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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RASUNAE MOQEET,

Plaintiff,

v.

CHARLOTTE'S WEB, INC., a Delaware Corporation,

Defendant.

CASE NO. 2:20-cv-07092-DMG-RAO

DEFENDANT'S NOTICE OF MOTION, MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT OR STAY THE CASE, AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Action Filed: August 6, 2020

Hearing:

Date: February 26, 2021
Time: 9:30 a.m.
Courtroom: Courtroom 8C
Judge: Honorable Dolly M. Gee

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on February 26, 2021, at 9:30 a.m., or as soon thereafter as the matter may be heard before the Honorable Dolly M. Gee, in the U.S. District Court for the Central District of California in the United States Courthouse, 350 West 1st Street, Los Angeles, California 90012, Courtroom 8C, 8th Floor, Defendant Charlotte's Web, Inc., will and does move this Court, pursuant to Rules 8, 9(b), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiff's First Amended Complaint in its entirety on the grounds that the Court lacks jurisdiction over the claims, Plaintiff has failed to state a claim against Defendant upon which relief may be granted, and/or Plaintiff has failed to state with particularity the circumstances constituting fraud. In the alternative, Defendant moves the Court to stay the case under the primary jurisdiction doctrine pending completion of regulatory action by the U.S. Food and Drug Administration.

This motion is made after the conference of counsel pursuant to Local Rule 7-3, which took place on October 9, 2020.

Defendant's Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, any matters of which the Court may take judicial notice, other documents on file in this action, and any oral argument of counsel.

Dated: December 18, 2020

GIBSON, DUNN & CRUTCHER LLP

By: *John D.W. Partridge*
John D. W. Partridge
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MEMORANDUM OF POINTS AND AUTHORITIES

This is one of numerous cases that Plaintiff's counsel has filed against companies that manufacture and sell cannabidiol ("CBD") products. In this lawsuit, Plaintiff Rasunae Moqeet premises her First Amended Complaint on twelve purported purchases of Defendant Charlotte's Web CBD products over the course of twenty months at a local grocer in California.[1] Based on threadbare allegations about those purchases and the bald legal conclusion that the CBD products she purchased are "illegal to sell" (Compl. ¶¶ 2, 14, 17), Plaintiff seeks an assortment of monetary and equitable remedies for herself and several classes of consumers under a grab bag of California consumer protection statutes and the Declaratory Judgment Act.

In so doing, Plaintiff offers no more than vague and conclusory assertions about her purported review of, and asserted reliance on, "information about the products" and unspecified "accompanying labels, disclosures, warranties, and marketing materials." *Id.* ¶ 14. Further, Plaintiff tethers her allegations regarding the CBD products' legality to informal and advisory FDA pronouncements interpreting the Federal Food, Drug, and Cosmetic Act ("FDCA"). Plaintiff thus seeks to enforce, in a private suit, the FDCA's provisions relating to dietary supplements and to secure legal conclusions that may conflict with ongoing regulatory activity by the FDA, the federal agency charged with exclusive regulatory and enforcement authority as to the labeling and marketing of CBD products.

In light of these legal flaws, among others, this Court should dismiss the Complaint for multiple, independent reasons:

1. Plaintiff's claims for equitable relief under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act

[1] Counsel dismissed identical claims against Charlotte's Web in the Northern District of California. *See McCarthy v. Charlotte's Web Holdings, Inc.*, No. 5:19-cv-07836 (N.D. Cal. Mar. 20, 2020), ECF 40 (order approving voluntary dismissal after motion to dismiss by Charlotte's Web). Plaintiff's counsel now returns to a new court with a new putative class plaintiff, but a nearly identical complaint.

("CLRA") are barred because she has an alternative remedy at law. Plaintiff does not plead that she lacks an adequate remedy at law. To the contrary, her claims for breach of purported express and implied warranties would provide an adequate remedy at law (even though those claims are also legally baseless). Because Plaintiff has an adequate remedy at law, her request for equitable relief under the California consumer protection statutes must be dismissed.

2. Plaintiff's sparse, conclusory allegations regarding the labeling of Charlotte's Web products fail to satisfy the pleading standards imposed by Rules 9(b) and 12(b)(6). Plaintiff's Complaint hinges on purportedly false, misleading, or deceptive product labeling. Yet she pleads only conclusory allegations in her Complaint about the labeling on Charlotte's Web products and her reliance on that labeling. Her Complaint therefore falls far short of the standard for well-pleaded claims under Rules 9(b) and 12(b)(6).

3. Plaintiff fails to plead a breach of warranty claim. Plaintiff never identifies a single representation regarding Charlotte's Web products that creates any express warranty. And she also fails to plead any facts whatsoever that give rise to a claim for breach of implied warranty.

4. The FDCA preempts Plaintiff's claims. Each of Plaintiff's claims hinges on her allegation that Charlotte's Web products are "illegal" under the FDCA. She bases this conclusion on the FDA's assertions in non-binding warning letters issued to other CBD companies and other public announcements that CBD products may not be marketed as dietary supplements. But the FDCA vests the FDA with exclusive authority to regulate the labeling and marketing of dietary supplements and enforce the FDCA provisions governing such products. 21 U.S.C. § 337. Because Plaintiff's suit amounts to no more than a private effort to enforce the FDCA—and impose additional labeling obligations on Charlotte's Web—the FDCA preempts her claims.

5. Plaintiff's putative nationwide class claims must be dismissed because the Court lacks personal jurisdiction over Charlotte's Web as to those claims. Plaintiff's

claims on behalf of non-California residents who did not purchase products in California have no nexus with California to support specific jurisdiction over Charlotte's Web.

