UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV17-02713 JAK (JPRx)	Date	October 16, 2017
Title	Matin Shalikar v. Asahi Beer U.S.A., Inc.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE
Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT (DKT. 28)**

I. Introduction

Alexander Panvini and Matin Shalikar ("Plaintiffs") brought this putative class action in which they advance California statutory and common law claims arising from the labeling and packaging of Asahi Super Dry beer (the "Product"), which is brewed by Asahi Beer U.S.A., Inc. ("Defendant"). On June 16, 2017, Plaintiffs filed a Second Amended Complaint ("SAC"), which is the operative one.[1] It advances the following claims: (i) violation of California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; (ii) violation of the California Unfair Competition Law ("UCL"), Cal. Civ. Code §§ 17200 *et seq.*; (iii) violation of the California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (iv) breach of implied warranty in violation of Cal. Comm. Code § 2314; (v) common law fraud; (vi) intentional misrepresentation; and (vii) quasi contract, unjust enrichment or restitution.[2]

On June 26, 2017, Defendant filed a motion to dismiss the SAC ("Motion" (Dkt. 28)). Plaintiff opposed the Motion. Dkt. 31. Defendant replied. Dkt. 32. A hearing on the Motion was held on September 11, 2017, and the matter was taken under submission. Dkt. 37. For the reasons stated in this Order, the Motion is **DENIED**.

[1] On April 5, 2017, Panvini filed a putative class action complaint against Defendant in the Northern District of California. *Panvini v. Asahi Beer U.S.A., Inc.*, No. 4:17-cv-01896-KAW (N.D. Cal. 2017). On April 10, 2017, Shalikar filed a putative class action complaint against Defendant in the Central District of California. Dkt. 1. On May 3, 2017, Panvini and Shalikar jointly filed the First Amended Complaint ("FAC") in this action. Dkt. 13. Pursuant to an order granting the voluntary dismissal of two claims in the FAC, Plaintiffs filed the SAC on June 16, 2017.

[2] The claims are brought on behalf of a putative class of "all persons in the United States who purchased the [P]roduct within the relevant statute of limitations periods" ("Nationwide Class"), a subclass consisting of "all persons, who are California residents who purchased the [P]roduct within the State of California, during the relevant statute of limitations periods" ("California Subclass"), and a subclass consisting of "all persons, who are California residents who purchased the Product, or who purchased the [P]roduct within the State of California, for personal, family, or household purposes during the relevant statute of limitations periods" ("California Consumer Subclass").

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II. Requests for Judicial Notice

Defendant seeks judicial notice of the following exhibits that have been presented in support of the Motion:

Exhibit A:	Sample of 12 oz. bottle of the Product.
Exhibit B:	Sample of alternative 12 oz. bottle of the Product.[3]
Exhibit C:	Sample of 21.4 oz. bottle of the Product.
Exhibit D:	Sample of six-pack carton packaging for 12 oz. bottles of Product.
Exhibit E:	U.S. Treasury Alcohol and Tobacco Tax and Trade Bureau ("TTB") Certificate of Label Approval ("COLA") for the labeling used on Exhibits A and B. Dkt. 16-2 at 9-11.
Exhibit F:	TTB COLA for the labeling used on Exhibit C. Dkt. 16-2 at 13-14.
Exhibit G:	Sapporo Bottle Labels, as displayed in COLAs judicially noticed in *Bowring v. Sapporo U.S.A., Inc.*, No. 16-cv-01858, 2017 WL 902151 (E.D.N.Y. 2017). Dkt. 32-2.
Exhibit H:	Red Stripe Bottle Labels, as displayed in COLAs judicially noticed in *Dumas v. Diageo PLC*, No. 15-cv-01681, 2016 WL 1367511 (S.D. Cal. 2016). Dkt. 32-3.
Exhibits I-J:	Settlement Agreement (Dkt. 32-5) and Final Order and Judgment (Dkt. 32-6) from *Suarez v. Anheuser-Busch Cos.*, No. 13-033620-CA-01 (Fla. Cir. Ct. 2013).

