than for purpose of resale.” *Id.* at ¶ 29.
25 Complaint asserts the following claims for relief: (1) violation of the Missouri
26 Merchandising Practice Act; (2) fraud; and (3) negligent misrepresentation.

27 **III. Request for Judicial Notice**

28 Defendants request judicial notice of the product label for the Real Ham Bone
For Dogs as a document whose contents are discussed in the complaint. (ECF No. 10-
3). The docket reflects that Brown has not responded to Defendants’ request for
judicial notice.

Federal Rule of Evidence 201 provides that “[t]he court may judicially notice a
fact that is not subject to reasonable dispute because it . . . is generally known within

1 the trial court’s territorial jurisdiction; or . . . can be accurately and readily determined
2 from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 210(b).
3 In ruling on a motion to dismiss, a court may consider “materials incorporated into the
4 complaint by reference. . . .” *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d
5 1049, 1061 (9th Cir. 2008). Courts may take judicial notice of documents discussed
6 in but not attached to a complaint when the documents’ authenticity is not subject to
7 dispute. *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1160-61 (9th Cir. 2012).

8 The Real Ham Bone For Dogs label is discussed in the Complaint. Brown’s
9 claims are based on representations made on the label and communications omitted
10 from the label. Brown does not dispute the authenticity of the Real Ham Bone For
11 Dogs label. Defendants’ request for judicial notice is granted. The Court takes judicial
12 notice of the Real Ham Bone For Dogs label for the purposes of this motion to dismiss:



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28 **IV. Motion to Dismiss**

1 **A. 12(b)(6) Standard**

2 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state
3 a claim upon which relief can be granted.” Federal Rule of Civil Procedure 8(a)(2)
4 provides that “[a] pleading that states a claim for relief must contain . . . a short and
5 plain statement of the claim showing that the pleader is entitled to relief.” “A district
6 court’s dismissal for failure to state a claim under Federal Rule of Civil Procedure
7 12(b)(6) is proper if there is a ‘lack of a cognizable legal theory or the absence of
8 sufficient facts alleged under a cognizable legal theory.’” *Conservation Force v.*
9 *Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police*
10 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

11 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
12 requires more than labels and conclusions, and a formulaic recitation of the elements
13 of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
14 (quoting Fed. R. Civ. P. 8(a)). “To survive a motion to dismiss, a complaint must
15 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
16 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
17 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
18 content that allows the court to draw the reasonable inference that the defendant is liable
19 for the misconduct alleged.” *Id.* (citation omitted). “When there are well-pleaded
20 factual allegations, a court should assume their veracity and then determine whether
21 they plausibly give rise to an entitlement to relief.” *Id.* at 679.

22 Claims sounding in fraud or mistake must additionally comply with the
23 heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which
24 requires that a complaint “must state with particularity the circumstances constituting
25 fraud or mistake.” Federal Rule of Civil Procedure 9(b) “requires . . . an account of the
26 time, place, and specific content of the false representations as well as the identities of
27 the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th
28 Cir. 2007) (quotation omitted); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,

1 1106 (9th Cir. 2003) (averments of fraud must be accompanied by “the who, what,
2 when, where, and how of the misconduct charged”) (quotation omitted). “To comply
3 with Rule 9(b), allegations of fraud must be specific enough to give defendants notice
4 of the particular misconduct which is alleged to constitute the fraud charged so that they
5 can defend against the charge and not just deny that they have done anything wrong.”
6 *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (citations and quotations
7 omitted).

8 In a suit involving multiple defendants, “there is no absolute requirement that .
9 . . the complaint must identify *false statements* made by each and every defendant.”
10 *Swartz*, 476 F.3d at 764 (emphasis in original). “On the other hand, Rule 9(b) does not
11 allow a complaint to merely lump multiple defendants together but requires plaintiffs
12 to differentiate their allegations when suing more than one defendant and inform each
13 defendant separately of the allegations surrounding his alleged participation in the
14 fraud.” *Id.* at 764-65 (alterations, citations, internal quotations omitted). “[A] plaintiff
15 must, at a minimum, identify the role of each defendant in the alleged fraudulent
16 scheme.” *Id.* at 765 (alterations, citations, internal quotations omitted).

17 **B. Fraud and Negligent Misrepresentation Claims**

18 Defendants contend that Brown’s fraud and negligent misrepresentation claims
19 must be dismissed because Brown has failed to comply with Rule 9(b). (ECF No. 10-1
20 at 7). Defendants contend that Brown fails to “specify which Defendant made any
21 alleged misrepresentations” and “does not allege that Frick’s has made any
22 misrepresentation at all.” *Id.*¹ Brown contends that she has adequately alleged the role
23 of each defendant in the fraudulent scheme and does not need to identify false
24 statements made by each defendant. (ECF No. 11 at 6). Brown contends that Frick’s
25 may be liable for Dynamic’s misrepresentations under an alter ego theory. *Id.*

26 The Complaint alleges that Dynamic and Frick’s worked in concert as parent and
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28 ¹ Defendants made similar contentions in their Motion to Dismiss *Reed v. Dynamic Pet Products, et al*, No. 3:15-cv-00987-WQH-DHB (S.D. Cal.), which this Court denied.