Plaintiff cannot cure these deficiencies through amendment. Accordingly, the Court should dismiss all of Plaintiff's claims with prejudice.

In the alternative, the Court should stay this case under the primary jurisdiction doctrine. As a prudential matter, federal courts may dismiss or stay a case when an otherwise judicially cognizable claim implicates the special expertise of an agency with regulatory authority over the complaint's subject matter. *See Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). Here, Plaintiff's Complaint turns on the legal status of, and proper labeling for, CBD products. In response to Congress's command, the FDA is in the midst of undertaking significant regulatory action on precisely those issues. Accordingly, this Court has already stayed a nearly identical case under the primary jurisdiction doctrine. *See Colette v. CV Sci., Inc.*, No. 19-10227-VAP (JEM), 2020 WL 2739861, at *4 (C.D. Cal. May 22, 2020) (staying case "until the FDA completes its rulemaking regarding . . . CBD ingestible products"). This Court should do the same here if it does not dismiss Plaintiff's Complaint in its entirety.

BACKGROUND

Hemp and CBD. Cannabidiol, or CBD, is one of more than 80 cannabinoid compounds found in the hemp plant (*Cannabis sativa* L.). Although CBD's popularity has surged in recent years, *see* Compl. ¶ 4, various categories of hemp-based products have long been marketed in the United States as dietary supplements and/or food. As the Ninth Circuit explained in a 2004 decision upholding the permissibility of selling certain hemp-based food products: "Congress was aware of the presence of trace amounts of psychoactive agents . . . in the resin of non-psychoactive hemp when it passed the 1937 'Marihuana Tax Act,' and when it adopted the Tax Act marijuana definition in the [Controlled Substances Act]. . . . Congress knew what it was doing, and its intent to exclude non-psychoactive hemp from regulation is entirely clear." *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 357 F.3d 1012, 1018 (9th Cir. 2004)

(citation omitted).

The CBD industry's recent growth, *see* Compl. ¶ 4, has coincided with amendments to federal law that further clarified hemp's legal status. In 2014, Congress expressly legalized the production of, and research into, so-called "industrial" hemp under the auspices of research institutions and state departments of agriculture. 7 U.S.C. § 5940. Congress defined such hemp as "the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol ['THC'] concentration of not more than 0.3 percent on a dry weight basis." *Id.*

In December 2018, Congress expanded the legal status of hemp products through the Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (codified at 7 U.S.C. §§ 1639o–1639s) (the "2018 Farm Bill"). This Act removed low-THC hemp and hemp products from the definition of "marijuana" in the Controlled Substances Act, and provided that "[n]o State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance" with federal law. 7 U.S.C. § 1639o. Congress also explicitly preserved the FDA's authority to regulate hemp products. *Id.* § 1639r(c). At Congress's direction, the FDA is engaged in ongoing regulatory activity concerning CBD products, including the proper labeling of those products, and recently submitted draft guidance to the White House Office of Management and Budget for review. *See infra*, Section VI.

Charlotte's Web. Based in Boulder, Colorado, Charlotte's Web produces and distributes hemp-derived CBD products nationwide. *See* Compl. ¶¶ 3, 15. Charlotte's Web does not produce or sell medicinal or recreational marijuana or products derived therefrom. Instead, the company's CBD products originate from proprietary hemp genetics that are processed into low-THC (and thus non-psychoactive) hemp-derived CBD extracts. Charlotte's Web product categories include CBD oil tinctures (liquid products), CBD capsules, and other edible forms of CBD. *See id.* ¶ 1.

Plaintiff's Purchases. Plaintiff is a California resident who alleges that she repeatedly purchased Charlotte's Web products over the course of thirteen months, from

May 2018 to December 2019. Compl. ¶ 13. She asserts that she bought Charlotte's Web "Simply Hemp Capsules" on ten separate occasions and that she also purchased Charlotte's Web Hemp Oil and Charlotte's Web Mint Chocolate flavored CBD Oil in two of those transactions. *Id.* She further alleges that she purchased Charlotte's Web "Hemp Liquid Capsules" on two occasions. *Id.* Plaintiff alleges that she purchased the products at a local grocer, Mother's Market & Kitchen, *id.*, which, like thousands of other retailers and grocers around the country, sells CBD products. Plaintiff does not allege that she purchased any other Charlotte's Web product. Yet she nevertheless purports to bring putative class-action claims based on purchases of Charlotte's Web "CBD Oils," "CBD Capsules," "CBD Gummies," and "CBD Isolate," which she concedes "contain numerous different flavors and dosages." *Id.* ¶ 1.

Plaintiff's Mislabeling Allegations. Plaintiff alleges that Charlotte's Web labels its products as "dietary supplements" and that she would not have purchased CBD products from Charlotte's Web had she known that the FDA has claimed that CBD cannot be sold as a "dietary supplement." *See* Compl. ¶¶ 18, 24. Specifically, Plaintiff contends that, based on FDA warning letters and other public statements, the CBD products marketed by Charlotte's Web are "illegal to sell," *id.* ¶ 2, because they (1) "contain the illegal dietary ingredient CBD," and/or (2) are "mislabeled as Dietary Supplements," *id.* ¶ 18. Other than the alleged violation of FDA-enforced labeling requirements, Plaintiff does not allege that the CBD products she purchased were deficient, or different from what she thought she was purchasing, in any respect.