In opposing the Motion, Plaintiffs seek judicial notice of the following[4]:

Exhibits 1-5:	Complaint (Dkt. 31-2), Motion to Dismiss (Dkt. 31-3), Response to Motion to Dismiss (Dkt. 31-4), Reply (Dkt. 31-5) and Order Denying Motion to Dismiss (Dkt. 31-6) from *Suarez v. Anheuser-Busch Cos.*, No. 13-033620-CA-01 (Fla. Cir. Ct. 2013).

[3] Defendant states that both 12 oz. versions of the Product were sold during 2015-2016, which is within the time period when Plaintiffs allegedly purchased the Product, and that the associated labelling is largely identical. Dkt. 16-2 at 2. Thus, it contends that the "neck labels on Exhibits A and B are substantively identical and contain identical disclosures of the Canadian origin of the beer; they vary only in the use of slightly different fonts and background color." *Id.*

[4] Plaintiffs do not expressly seek judicial notice of Exhibits 1-6. However, they discuss all of them in the opposition to the Motion and have submitted them in support of that brief. Because a request for judicial notice can be inferred, it is granted.

Exhibit 6: TTB COLA for Kirin Ichiban label at issue in *Suarez v. Anheuser-Busch Cos.*, No. 13-033620-CA-01 (Fla. Cir. Ct. 2013). Dkt. 31-7.

Exhibit 7: Complete TTB Form 5100.31. Dkt. 31-8.

"Although generally the scope of review on a motion to dismiss for failure to state a claim is limited to the Complaint, a court may consider evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff['s] claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal quotation marks and citations omitted).

Fed. R. Evid. 201(b) permits judicial notice of a fact that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Court filings and other matters of public record are properly subject to judicial notice. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). "[R]ecords and reports of administrative bodies" are within this category. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds*, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). Judicial notice has been taken of TTB COLAs as matters of public record when there is no dispute as to their authenticity. *See, e.g.*, *Cruz v. Anheuser-Busch, LLC*, No. 14-CV-09670, 2015 WL 3561536 (C.D. Cal. June 3, 2015); *Welk v. Beam Suntory Import Co.*, 124 F. Supp. 3d 1038, 1041-42 (S.D. Cal. 2015); *Hofmann v. Fifth Generation, Inc.*, No. 14–cv–2569 JM, 2015 WL 5440330, at *2 (S.D. Cal. Mar. 18, 2015). Similarly, judicial notice has been taken of product labeling and packaging when a complaint expressly refers to them and their authenticity is not disputed. *See, e.g.*, *Welk*, 124 F. Supp. 3d at 1041-42; *Parent v. MillerCoors LLC*, No. 13-CV-1204, 2015 WL 6455762, at *3 (S.D. Cal. Oct. 26, 2015); *Hofmann*, 2015 WL 5440330, at *3.

Neither party has objected to the request for judicial notice made by the other. Further, there are no issues as to the authenticity of the materials. All of them are either public records, referred to in the SAC, or central to the Plaintiffs' underlying claims. For the foregoing reasons, the requests for judicial notice are **GRANTED**.

III. Factual Background

Asahi Breweries, Ltd. began the sale of the Product in Japan in 1987. SAC ¶ 14. In 1998, Defendant was established for the purpose of marketing, distributing and selling the Product in the United States. *Id.* ¶ 15. Since 2004, Asahi Breweries, Ltd. has entered agreements with Molson Canada pursuant to which it brews the Product in Canada. The Product is then distributed and sold by Defendant in the United States. *Id.* ¶ 16-17. A six-pack of the Product is commonly sold at a retail price of $9.99. *Id.* ¶ 21. The SAC alleges that this constitutes a "price premium" when compared to beers that are brewed in the United States or Canada. *Id.* The SAC cites two examples: Budweiser, with a common retail price of $6.99 for a six-pack; and Labatt Blue, which retails for $6.99. *Id.* It is alleged that, in brewing the Product, Molson Canada uses water from sources near its Canadian breweries. *Id.* ¶¶ 23-24. It is alleged that this makes the product labelling deceptive because a reasonable consumer would conclude that it is brewed by

