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

GINA BECKMAN, individually and
on behalf of herself and all others
similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC., *et al.*,

Defendants.

Case No. 17-cv-02249-BAS-BLM

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS’ MOTION TO
DISMISS**

[ECF No. 4]

Plaintiff Gina Beckman brings this putative class action lawsuit against Defendants Wal-Mart Stores, Inc. (“Wal-Mart”), Espresso Supply, Inc., Eko Brands, LLC, and Ekobrew (collectively, “Defendants”) alleging that Defendants breached warranties and violated other California law related to a product they sold. She claims that the Brew & Save branded reusable coffee filter advertises on its label that it is compatible with all “Keurig® 1.0 and 2.0” machines when, in fact, it is not. Defendants now move to dismiss the First Amended Complaint (ECF No. 1-8 at 5-37) (“FAC”). (ECF No. 4.)

1 The Court finds this motion suitable for determination on the papers and
2 without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the reasons
3 stated below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants’
4 motion to dismiss. (ECF No. 4.)

5
6 **I. BACKGROUND**

7 Plaintiff’s claims arise from her purchase of a “Brew & Save” branded
8 reusable carafe cup (“Carafe Filter”) for her Keurig 2.0 series coffee maker. (FAC ¶
9 10.) Plaintiff purchased the Carafe Filter from a Wal-Mart store on or about May 22,
10 2017. (*Id.* ¶ 23.) The Carafe Filter advertises on its front label that it is “Keurig® 1.0
11 and 2.0 compatible.” (*Id.* ¶ 25.) The back of the product label, which Plaintiff stated
12 she read, states “Compatible with all brewers that accommodate a Keurig 2.0 style
13 carafe cup.” (*Id.* ¶¶ 25, 28.) The top of the packaging states “Keurig® 1.0 and 2.0
14 Compatible Carafe” and then lists the homepage of the Brew & Save’s website. (*Id.*
15 ¶ 25.) Plaintiff alleges that “[a]ccording to www.brewandsave.com, the Carafe Filter
16 is compatible with most Keurig® and single serve brewers.” (*Id.* ¶¶ 26, 56.) Plaintiff
17 states that she purchased the Carafe Filter for her Keurig 2.0 machine because the
18 packaging stated that the product was compatible with her Keurig coffee maker. (*Id.*
19 ¶¶ 29, 32.)

20 The day after purchasing the Carafe Filter, Plaintiff attempted to use it, but
21 received an error message when she inserted the product. (FAC ¶ 30.) Plaintiff
22 alleges that this error message “indicated that the Carafe Filter was not designed for
23 her Keurig®.” (*Id.* (alleging that the “error message further instructed Plaintiff to try
24 one of the hundreds of pods with the Keurig® logo”).) She continued to receive the
25 same error message despite trying to use the Carafe Filter multiple times. (*Id.* ¶ 31.)
26 Plaintiff further alleges that many internet reviews of the Carafe Filter on Wal-Mart’s
27 website states that other consumers had the “same and/or similar issues.” (*Id.* ¶ 34,
28 at Ex. 1.)

1 On June 16, 2017, Plaintiff initiated this action in the San Diego Superior
2 Court, and filed the FAC on September 7, 2017. In the FAC, Plaintiff asserts claims
3 for: (1) breach of implied warranty of merchantability; (2) breach of express
4 warranty; (3) breach of implied warranty of fitness for a particular purpose; and (4)
5 violation of the California’s Unfair Competition Law, Business & Professions Code
6 §§ 17200, *et seq.*, (“UCL”) and the California False Advertising Act §§ 17500, *et*
7 *seq.* (collectively, “Unfair Business Practices claim”). (ECF No. 1-8.) The FAC
8 named the following defendants: Wal-Mart, “Espresso Supply, Inc.,” “Eko Brands,
9 LLC,” and “Ekobrew.” (*Id.* ¶ 11.) On November 3, 2017 Defendants removed this
10 case to federal court. (ECF No. 1.)