Plaintiff claims that Charlotte's Web has engaged in "multiple and prominent systematic mislabeling of the Products." Compl. ¶ 6. But her factual allegations concerning the alleged "systematic mislabeling" comprise only a single sentence: "Every product contains a Supplement Facts section on the back of the container which is reserved for dietary supplements and explicitly state 'Dietary Supplement' on the front of the packaging." *Id.* ¶ 18. Plaintiff does not allege that she reviewed this specific information on the label. *Id.*

Instead, without alleging any specifics, she pleads that she reviewed "accompanying labels, disclosures, warranties, and marketing materials" when purchasing the Charlotte's Web products and unspecified "information about the products." Compl. ¶ 14. Notably, she does not identify any particular claims, packaging, advertising, or marketing materials that she read, viewed, or relied on when deciding to purchase the Charlotte's Web CBD products. *Id.* ¶ 14. Plaintiff does not identify who created or disseminated the "information about the products" or the "accompanying" materials. *Id.* Further, Plaintiff does not include in her Complaint the labeling that she purportedly reviewed.

Legal Landscape Relating to Dietary Supplements. Federal law *requires* that dietary supplements—which are broadly defined to include products taken by mouth that contain a "dietary ingredient" such as vitamins, minerals, amino acids, and herbs or botanicals, 21 U.S.C. § 321(ff)(1)—be labeled as "dietary supplements." *See* 21 C.F.R. § 101.3(g) ("Dietary supplements shall be identified by the term 'dietary supplement' as a part of the statement of identity."). In accordance with this statutory requirement, Charlotte's Web has labeled certain of its products as dietary supplements.

Under 21 U.S.C. § 321(ff)(3)(B), if a substance is an active ingredient in an FDA-approved drug, or has been authorized for investigation as a new drug for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public, then products containing that substance are excluded from the definition of dietary supplement. Plaintiff asserts that CBD should be excluded from the definition of "dietary supplement" and therefore may not be labeled as such. Compl. ¶ 20. There are, however, exceptions to the exclusion: if the substance was marketed in food or as a dietary supplement before the drug was approved or before the substantial clinical investigations involving the drug had been instituted, the exclusion does not apply. 21 U.S.C. § 321(ff)(3)(B). In her Complaint, Plaintiff neither analyzes these provisions nor pleads facts that show how or why the dietary-supplement exclusion applies to the Charlotte's Web products she purchased.

The FDA's Assertions Regarding CBD Sales and Plaintiff's Resulting Allegations. In support of her mislabeling contentions, Plaintiff relies almost exclusively on allegations that the FDA has issued warning letters to other CBD companies (but not Charlotte's Web), and that the agency has publicized its position that CBD may not be marketed as a dietary supplement. Compl. ¶¶ 17–19.[2]

Neither FDA warning letters nor the FDA's other public statements on CBD marketing have the force of law. As the FDA acknowledges, warning letters do not represent final agency action and are purely "informal and advisory." *See* FDA, Regulatory Procedures Manual, Ch. 4, at 4 (Nov. 2019), *available at* https://www.fda.gov/media/71878/download. A warning letter "communicates the agency's position on a matter, but it does not commit FDA to taking enforcement action," and thus the "FDA does not consider Warning Letters to be final agency action on which it can be sued." *Id.* Similarly, the FDA's Good Guidance Practices expressly exclude "general information documents provided to consumers or health professionals," "press materials," "warning letters," and "other communications directed to individual persons or firms" from the definition of "guidance document." 21 C.F.R. § 10.115(b). At most, therefore, the FDA has issued "informal" and "advisory" communications that bind neither the public nor the FDA itself.

Because the FDA has not issued formal guidance regarding CBD sales, let alone completed notice-and-comment rulemaking, Plaintiff's allegations incorporating the FDA's assertions are unsupported legal conclusions entitled to no deference.

LEGAL STANDARD

Rules 8 and 12(b)(6). To survive scrutiny under Rules 8 and 12(b)(6), a plaintiff must allege facts that, if true, would "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550

[2] Plaintiff also tacks on cursory allegations that Charlotte's Web product labeling violates the California Sherman Act, but those allegations derive entirely from the purported FDCA violations (as discussed below). *See* Compl. ¶¶ 22, 43, 45.

U.S. 544, 570 (2007)). A complaint may be dismissed under Rules 8 and 12(b)(6) for either of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A plaintiff cannot rely on "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678.

Rule 9(b). Plaintiff's claims under the UCL, FAL, and CLRA also must satisfy Rule 9(b)'s strict pleading standard, *see Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009), which requires stating "with particularity" "the circumstances constituting fraud," Fed. R. Civ. P. 9(b). Under Rule 9(b), the plaintiff "must set forth *more* than the neutral facts necessary to identify the transaction," *Cooper v. Pickett*, 137 F.3d 616, 625 (9th Cir. 1997) (emphasis in original), and must instead "identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement," *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotations and brackets omitted).

Rule 12(b)(2). A defendant may seek dismissal of an action, or of particular claims, for lack of personal jurisdiction over the defendant. Fed. R. Civ. P. 12(b)(2). Plaintiffs bear the burden of showing that courts have personal jurisdiction over defendants. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006).

ARGUMENT

Plaintiff's Complaint does not satisfy the legal standards set forth above. Because the fundamental flaws in her Complaint cannot be cured through amendment, the Court should dismiss this case with prejudice. In the alternative, the Court should stay Plaintiff's case based on the primary jurisdiction doctrine.