using high quality water from Japan. *Id.*

The SAC also alleges that certain elements of the appearance of the Product "creat[e] the impression that the Product is brewed in Japan." *Id.* ¶ 27. These elements include the following: (i) the use of English for the "Asahi" name, which means "morning sun" in Japanese; (ii) the Japanese Katakana script アサヒビール which means "Asahi beer"; (iii) the Japanese Katakana script スーパードライ which means "Super Dry"; and the Japanese Kanji characters 辛口 which mean "Karakuchi," which in Japanese means "dry taste." *Id.* ¶¶ 27-28.

The following disclosure appears on the Product's bottleneck label and on the bottom corner of each end of the six-pack carton of the Product: "BREWED AND BOTTLED UNDER ASAHI'S SUPERVISION BY MOLSON CANADA, TORONTO, CANADA. IMPORTED BY ASAHI BEER U.S.A., INC. TORRANCE, CA PRODUCT OF CANADA."[5] When the 12 oz. bottles are inside the six-pack cardboard carton, the bottleneck labels are visible without having to remove the bottles.

The Product is sold in grocery chains, convenience stores, liquor stores and other retailers throughout the United States. *Id.* ¶ 19. It is alleged that the Plaintiffs and other members of the proposed Classes purchased the Product reasonably believing it was brewed in Japan. It is also alleged that they would not have made these purchases and paid the corresponding price premium had they known that the Product was not brewed in Japan. *Id.* ¶¶ 31-36. Specifically, Shalikar allegedly purchased a six-pack of 12 oz. bottles of Product from a grocery store in Los Angeles in 2016. *Id.* ¶ 11. Shalikar allegedly relied on the trade name "Asahi" and the Japanese script on the label and product packaging in connection with his decision to make this purchase. *Id.* Panvini allegedly purchased six-packs of the 12 oz. bottles from "multiple locations" in California in 2015. These purchasing decisions were based on his reliance on these same representations. *Id.* ¶¶ 12, 20, 28, 31. The SAC does not make clear what price each Plaintiff paid for the Product when each purchased it.[6]

Manufacturers of alcoholic beverages, including beer, are required to submit to the U.S. Treasury Alcohol and Tobacco Tax and Trade Bureau ("TTB") copies of the beverage labels for approval prior to using them in commerce. The TTB reviews the applications to ensure that the labels comply with federal regulations, which prohibit, among other things, labels that include misleading representations as to the origin of the beverage. On October 21, 2014, Defendant submitted its completed form TTB 5100.31 as part of its request for TTB approval of the labels used on its 12 oz. bottles. Dkt. 16-2 at 9. This application included color copies of the larger of the two labels used on the bottles as well as the smaller, bottleneck labels. On November 5, 2014, the TTB approved the application and issued the Certificates of Label Approval ("COLA"). *Id.* at 10-11.

The SAC also alleged that, in a recent survey ("Asahi Survey") of 1000 representative adults, 86% of respondents believed the Product is brewed in Japan based on its packaging. The survey results also included that, based on the content of the bottle labels, 87% of the respondents believed that the Product is brewed in Japan. *Id.* ¶ 30.

[5] The only material difference between these two statements is that the bottleneck label includes Defendant's website, "www.asahibeerusa.com."

[6] Because it is not alleged that either Plaintiff purchased 21.4 ounce bottles of the Product, the analysis in this Order addresses only the 12 ounce bottles that they allegedly purchased.