1 subsidiary entities in the marketing and selling of the Real Ham Bone For Dogs. (ECF
2 No. 1 at 13). Brown has adequately “identif[ied] the role of each defendant in the
3 alleged fraudulent scheme[.]” *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007),
4 and the Court is able to draw the reasonable inference that “Defendants” means
5 Defendants Dynamic and Frick’s working in concert. The Court concludes that the
6 allegations of each defendant’s involvement are “specific enough to give defendants
7 notice of the particular misconduct which is alleged to constitute the fraud charged so
8 that they can defend against the charge and not just deny that they have done anything
9 wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001).

10 Defendants also contend that Brown’s claims for fraud and negligent
11 misrepresentation “must be dismissed because the alleged misrepresentations were not
12 likely to have deceived a reasonable consumer.” (ECF No. 10-1 at 6). Defendants
13 contend that “no reasonable consumer could have been deceived by the label on the
14 Real Ham Bone For Dogs.” *Id.*²

15 Brown alleges that the Real Ham Bone For Dogs “is not appropriate for dogs and
16 is not safe for its intended purpose.” (ECF No. 1 at 15). The label advertises the Real
17 Ham Bone For Dogs as “Real Ham Bone *For Dogs*.” *Id.* at 1 (emphasis in original).
18 The label also contains the following language: “Bone is to be chewed over several
19 sittings, not eaten Not recommended for dogs with digestive problems or
20 aggressive chewers. Remove bone immediately if splintering occurs or small fragments
21 break off.” (ECF No. 10-2 at 5). Accepting as true the allegation that the Real Ham
22 Bone For Dogs is “not appropriate for dogs,” (ECF No. 1 at 15), the Court cannot
23 conclude that “no reasonable consumer could have been deceived by the label on the
24 Real Ham Bone For Dogs,” (ECF No. 10-1 at 6). Consequently, Brown has stated a
25 plausible claim for relief.

26 **C. Missouri Merchandising Practices Act (“MMPA”) Claim**

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28 ² Defendants made similar contentions in their Motion to Dismiss *Reed v. Dynamic Pet Products, et al*, No. 3:15-cv-00987-WQH-DHB (S.D. Cal.), which this Court denied.

1 “To prevail on a claim under the MMPA, a plaintiff must plead and prove he or
2 she (1) purchased merchandise (which includes services) from defendants; (2) for
3 personal, family or household purposes; and (3) suffered an ascertainable loss of money
4 or property; (4) as a result of an act declared unlawful under the [MMPA].” *Murphy*
5 *v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 311 (Mo. Ct. App. 2016) (citations
6 omitted). The MMPA declares unlawful “[t]he act, use or employment by any person
7 of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice
8 or the concealment, suppression, or omission of any material fact in connection with the
9 sale or advertisement of any merchandise.” Mo. Rev. Stat. § 407.020(1).

10 Defendants contend that Brown’s MMPA claim should be dismissed because
11 Brown “has not alleged an actual deception.” (ECF No. 10-1 at 8). This contention is
12 very similar to Defendants’ contention that Brown’s claims for fraud and negligent
13 misrepresentation “must be dismissed because the alleged misrepresentations were not
14 likely to have deceived a reasonable consumer.” (ECF No. 10-1 at 6). The Court
15 declines to dismiss Brown’s MMPA claim for the same reason it declines to dismiss
16 Brown’s claims for fraud and negligent misrepresentation: assuming that the Real Ham
17 Bone For Dogs is “not appropriate for dogs,” (ECF No. 1 at 15), it is a question of fact
18 whether a reasonable consumer would be deceived into believing that the Real Ham
19 Bone For Dogs is appropriate for dogs after reading the label.

20 Defendants also contend that Brown’s MMPA claim should be dismissed because
21 she “has pleaded no acts [showing] that she has suffered an ascertainable loss and that
22 this loss was caused by the alleged deception.” (ECF No. 10-1 at 12). To bring an
23 MMPA claim, a plaintiff must allege that he or she “suffered an ascertainable loss of
24 money or property [] as a result of an act declared unlawful under the [MMPA].”
25 *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 311 (Mo. Ct. App. 2016)
26 (citations omitted). Under Missouri law, a plaintiff fulfills this requirement when he
27 or she alleges “an ascertainable loss under the benefit-of-the-bargain rule.” *Plubell v.*
28 *Merck & Co.*, 289 S.W.3d 707, 715 (Mo. Ct. App. 2009). A plaintiff alleges an


1 ascertainable loss under the benefit-of-the-bargain rule when he or she alleges that the
2 actual value of the item purchased was less than “the value of the item if it had been as
3 represented at the time of the transaction.” *Id.* (“[B]ecause Plaintiffs alleged Vioxx was
4 worth less than the product as represented, they stated an objectively ascertainable loss
5 under the MMPA using the benefit-of-the-bargain rule.”).

6 Brown alleges that she purchased the Real Ham Bones For Dogs based on
7 Defendants’ misrepresentations that it was safe for dogs to chew when, in reality, it was
8 not. (ECF No. 1 at ¶¶ 15, 18.) Accepting these facts as true, the Real Ham Bones For
9 Dogs that Brown purchased were “worth less than the product[s] as represented”; a dog
10 chew that is not safe for dogs to chew is worth less than the same dog chew would be
11 if it were safe for dogs to chew. *Plubell*, 289 S.W.3d at 715. Consequently, Brown
12 alleged an ascertainable loss.

13 **V. Conclusion**

14 IT IS HEREBY ORDERED that Defendants’ motion to dismiss (ECF No. 10)
15 is DENIED.

16 DATED: October 18, 2017

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18 **WILLIAM Q. HAYES**
19 United States District Judge

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