I. Plaintiff's FAL, CLRA, And UCL Claims For Equitable Relief Should Be Dismissed Because Plaintiff Has An Alternative Remedy At Law *[Counts I–III]*

The FAL and UCL only provide equitable remedies, and Plaintiff also seeks equitable relief under the CLRA.[3] Compl. ¶ 75. Because Plaintiff has an adequate remedy at law, her claims for equitable relief under these statutes cannot proceed.

Equitable remedies "are 'subject to fundamental equitable principles, including inadequacy of the legal remedy.'" *Philips v. Ford Motor Co.*, 726 F. App'x 608, 609 (9th Cir. 2018) (quoting *Prudential Home Mortg. Co. v. Super. Ct.*, 66 Cal. App. 4th 1236 (1998)). The question is not whether Plaintiff is *likely* to prevail on her legal claims. Rather, the question is whether, assuming she prevails, the available remedy would be "adequate." "For this reason, courts generally require plaintiffs seeking equitable relief to allege some facts suggesting that damages are insufficient to make them whole." *Gibson v. Jaguar Land Rover N. Am., LLC*, No. 20-00769-CJC (GJS), 2020 WL 5492990, at *3 (C.D. Cal. Sept. 9, 2020). Where plaintiffs have an adequate legal remedy and thus cannot claim a right to equitable relief, courts dismiss plaintiffs' equitable causes of action. *Gomez v. Jelly Belly Candy Co.*, No. 17-00575-CJC (FFM), 2017 WL 8941167, at *2 (C.D. Cal. Aug. 18, 2017) (ruling that plaintiff's "claims under the UCL and FAL, and her claim under the CLRA to the extent it seeks equitable relief, must be dismissed").

Earlier this year, the Ninth Circuit affirmed a district court's conclusion that a complaint must "allege that [plaintiff] lacks an adequate legal remedy" in order to seek equitable relief under the UCL and CLRA. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020) (citation omitted). Because the complaint in *Sonner* did not include such allegations (and because plaintiff sought "the same sum in equitable restitution . . . as she requested in damages"), the Ninth Circuit concluded that plaintiff "fails to establish that she lacks an adequate remedy at law . . . [and] that the district

[3] Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*; False Advertising Law, Cal. Bus. & Prof. Code § 17500; and Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq*.

court did not err in dismissing [her] claims for equitable restitution under the UCL and CLRA." *Id.*

The Ninth Circuit's recent decision in *Sonner* establishes that dismissal is appropriate now, and there is no reason to wait until the eve of trial to reach this result. Indeed, since *Sonner*, courts have held that claims under the UCL, FAL, and CLRA (for injunctive relief) must be dismissed on a motion to dismiss if plaintiff has failed to plead she lacks an adequate remedy at law. *See Loo v. Toyota Motor Sales, USA*, *Inc.*, No. 19-00750-VAP-ADS, 2020 WL 4187918, at *8 (C.D. Cal. Apr. 10, 2020) ("The Court agrees that Plaintiffs may seek alternative forms of relief . . . ; however, in order to avail themselves of . . . equitable remedies, Plaintiffs must allege that their legal remedies are inadequate."); *Gibson*, 2020 WL 5492990, at *3 (explaining that "[t]he Ninth Circuit has very recently made clear that this principle applies to claims for equitable relief under both the UCL and CLRA" and granting motion to dismiss claims). Moreover, it is not permissible to plead legal and equitable remedies in the alternative. *See Drake v. Toyota Motor Corp.*, No. 20-01421-SB-PLA, 2020 WL 7040125, at *14 (C.D. Cal. Nov. 23, 2020) (dismissing claims under UCL, FAL, and CLRA and explaining that a "party does not avoid federal equitable principles merely because the equitable claim is pled in the alternative"); *In re Macbook Keyboard Litig.*, No. 18-02813, 2020 WL 6047253, at *2 (N.D. Cal. Oct. 13, 2020) ("The question is not whether or when Plaintiffs are required to choose between two available inconsistent remedies, it is whether equitable remedies are available to Plaintiffs at all . . . and that question is not premature on a motion to dismiss.").[4]

[4] Although some courts, including this one, deferred resolution of this issue in pre-*Sonner* rulings and stated that a plaintiff "may request equitable relief as an alternative to legal remedies," at least at the pleading stage, *Robinson v. Unilever U.S., Inc.*, No. 17-3010-DMG (AJW), 2018 WL 6136139, at *5 (C.D. Cal. June 25, 2018), other courts have long held the opposite, *see, e.g.*, *Wildin v. FCA US LLC*, No. 17-02594-GPC (MDD), 2018 WL 3032986, at *7 (S.D. Cal. June 19, 2018) (noting an "intra-circuit split"). Those rulings permitting plaintiffs to seek equitable relief in the alternative do not survive *Sonner*.

Here, Plaintiff pleads no facts "suggesting that damages are insufficient to make [her] whole," *Gibson*, 2020 WL 5492990, at *3, and affirmatively seeks monetary relief for her breach of warranty claims, *see* Compl. ¶¶ 83, 91. Thus, each of her equitable claims—including her entire UCL and FAL causes of action and the portion of her CLRA cause of action requesting equitable relief—must be dismissed.[5]

II. Plaintiff's Conclusory Allegations About The Labeling Of Charlotte's Web Products Fail To State A Claim Under Rule 12(b)(6) And Rule 9(b) *[Counts I–III]*

Plaintiff's claims under the UCL, FAL, and CLRA—including for damages under the CLRA—also fail for the independent reason that she does not meet the pleading requirements of Rules 9(b) and 12(b)(6).