IV. Analysis

A. General Legal Standards

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "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. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may move to dismiss for failure to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

B. Safe Harbor from Liability Under CLRA, UCL and FAL

1. Background

Under the Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. §§ 201-219, the Secretary of the Treasury ("Secretary") is authorized to regulate the distribution of alcoholic beverages, including beer. *Id.* § 205(e). As part of the exercise of this authority, the Secretary may issue regulations that "will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary . . . finds to be likely to mislead the consumer." *Id.* Regulated beverages may not be sold unless they are "bottled, packaged, and labeled in conformity with such regulations." *Id.*

The Secretary has assigned these duties to the TTB, which has issued the required regulations. They include provisions that prohibit labels on alcoholic beverages that include "[a]ny statement that is false or untrue in any particular, or that, irrespective of any falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression." 27 C.F.R. § 7.29(a)(1). An alcoholic beverage may not be sold until the TTB reviews and approves its labelling and issues a Certificate of Label Approval (COLA). 27 C.F.R. § 7.41(a) ("No person may bottle or pack malt beverages, or remove malt beverages from the plant where bottled or packed unless an approved certificate of label approval, TBB Form 5100.31, is issued."). These regulations also

prohibit any labels that use a brand name if the

> brand name, . . . standing alone, or in association with other printed or graphic matter, impression or inference as to the age, origin, identity, or other characteristics of the product unless the appropriate TTB officer finds that such brand name, either when qualified by the word 'brand' or when not so qualified, conveys no erroneous impressions as to the age, origin, identity, or other characteristics of the product.

27 C.F.R. § 7.23(b).

No information has been submitted in connection with the Motion as to the manner in which the TTB applied its regulations or made regulatory decisions as to the labels at issue in this action. Nor has such information been provided as to the general process that is used by the TTB.

2. Safe Harbor Doctrine

a. Legal Standards

If state or federal law "has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination" by recognizing an action under California's unfair competition laws. *Cel-Tech Comm's, Inc. v. Los Angeles Cellular Tele. Co.*, 20 Cal. 4th 163, 182 (1999); *see Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (the safe harbor applies to the CRLA, UCL and FAL). Under this doctrine, "[w]hen specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." *Cel-Tech* 20 Cal. 4th at 182. However, the safe harbor only applies when "another action . . . actually bar[s] the action or clearly permit[s] the conduct." *Id.* at 183.

The questions here are whether the COLAs issued by the TTB have the force of law, and if they do, whether they "clearly permit the conduct" alleged to be unlawful by Plaintiffs. *Id.* As the moving party, Defendant bears the burden of persuasion on these questions. *Hofmann*, 2015 WL 7430801, at *2. *United States v. Mead Corp.*, 533 U.S. 218 (2001) applies as to whether regulatory conduct has the force of law sufficient to establish a safe harbor through the application of *Chevron* deference. *See Chevron v. NRDC*, 467 U.S. 837 (1984). Thus, "[c]reation of federal law [through regulatory action] should demand at least the same formality for purposes of preemption as it does for purposes of *Chevron* deference." *Reid v. Johnson & Johnson*, 780 F.3d 952, 964 (9th Cir. 2015).

With respect to whether the COLAs have the force of law, "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Mead,* 533 U.S. at 230.[7] In *Mead*, tariff rulings by the U.S. Customs Service were not given *Chevron* deference for the following reasons: (i) each ruling was not subject to notice-and-comment rulemaking or an equivalent process; (ii) the rulings were not binding on third

[7] The next step under *Mead* is to determine whether "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Fournier v. Sebelius*, 718 F.3d 1110, 1119 (9th Cir. 2013). Because the SAC does not allege that the actions of the TTB exceeded its delegated authority, this issue is not addressed.

parties; and (iii) the volume of rulings, *i.e.*, 10,000 per year, and that they were made independently by those in dozens of offices across the United States, reflected that Congress had not intended that each ruling would have the force of law. This determination was made notwithstanding that the rulings at issue were authorized by regulations promulgated by the Secretary of the Treasury pursuant to his statutory authority. *Id.* at 222, 233.