11 12 **II. LEGAL STANDARD**

13 A pleading that states a claim for relief must contain “a short and plain
14 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
15 8(a)(2). The complaint must plead sufficient factual allegations to “state a claim to
16 relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
17 (internal quotation marks and citations omitted). “A claim has facial plausibility when
18 the plaintiff pleads factual content that allows the court to draw the reasonable
19 inference that the defendant is liable for the misconduct alleged.” *Id.*

20 Federal Rule of Civil Procedure 9(b) states that when alleging fraud, a party
21 must “state with particularity the circumstances constituting fraud or mistake.” Rule
22 9(b) requires the allegations to state the “who, what, when, where, and how of the
23 misconduct charged.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir.
24 2009). A party alleging fraud must “set forth *more* than the neutral facts necessary to
25 identify the transaction.” *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir.
26 1994) (emphasis in original), superceded by statute on other grounds. When a party
27 does not comply with these requirements, a court must dismiss for failure to state a
28 claim. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1008 (9th Cir. 2009).

1 Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss
2 an action based on a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).
3 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*
4 *Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power authorized by
5 Constitution and statute, which is not to be expanded by judicial decree.” *Id.* (citations
6 omitted). “It is to be presumed that a cause lies outside this limited jurisdiction, and
7 the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Id.*
8 (citations omitted). Thus, “[w]hen subject matter jurisdiction is challenged under the
9 Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving
10 jurisdiction in order to survive the motion.” *Kingman Reef Atoll Invs., L.L.C. v.*
11 *United States*, 541 F.3d 1189, 1197 (9th Cir. 2008) (quoting *Tosco Corp. v.*
12 *Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001)), abrogated on
13 other grounds by *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

14 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
15 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
16 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court must
17 accept all factual allegations pleaded in the complaint as true and must construe them
18 and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill*
19 *v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). To avoid a Rule
20 12(b)(6) dismissal, a complaint need not contain detailed factual allegations, rather,
21 it must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell*
22 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A Rule 12(b)(6) dismissal may
23 be based on either a ‘lack of a cognizable legal theory’ or ‘the absence of sufficient
24 facts alleged under a cognizable legal theory.’” *Johnson v. Riverside Healthcare Sys.,*
25 *LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police*
26 *Dep’t*, 901 F.2d 696, 699 (9th Cir.1990).).

27

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1 **III. DISCUSSION**

2 **A. Motion to Strike**

3 As an initial matter, in its reply, Defendants move to strike Plaintiff counsel’s
4 declaration submitted with Plaintiff’s response to the motion to dismiss. (ECF No. 9
5 at 1-2.) It appears Defendants made this request because it believes the Court will
6 consider the attorney’s statements in lieu of or in addition to the allegations Plaintiff
7 makes in her FAC. In light of the legal standard the Court is required to apply for
8 this motion, this request is unnecessary, and, accordingly, is denied as moot.

9
10 **B. Standing for Injunctive Relief**

11 Plaintiff seeks injunctive relief to enjoin Defendants from making the alleged
12 misrepresentations regarding the compatibility of the Carafe Filter. (FAC at 17.)
13 Defendants contend that Plaintiff lacks standing to seek injunctive relief. The Court
14 finds that Plaintiff has failed to properly plead her claim for injunctive relief.

15 Article III of the Constitution limits the jurisdiction of the federal courts to
16 actual “cases” and “controversies.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408
17 (2013). Federal courts require plaintiffs to demonstrate three elements to establish
18 that they have “standing” to sue: (1) “injury in fact” that is “concrete and
19 particularized” and “actual and imminent”; (2) the injury must be fairly traceable to
20 defendant’s conduct; and (3) the injury can be redressed through adjudication. *See*
21 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Where a plaintiff seeks
22 prospective injunctive relief, Article III has been interpreted to require the plaintiff
23 to show “a sufficient likelihood that he [or she] will again be wronged in a similar
24 way.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). A plaintiff invoking
25 federal jurisdiction must satisfy the standing requirements of Article III even if the
26 plaintiff only asserts state law claims. *See Birdsong v. Apple. Inc.*, 590 F.3d 955, 960
27 n.4 (9th Cir. 2009).