In cases involving product labeling under the three statutes, a plaintiff must plead that (1) the defendant's statements violate labeling regulations, (2) the plaintiff actually relied on the labeling statements when deciding to purchase the products, and (3) the plaintiff suffered "economic injury." *See Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 885 (Cal. 2011). The "particular circumstances surrounding" the alleged misrepresentations must be alleged with particularity because Rule 9(b) applies to the FAL, the CLRA, and

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[5] Plaintiff's claim for declaratory relief fares no better than her request for injunctive relief. The Court should dismiss Count VI, under the DJA, if it dismisses Plaintiff's other claims. The DJA provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Although the DJA "expanded the scope of the federal courts' remedial powers, it did nothing to alter the courts' jurisdiction, or the 'right of entrance to federal courts.'" *Countrywide Home Loans, Inc. v. Mortg. Guar. Ins. Corp.*, 642 F.3d 849, 853 (9th Cir. 2011) (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)). Accordingly, "a claim for declaratory judgment is a form of relief; it does not by itself state a claim." *Bernardi v. Amtech/San Francisco Elevator Co.*, No. 08-01922-WHA, 2008 WL 2345153, at *5 (N.D. Cal. June 5, 2008) (citing *Audette v. Int'l Longshoremen's & Warehousemen's Union*, 195 F.3d 1107, 1111 n.2 (9th Cir. 1999)). Because Plaintiff's request for relief under the DJA is completely derivative of her other claims, it cannot stand on its own and should be dismissed along with her other claims.

the fraudulent prong of the UCL. *See Kearns*, 567 F.3d at 1125-26.[6] Accordingly, when a plaintiff fails to specify what "advertisements or other sales material specifically stated," "when he was exposed to them or which ones he found material," and "which sales material he relied upon in making his decision to buy," dismissal is required. *Kearns*, 567 F.3d at 1126; *see also Otero v. Zeltiq Aesthetics, Inc.*, No. 17-3994-DMG (MRW), 2017 WL 9538711, at *6–7 (C.D. Cal. Nov. 21, 2017) (stating that where "[p]laintiffs fail to allege with specificity the circumstances under which they were exposed to Defendant's misleading statements" and "[t]he Court cannot discern from th[e] allegation[s] which statements Plaintiffs reviewed and relied upon," dismissal is required); *compare with Henderson v. Gruma Corp.*, No. 10-04173-AHM (AJW), 2011 WL 1362188, at *6 (C.D. Cal. Apr. 11, 2011) (accepting that "Plaintiffs have sufficiently alleged actual reliance" where the allegations identified specific labeling).

Here, Plaintiff alleges that each Charlotte's Web product states "dietary supplement" on the front of the package and includes a "Supplement Facts section on the back of the container." Compl. ¶ 18. But Plaintiff's allegations about her reliance on this labeling are conclusory at best, and thus insufficient. Despite claiming she made twelve separate purchases during the course of more than a year, Plaintiff does not specify anywhere in her Complaint which statements she allegedly reviewed and relied upon, the circumstances under which she was exposed to the allegedly misleading statements, or even who made the statements. Instead, Plaintiff asserts generally, and without reference to any particular purchase or product, that she relied on "information about the products" and "accompanying labels, disclosures, warranties, and marketing materials" when "deciding to purchase Defendant's Products." *Id.* ¶ 14.

This Court's decision in *Otero v. Zeltiq Aesthetics, Inc.*, 2017 WL 9538711, is

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[6] Rule 9(b) also applies to claims under the "unlawful" and "unfair" prongs of the UCL insofar as they are premised on the same allegedly fraudulent conduct. *See Sue Shin v. Campbell Soup Co.*, No. 17-1082-DMG (JC), 2017 WL 3534991, at *4 (C.D. Cal. Aug. 9, 2017) ("Rule 9(b)'s heightened-pleading requirement applies to the unlawful and unfair prongs of the UCL.").

instructive. There, the Court held that plaintiffs failed to satisfy Rule 9(b)'s pleading standard even where plaintiffs "undoubtedly identifie[d] certain allegedly misleading statements" and alleged they had "reviewed" a website "specifically regarding [defendant's] representations implying that the device was approved by the FDA." *Id.* at *6. As the Court explained, that was not enough because plaintiffs must allege "which of the[] specific statements" they "were exposed to and relied upon," including "when they saw any of the purportedly misleading statements" and where they saw the specific, allegedly "misleading" materials identified in a complaint. *Id.*

The Court should reach the same result here. Plaintiff nowhere alleges what specific materials she reviewed, when she reviewed them, who disseminated those materials, or what statements, in particular, she relied upon. *See* Compl. ¶¶ 14, 18. Absent any specificity whatsoever about these critical points, Plaintiff's claims cannot stand on her bare, conclusory allegation that she "would not have purchased the Products" if she had known about the purported mislabeling. Compl. ¶¶ 14, 24, 27; *Turcios v. Carma Labs., Inc.*, 296 F.R.D. 638, 644 (C.D. Cal. 2014) (dismissing claims where "Plaintiff has not shown that he relied on any allegedly deceptive practices when making his [] purchases").[7]

III. Plaintiff's Warranty Claims Should Be Dismissed Because She Does Not Identify Any Express Or Implied Warranties *[Counts IV–V]*

Under *Sonner* and Rules 9(b) and 12(b)(6), Plaintiff's claims under the UCL, FAL, and CLRA fail completely. Her remaining claims for breach of warranty also fail as a matter of law.