Although an agency determination made pursuant to the "notice-and-comment" process is significant in "pointing to *Chevron* authority, the want of that procedure . . . does not decide the case, for we sometimes have found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Id.* at 231; s*ee also Reid*, 780 F.3d at 964 ("Some agency actions short of notice-and-comment rulemaking may have the force of law."). Consequently, "delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." *Mead*, 533 U.S. at 227.

Defendant relies on *Cruz v. Anheuser-Busch, LLC*, to support its position that the COLA for the Product should be treated as an action with the force of law. In *Cruz*, plaintiffs brought CLRA, UCL and FAL claims against Anheuser-Busch. The plaintiffs alleged that "incorporating the word 'light' on the [Bud Light Lime Lime-A-Rita Products] is misleading because it leaves an impression that these products are low in calories and carbohydrates." *Id.* at *1. The District Court granted the motion to dismiss, after concluding that the relevant COLAs, which the TTB had issued for the labels on the Lime-A-Rita Products provided a legal safe harbor. *Id.* at *3. In support of this outcome, *Cruz* determined that the COLAs had the "force of law" under *Mead* for several reasons: (i) "the TTB is given preapproval authority to issue COLAs to endorse a label's compliance with the FAA before the label is released to the public" pursuant to 27 C.F.R. § 7.41; (ii) "Congress spoke to this exact issue of regulating the alcoholic beverage labeling industry when it enacted the FAA . . . which authorized the Secretary of the Treasury to prescribe the FAA regulations"; and (iii) the Secretary "delegated its rulemaking authority to the TTB who then, in turn, promulgated a series of regulations within the alcoholic beverage industry." *Id.* at *5-6.

In support of their contrary position, Plaintiffs rely on *Hofmann v. Fifth Generation, Inc.*, 2015 WL 5440330, at *2 (S.D. Cal. Mar. 18, 2015). *Hofmann* disagreed with *Cruz.* Plaintiffs in *Hofmann* brought CLRA, UCL and FAL claims against a manufacturer of vodka. Their basis was the product label that stated "handmade." *Id.* at *1-2. Unlike *Cruz, Hofmann* concluded that the COLA did not have the force of law, because "*Mead* illustrates that the Secretary of Treasury's delegation of authority to TTB is not dispositive of whether TTB's COLAs have the force of federal law." *Id.* at *6*. Hofmann* also determined that the COLA examination and approval process was not a "formal, deliberative process akin to notice and comment rulemaking or an adjudicative enforcement action." *Id.* (quoting *Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066, 1076 (E.D. Cal. 2010). As in *Mead*, the "sheer number of rulings" that the TTB issues was also offered in support of this conclusion. *Id.*

b. Application

Defendant has failed to meet its burden under *Mead*. It argues only that "COLAs carry the force of law because they are the result of the Federal Alcohol Administration Act and the proper delegation of regulatory power by the Secretary of the Treasurer [sic] to the TTB," and that "[n]o further formality is required than that the exclusive federal agency's actions flow directly from a valid federal regulation." Dkt.

32 at 14. *Mead* rejected this position in concluding that, merely because an administrative action is based on statutory and regulatory authority, is not a *per se* basis for its having the force of law. *See Hofmann*, 2015 WL 7430801, at *5 ("[T]he USCS's tariff rulings in *Mead* were similarly authorized by regulations promulgated by the Secretary of Treasury through authority delegated by Congress.").

For these reasons, in support of the Motion, Defendant has not met its burden of showing that the COLA issued for the Product in 2014 has the force of law. Consequently, it is unnecessary to address whether the COLA permitted the allegedly unlawful conduct.

C. Whether the CLRA, UCL and FAL Claims Are Adequately Alleged

1. Legal Standards

To state these claims, a complaint must plausibly allege that the labeling and packaging of the Product was "'false or misleading' to the reasonable consumer." *Ebner*, 838 F.3d at 965. To meet this standard, the allegations must be sufficient as to whether "members of the public are likely to be deceived" by the labeling and packaging. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). The allegations must present more than "a mere possibility" that the labeling "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Ebner*, 838 F.3d at 965 (quoting *Lavie v. Proctor & Gamble Co.*, 105 Cal. 4th 496 (2003). Instead, they must plausibly allege "a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id.* (quoting *Lavie*, 105 Cal. 4th at 508). Except for in rare circumstances, the question "whether the packaging as a whole was deceptive is a question of fact that cannot be resolved on a motion to dismiss." *Zakaria v. Gerber Products Co.*, No. 15-200-JAK, 2015 WL 3827654, at *8 (C.D. Cal. 2015). Dismissal is appropriate only where it would be "impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived" based on what is alleged. *Williams,* 552 F.3d at 939.

In *Ebner v. Fresh, Inc.*, the Ninth Circuit affirmed the dismissal of an action on the ground that the plaintiff there could not "plausibly allege that the omission of supplemental disclosures about the product's weight rendered [the product's label] false or misleading to the reasonable consumer." 838 F.3d at 965. The basis for this determination was that the label of the product included a legible disclosure about its weight. *Id.* Further, the disclosure did not "contradict other representations or inferences" on the packaging, and there were "no other words, pictures, or diagrams adorning the packaging, as there were in *Williams*, from which *any* inference could be drawn or on which *any* reasonable belief could be based about" the weight of the product. *Id.* at 966.

When "consumer survey data is incorporated into . . . [a complaint], . . . the Court must presume its truth" on a motion to dismiss, even if a defendant has raised colorable arguments as to the reliability of the survey methodology. *See Branca v. Nordstrom, Inc.*, No. 14-CV-2062-MMA-JMA, 2015 WL 10436858, at *7 (S.D. Cal. Oct. 9, 2015). This rule arises from the well-established principle that "any weighing of evidence is inappropriate on a 12(b)(6) motion." *Jones v. Johnson*, 781 F.2d 769, 722 n.1 (9th Cir. 1986).

2. Application

The SAC alleges that "the overall brand image" of the Product is misleading because it would cause a

reasonable consumer to believe that the Product is brewed in Japan. SAC ¶ 27. In support of this general claim, the SAC presents allegations about the following features of the label and packaging of the Product: (i) the name "Asahi," which means "morning sun" in Japanese, is translated into English; (ii) the Japanese Katakana script アサヒビール which in Japanese is pronounced "Asahi beer,"; (iii) the Japanese Katakana script スーパードライ which in Japanese means "Super Dry," is used; and (iv) the Japanese Kanji characters 辛口 which in Japanese are pronounced, "Karakuchi," and mean "dry taste," are used. *Id.* ¶¶ 27-28. It is also undisputed that the label and packaging of the Product each disclose that the Product is brewed in Canada. This statement appears in all capital letters that are printed in a color different from that of the backgrounds. The font size of these disclosures is smaller than that used for the English text and Japanese script on the labels. It is also undisputed that the bottleneck labels are visible when the bottles are within the carton.[8]

Ebner recognized that a motion to dismiss that arises from allegations of misleading product labelling may be granted if a disclosure on the product concerning the challenged language does not "contradict other representations or inferences" on the packaging and labeling, and if there were "no other words, pictures, or diagrams adorning the packaging . . . from which *any* inference could be drawn or on which *any* reasonable belief could be based about" the origin of the product. 838 F.3d at 966. However, the allegations of the SAC are sufficient to state a claim that the "words, pictures, [and] diagrams adorning the packaging" could give rise to a reasonable inference or belief that the Product was produced in Japan. It is alleged that the Japanese characters and script are prominently displayed. The effect of the disclosures cannot be determined as a matter of law on the present record.