Express Warranty. Count IV of Plaintiff's Complaint alleges a breach of express warranties under California Commercial Code § 2313(1). Under Section 2313, "[a]ny

[7] Plaintiff alleges that Charlotte's Web misbrands its products by failing to include "adequate directions for use," and that this conduct is "deceptive, unfair, and unlawful." Compl. ¶ 22. This allegation cannot salvage plaintiff's UCL, FAL, and CLRA claims because, among other reasons, it does not cure her failure to plead reliance. She does not allege that she would have used the products differently if there had been adequate directions for use.

affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." *Id.* "[T]o plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury." *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986). Representations regarding a product must be "specific and unequivocal." *Maneely v. Gen. Motors Corp.*, 108 F.3d 1176, 1181 (9th Cir. 1997).

Plaintiff's Complaint is devoid of any allegation regarding the "exact terms" of an express warranty as to Charlotte's Web products. The most that Plaintiff asserts is that the words "dietary supplement" appear on the packaging, Compl. ¶ 17, but she does not point to any "specific and unequivocal" promise that the "goods shall conform to the affirmation or promise." Plaintiff's allegations are therefore insufficient to state a claim for breach of express warranty.

Plaintiff's only other allegation about a purported express warranty is wholly conclusory. Plaintiff alleges that, before making her purchases, she "reviewed the accompanying labels, disclosures, warranties, and marketing materials," and "understood them as representations and warranties by Defendant that the Products were being sold legally." Compl. ¶ 14. But this is a textbook case of conclusory pleading. Her supposed "factual" allegations are nothing more than a single-paragraph recitation of elements of her claim: that there were (unspecified) "warranties," that she "reviewed" them, and that she "relied" on them as the basis for her purchase. This is not enough. "[T]o establish an express warranty, a plaintiff must demonstrate that defendant's statements of fact or opinion were the basis of the agreement between the parties." *McKinniss v. Gen. Mills, Inc.*, No. 07-2521-GAF (FMO), 2007 WL 4762172, at *2 (C.D. Cal. Sept. 18, 2007). Yet Plaintiff fails to specify what statements constituted an alleged warranty or why she thought those statements were warranties that the products were "being sold legally." By failing to plead anything other than the most conclusory

statements, Plaintiff fails to plausibly allege any express warranty or her reasonable reliance thereon. *See Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 897 (C.D. Cal. 2013) (dismissing claims for breach of express and implied warranties).

Implied Warranty. Count V of Plaintiff's Complaint alleges a breach of an implied warranty of merchantability under California Commercial Code § 2314. Under California law, an implied warranty can be violated if (1) the product is not "fit for the ordinary purposes for which such good[] [is] used," or (2) the product does not "[c]onform to the promises or affirmations of fact made on the container or label if any." Cal. Com. Code § 2314(2).

Plaintiff fails to allege adequately that the products marketed by Charlotte's Web are not "fit for the[ir] ordinary purposes." Rather than claim that Charlotte's Web CBD products failed to provide the specific benefits associated with their ordinary use, she instead contends that it is illegal to call CBD products dietary supplements. Her lone allegation supporting this implied warranty theory amounts to no more than a legal conclusion, which this Court should disregard. *See* Compl. ¶ 90 (alleging that the putative class did not receive goods "impliedly warranted by Defendant to be merchantable in that . . . they [are not] fit for their ordinary purpose of providing the benefits as promised").

Insofar as Plaintiff's allegations relate to representations on the packaging, those representations "are more suited to a breach of express warranty claim, as they are specific representations made by the product manufacturer rather than characteristics that affect the product's merchantability or fitness for a particular purpose." *Viggiano*, 944 F. Supp. 2d at 897. Thus, just as Plaintiff's express warranty claim fails, so too does her implied warranty of merchantability theory.

IV. Federal Law Preempts Plaintiff's Claims *[Counts I–VI]*

The FDCA impliedly preempts Plaintiff's claims premised on the assertion that Charlotte's Web products are "illegal." Under 21 U.S.C. § 337, all "proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the

United States." Congress further preserved the FDA's enforcement authority by providing that "[n]othing in [the FDCA] shall be construed as requiring the [FDA] to report for prosecution . . . minor violations of [the FDCA] whenever [it] believes that the public interest will be adequately served by a suitable written notice or warning." 21 U.S.C. § 336.

In *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), the Supreme Court explained that the FDCA "leaves no doubt that it is the *Federal Government* rather than private litigants who are authorized to file suit for noncompliance." *Id.* at 349 n.4 (emphasis added). Thus, state-law claims are impliedly preempted where the "claims exist solely by virtue of the FDCA . . . requirements." *Id.* at 353. Applying *Buckman*, the Ninth Circuit held in *Perez v. Nidek Co.*, 711 F.3d 1109 (9th Cir. 2013), that the FDCA preempted a state-law claim against a medical device manufacturer and group of physicians filed by plaintiffs who alleged that they were "subject to the off-label use of a medical device" and that the FDA "status of the device was not disclosed to them." *Id.* at 1111. According to the plaintiffs, the "FDA had not approved" the medical device for the surgeries they underwent and "had they known, they would not have consented to the surgeries." *Id.* at 1112. The district court dismissed the plaintiffs' state-law claims, and the Ninth Circuit affirmed, *id.* at 1111, holding that the plaintiffs' claim for fraud by omission was "impliedly preempted because it amounts to an attempt to privately enforce the FDCA," *id.* at 1117. The Ninth Circuit emphasized that "[t]he FDA knew about the allegations . . . [of] unapproved . . . use[s] and took steps to address the allegations by issuing warning letters . . . , but it did not take final action against the defendants." *Id.* at 1120.