This conclusion is also supported by the survey evidence alleged in the SAC. According to those allegations, more than 86% of the "demographically representative U.S. sample of over 1,000 adults" who viewed the Product or its packaging, believed that it was produced in Japan. SAC ¶ 30. Defendant contests the reliability of this alleged survey, given the absence of allegations about its methodology or reliability. This includes issues as to how the questions were asked and how the Product was displayed, *e.g.,* whether the disclosures were visible. However, "any weighing of evidence is inappropriate on a 12(b)(6) motion." *Jones*, 781 F.2d at 722 n.1. Consequently, the SAC has plausibly alleged "a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Ebner*, 838 F.3d at 965.

For the foregoing reasons, the Motion is **DENIED** as to the first, second and third claims for relief.

[8] The SAC does not include any allegations as to these disclosures. However, in the opposition to the Motion, Plaintiffs argue that "the supposed disclosure on the Asahi Beer bottles is likewise difficult to read" and "it is illegible even in the large images" in the SAC. Dkt. 31 at 17; *see id.* at 16 ("The disclosure appears in miniscule [sic] font on the necks of the bottles under the bolded name of the Product, as well as Japanese symbols an imagery that are much larger and highlighted by a red background."). Plaintiffs then contend that "[w]hen viewed in context of the entire bottle, the images from the SAC show the disclosure if neither clear nor explicit to consumers, as is overshadowed by more prominent representations at best." *Id.* at 17.

D. Fourth Claim for Relief: Breach of Implied Warranty

1. Legal Standards

"Strict adherence to privity rules for express warranty causes of action has not been required in the products liability context." *Dagher v. Ford Motor Co.*, 238 Cal. App. 4th 905, 927 (2015) (citing *Seely v. White Motor Co.*, 63 Cal. 2d 9, 14 (1965)) ("Since there was an express warranty to plaintiff in the purchase order, no privity of contract was required."); *Hauter v. Zogarts*, 14 Cal. 3d 104, 115, n.8 (1975) ("The fact that [plaintiff] is not in privity with defendants does not bar recovery. Privity is not required for an action based upon an express warranty."); *Cardinal Health 301, Inc. v. Tyco Electronics Corp.*, 169 Cal. App. 4th 116, 143-44 (2008) (no privity requirement for liability on an *express* warranty "because it is deemed fair to impose responsibility on one who makes affirmative claims as to the merits of the product, upon which the remote consumer presumably relies.").

With respect to such claims,

> [u]nder California law, a party raising claims for breach of implied warranty must establish that "vertical contractual privity" exists between plaintiff and defendant. *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) ("A lack of vertical privity requires the dismissal of [plaintiff's] implied warranty claims."); *All West Electronics, Inc. v. M–BW, Inc.*, 64 Cal. App. 4th 717, 725 (1998) ("Privity of contract is a prerequisite in California for recovery on a theory of breach of implied warranties of fitness and merchantability."). Privity exists only where the plaintiff and defendant are in "adjoining links of the distribution chain." *Osborne v. Subaru of Am. Inc.*, 198 Cal. App. 3d 646, 656 n.6 (1988). An end consumer who purchases a product from a retailer is not in privity with a manufacturer. *Id.*

Roberts v. Electrolux Home Products, Inc., No. CV 12-1644 CAS VBKX, 2013 WL 7753579, at *9 (C.D. Cal. Mar. 4, 2013).

California law is unsettled as to whether the privity requirement bars a consumer who purchased a product from a retailed from asserting an implied warranty claim against a manufacturer:

> Some [federal district] courts have found that consumers can assert implied warranty claims in this factual context as third-party beneficiaries of agreements between the manufacturer and retailer. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 754 F. Supp. 2d 1145, 1184-85 (C.D. Cal. 2010); *Keegan v. American Honda Motor Co., Inc.*, 838 F. Supp. 2d 929, 947 (C.D. Cal. 2012) (following *Toyota*). The basis of this third-party beneficiary exception is the California Court of Appeal decision *Gilbert Financial Corp. v. Steelform Contracting Co.*, 82 Cal. App. 3d 65, 69 (1978), which held that a plaintiff homeowner could assert an implied warranty claim against a subcontractor as a third party beneficiary of the agreement between the contractor and subcontractor. *Id. See also Cartwright v. Viking Industries*, Inc., 249 F.R.D. 351, 356 (E.D. Cal. 2008) (discussing *Gilbert); In re Toyota*, 754 F.Supp.2d at 1184 (discussing *Gilbert*). Applying the holding of *Gilbert*, these decisions reason that "where a plaintiff pleads that he or she is a third-party beneficiary to a contract that gives rise to the implied warranty of merchantability, he or she may assert a claim for the implied warranty's breach." *In re Toyota*, 754 F.Supp.2d at 1185.