Under *Buckman* and *Perez*, state-law fraud and mislabeling claims may coexist with the FDCA in certain limited instances. *See Perez*, 711 F.3d at 1119 ("[C]ourts have acknowledged that some fraud and false advertising claims related to FDA status may go forward."). But there is only a "'narrow gap' through which a state-law claim [can] fit to escape preemption by the FDCA." *Id.* at 1120 (citing *In re Medtronic, Inc., Sprint*

Fidelis Leads Prods. Liab. Litig., 623 F.3d 1200, 1204 (8th Cir. 2010)). A "plaintiff must not be suing *because* the conduct violates the FDCA" given that "such a claim would be impliedly preempted under *Buckman*." *Id.* (emphasis added).

Plaintiff attempts to avoid implied preemption by invoking California's Sherman Food, Drug, and Cosmetic Act, California Health & Safety Code § 109875 *et seq*., which Plaintiff says "incorporates into California law all regulations enacted pursuant to the U.S. Food Drug and Cosmetic Act" such that "[a]n act or omission that would violate an FDCA regulation necessarily therefore violates California's Sherman Law." Compl. ¶ 22 n.6. Although a plaintiff's claims are not preempted where they rely upon alleged "violat[ions] [of] a state-law duty that parallels a federal-law duty," *Otero*, 2017 WL 9538711, at *5, a claim is still impliedly preempted where, "as pled, it hinges entirely on conduct she claims violates the FDCA," *Ebrahimi v. Mentor Worldwide LLC*, No. 16-7316-DMG (KS), 2017 WL 4128976, at *6 (C.D. Cal. Sept. 15, 2017).

Plaintiff's claims are impliedly preempted under this precedent. Plaintiff is suing precisely because (in her view) the sale of CBD products violates the FDCA—i.e., because Charlotte's Web allegedly markets its products contrary to federal prohibitions on marketing CBD products as dietary supplements. Plaintiff expressly alleges that "Defendant's Products cannot be dietary supplements *because* they do not meet the definition of a dietary supplement under" the FDCA. Compl. ¶ 20 (emphasis added); *see also id.* ¶ 58 ("Defendant . . . misled consumers acting reasonably . . . *because* the Products are illegally labeled as dietary supplements." (emphasis added)); *id.* ¶ 59 (alleging Plaintiff suffered injury "because" of labeling indicating "that the Products were legal dietary supplements"). In advancing this argument, Plaintiff relies on the FDA's warning letters, which, in turn, assert violations of the FDCA. *Id.* ¶ 16. In fact, Plaintiff does not allege there is anything else false or misleading about calling CBD a dietary supplement aside from her assertion (based on informal and advisory communications by the FDA) that CBD does not meet the FDCA's definition of that term.

Plaintiff's separate allegation that Charlotte's Web products are "misbranded . . . [because] their labeling fails to bear adequate directions for use" is also preempted under the FDCA. The premise of Plaintiff's argument is that CBD is not a dietary supplement, but rather a drug, and therefore must bear adequate directions for use. *See* Compl. ¶ 21 (citing 21 U.S.C. § 352(f)(1), the provision applicable to "[m]isbranded drugs and devices"). But the "adequate directions for use" requirement is imposed by *the FDCA*, 21 U.S.C. § 352(f)(1), which means that Plaintiff is again seeking to use state law to enforce a provision of federal law that rests within the FDA's exclusive enforcement authority. *See* 21 U.S.C. § 337.

Because Plaintiff's claims "hinge[ ] entirely on conduct she claims violates the FDCA," *Ebrahimi*, 2017 WL 4128976, at *6, and would therefore interfere with the FDA's exclusive authority—and discretion—to enforce the FDCA, her claims are impliedly preempted under *Buckman* and *Perez*.

V. Plaintiff's Nationwide Class Claims Should Be Dismissed For Lack Of Personal Jurisdiction *[Counts I, IV–VI]*

If this Court does not dismiss the Complaint in its entirety based on the pleading deficiencies discussed above, Plaintiff's putative nationwide class action should be dismissed under Rule 12(b)(2) for lack of personal jurisdiction.

Personal jurisdiction may be general or specific. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017). Here, Plaintiff does not allege that general jurisdiction exists. For a "court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum." *Id.* at 1780 (internal quotation marks and alterations omitted). Thus, this Court may be able to assert specific personal jurisdiction over Charlotte's Web with respect to Plaintiff's individual claims and claims she filed on behalf of the California subclass.

But the same cannot be said for claims Plaintiff brought on behalf of a nationwide class. As the Supreme Court has concluded, courts do not have specific personal jurisdiction over nonresident defendants in relation to the claims of nonresident plaintiffs

when there is no connection between those plaintiffs' claims and the defendant's contacts with the forum state. *Id.* The Complaint fails to allege any link, much less an adequate link, between California and the claims Plaintiff filed on behalf of nationwide putative class members to establish that those claims "arise out of or relate to" any contacts Charlotte's Web may have with California. *Id.* at 1786 (internal quotation marks and alterations omitted). Accordingly, Plaintiff's proposed nationwide class claims should be dismissed under Rule 12(b)(2).[8]

VI. Alternatively, The Court Should Stay This Case Under The Primary Jurisdiction Doctrine *[Counts I–VI]*

Plaintiff asks this Court to determine that Charlotte's Web illegally labeled and marketed its CBD products as "dietary supplements." Under the primary jurisdiction doctrine, courts may, as a prudential matter, "route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved," *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987), and stay the case pending the agency's analysis, *Clark*, 523 F.3d at 1114. In evaluating whether to do so, the Court must consider "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002).