> Other courts have disagreed. In *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075 (N.D. Cal. 2011), the plaintiffs urged the district court to find an exception to the privity requirement when an implied warranty claim is brought by an injured consumer who is the intended user of a product. *Id.* at 1083. The court rejected this argument and disagreed with the decisions discussed directly above, reasoning that "[n]o reported California decision has held that the purchaser of a consumer product may dodge the privity rule by asserting that he or she is a third-party beneficiary of the distribution agreements linking the manufacturer to the retailer who ultimately made the sale." *Id.* In the absence of such a decision, the court reasoned that it could not recognize a third-party beneficiary exception to the privity requirement, even if it were necessary to allow the intended consumers of a product to bring an implied warranty claim. *Id.* ("California courts have painstakingly established the scope of the privity requirement under California Commercial Code section 2314, and a federal court sitting in diversity is not free to create new exceptions to it.") (quoting *Clemens v. Daimler Chrysler Corp.*, 534 F.3d at 1023-24). While the court recognized that *Gilbert* allowed a third-party beneficiary of a contract to assert an implied warranty claim despite a lack of privity, it reasoned that *Gilbert* was not subject to the broad interpretation it had been given by other federal courts, even though the court agreed a broad third-party beneficiary exception had "logical and equitable appeal." *Id.*
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> . . .
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> *Gilbert* arose in a distinct factual context from the instant action, and . . . federal courts sitting in diversity should not create new exceptions to California legal rules, . . . the principle adopted in *Gilbert* is applicable here. The court's reasoning in *Gilbert* did not rely on facts unique to that case, but instead reasoned broadly that "[plaintiff] is a third-party beneficiary of the contract . . . and therefore can sue for breach of the implied warranty of fitness." *Gilbert*, 82 Cal. App. 3d at 69. Consequently, *Gilbert* is best interpreted to establish an exception to the privity requirement that applies when a plaintiff is the intended beneficiary of implied warranties in agreements linking a retailer and a manufacturer, and therefore lack of privity does not bar plaintiffs' implied warranty claims.

Roberts, 2013 WL 7753579, at *9-10.

2. Application

The SAC alleges all of the following: (i) at the relevant times, Defendant knew that consumers, including Plaintiffs and putative Class Members, were both the ultimate consumers of the Product and the targets of the labelling and packaging; (ii) Defendant intended that consumers who used the Product would consider and rely on the representations made on its labels and packaging; (iii) Defendant marketed the Product to Plaintiffs and putative Class Members; and (iv) Plaintiffs and the putative Class Members were intended beneficiaries of the implied warranties. SAC ¶¶ 2, 4, 11, 12, 26, 29, 60, 97, 100, 108. These allegations are sufficient to meet the aforementioned elements of an implied warranty claim.

For the foregoing reasons, the Motion is **DENIED** as to the fourth claim for relief.

E. The Fifth, Sixth and Seventh Claims for Relief

Defendant argues that, because the remaining causes of action are derivative of those discussed above and rely on the same substantive factual allegations, none states a claim. For the reasons stated above, the prior claims have been pleaded adequately. Therefore, the Motion is **DENIED** as to the fifth, sixth and seventh claims for relief.

V. Conclusion

For the reasons stated in this Order, the Motion is **DENIED**. Any response to the Second Amended Complaint shall be filed no later than October 30, 2017.

IT IS SO ORDERED.

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