Congress explicitly recognized the FDA's jurisdiction to regulate hemp products in the 2018 Farm Bill. *See* 7 U.S.C. § 1639r(c). Congress thereby reinforced the FDA's

[8] Although the due process principles addressed in *Bristol-Meyers* should result in dismissal of Plaintiff's claims on behalf of nonresident putative class members, Charlotte's Web recognizes the Court is among those district courts that has held that the Supreme Court's reasoning under *Bristol-Meyers Squibb* may not apply in the class action context at the pleading stage, and that these issues may be more appropriate for the class certification stage. *See Robinson*, 2018 WL 6136139, at *3. Charlotte's Web raises the argument here to preserve the issue if the Court determines that dismissal at this stage is not appropriate.

longstanding and comprehensive authority over the labeling of foods and dietary supplements under the FDCA. Questions regarding the labeling of hemp products, like the Charlotte's Web CBD products at issue here, therefore rest squarely within the FDA's realm of responsibility. Indeed, the 2014 and 2018 Farm Bills, taken together with the FDCA, subject the hemp industry to comprehensive federal regulatory oversight, primarily by the FDA.

Currently, the FDA is actively engaged in regulatory activity, at congressional direction, concerning hemp and CBD products, including the proper labeling of those products. On July 8, 2020, the FDA submitted a report to Congress regarding a "Sampling Study of the Current Cannabidiol Marketplace to Determine the Extent That Products are Mislabeled or Adulterated," which described the FDA's efforts to undertake congressionally-mandated "CBD product testing to better understand the contents and characteristics of currently marketed CBD products."[9] Then, on July 22, 2020, the FDA submitted to the White House Office of Management and Budget for review a draft guidance document, "Cannabidiol Enforcement Policy."[10] These recent efforts build on several years of work by the FDA to understand and develop regulations for CBD products.[11] In light of the statutory backdrop and the FDA's ongoing regulatory

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[9] FDA, Report to the U.S. House Committee on Appropriations and the U.S. Senate Committee on Appropriations, Sampling Study of the Current Cannabidiol Marketplace to Determine the Extent That Products are Mislabeled or Adulterated (July 2020), *available at* https://hempindustrydaily.com/wp-content/uploads/2020/07/CBD-Marketplace-Sampling_RTC_FY20_Final.pdf.

[10] *See* Cannabidiol Enforcement Policy; Draft Guidance for Industry; Availability, RIN 0910-ZA76 (July 22, 2020), https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp ("List of Regulatory Actions Currently Under Review").

[11] *See, e.g.*, FDA.gov, FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD), https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd (last visited Dec. 17, 2020); *see also* Scientific Data and Information About Products Containing Cannabis or Cannabis-Derived Compounds; Public

activity, proceeding with this case now would interfere with the FDA's primary jurisdiction over CBD labeling.

This Court has stayed a nearly identical case "until the FDA completes its rulemaking regarding the marketing, including labelling, of CBD ingestible products." *Colette*, 2020 WL 2739861, at *5. That decision joins courts around the country that have stayed similar cases challenging labeling of CBD products pending completion of the FDA regulatory process. *See, e.g.*, *Snyder v. Green Roads of Fla. LLC*, 430 F. Supp. 3d 1297, 1309 (S.D. Fla. 2020) (staying case where "the Court would benefit greatly from the FDA's regulatory framework"); *Glass v. Glob. Widget, LLC*, No. 2:19-cv-01906, 2020 WL 3174688 at *4 (E.D. Cal. June 15, 2020) (staying litigation "until such time as the FDA completes its rulemaking regarding the marketing, including labeling, of hemp derived ingestible products").

If the Court does not dismiss Plaintiff's claims in their entirety, it should follow *Colette* and stay this case until the FDA has completed its ongoing rulemaking regarding hemp and CBD products.

CONCLUSION

Plaintiff's claims cannot survive scrutiny at the pleading stage. Plaintiff's FAL, UCL, and CLRA claims seeking equitable relief fail because she fails to allege she lacks an adequate remedy at law, and she alleges that she is entitled to an adequate legal remedy through her breach-of-warranty claims (even though her warranty claims also fail as a matter of law). Her claims under the FAL, CLRA, and UCL are also legally deficient because Plaintiff fails to allege plausibly and with the requisite particularity that she relied on specific labeling or statements on Charlotte's Web packaging before

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Hearing; Request for Comments, 84 Fed. Reg. 12,969 (Apr. 3, 2019) (announcing May 2019 public hearing and request for public comments); Lowell Schiller, Principal Associate Commissioner for Policy, FDA, Remarks at the National Industrial Hemp Council 2019 Hemp Business Summit (Aug. 13, 2019) ("Given the substantial public interest in the possibility of CBD in foods and/or supplements, FDA is actively evaluating whether such rulemaking might be appropriate for CBD.").

making a purchase. Further, because Plaintiff seeks to step into the shoes of the FDA to enforce the FDCA's labeling provisions, the FDCA preempts her claims. The multiple fundamental flaws identified throughout this Motion establish that any amendment of this Complaint would be futile. The Court should dismiss the Complaint with prejudice, or in the alternative, stay the case under the primary jurisdiction doctrine to allow the FDA to complete the regulatory analysis of hemp and CBD that Congress delegated to that agency.

* * *

Dated: December 18, 2020

By: */s/ John D.W. Partridge*

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