28

1 Under the recent Ninth Circuit precedent, a plaintiff can allege that there is a
2 likelihood of repetition for injunctive relief, even if the plaintiff makes other
3 allegations about not purchasing the same product again. In *Davidson v. Kimberly-*
4 *Clark Corporation*, the false advertising statements at issue related to bathroom
5 wipes that were not “flushable” as advertised. 889 F.3d 956, 966-67 (9th Cir. 2018).
6 The Ninth Circuit found that the consumer had standing to seek injunctive relief
7 “even though the consumer now knows or suspects that the advertising was false at
8 the time of the original purchase, because the consumer may suffer an ‘actual and
9 imminent, not conjectural or hypothetical’ threat of future harm.” *Id.* at 969 (quoting
10 *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). The court reasoned that
11 the plaintiff had Article III standing because, in part, she alleged a desire to purchase
12 other “flushable” wipes from the defendant in the future if the wipes were truly
13 “flushable.” *Id.* at 966. Thus, the court found that the plaintiff “properly alleged that
14 she faces a threat of imminent or actual harm by not being able to rely on
15 [defendant]’s labels in the future, and that this harm is sufficient to confer standing
16 to seek injunctive relief.” *Id.* at 967. The Ninth Circuit concluded that “[k]nowledge
17 that the advertisement or label was false in the past does not equate to knowledge
18 that it will remain false in the future.” *Id.* at 969.

19 Here, though the law permits Plaintiff to allege standing for injunctive relief,
20 she fails to do so. Plaintiff fails to include any allegations in the FAC to support a
21 finding that her injury would be repeated. Tellingly, in her opposition, Plaintiff does
22 not cite to any such allegations in support of her argument for standing. (ECF No. 7
23 at 13:16-18,); *see Davidson*, 873 F.3d at 1113 (describing that standing exists where
24 a consumer makes “plausible allegations that she will be unable to rely on the
25 product’s advertising or labeling in the future, and so will not purchase the product
26 although she would like to” or that “she might purchase the product in the future,
27 despite the fact it was once marred by false advertising or labeling, as she may
28 reasonably, but incorrectly, assume the product was improved”). Because Plaintiff

1 fails to sufficiently plead standing for her requests of injunctive relief, the Court
 2 **GRANTS WITH LEAVE TO AMEND**¹ Defendants’ motion to dismiss with
 3 respect to the claims for injunctive relief.

4
 5 **C. Failure to State a Claim**

6 Defendants argue that Plaintiff fails to state her claims because she does not
 7 plead her claims with sufficient particularity. Plaintiff disputes this argument and
 8 states that all of her claims are sufficiently pled.

9
 10 **i. First, Second, and Third Causes of Action Relating to Warranty**

11 Plaintiff makes three breach of warranty claims that involve the same
 12 underlying allegations. Plaintiff’s first cause of action alleges a breach of implied
 13 warranty of merchantability. (FAC ¶¶ 28-48 (alleging violations of California Civil
 14 Code § 1794(a) and California Commercial Code § 2314). Section 2314 states that
 15 “a warranty that the goods shall be merchantable is implied in a contract for their sale
 16 if the seller is a merchant with respect to goods of that kind.” *See Viggiano v. Hansen*
 17 *Nat. Corp.*, 944 F. Supp. 2d 877, 896 (C.D. Cal. 2013) (“Unless specific disclaimer
 18 methods are employed, an implied warranty of merchantability arises and
 19 accompanies every retail sale of consumer goods.”) California Civil Code section
 20 1794 permits a consumer to recover when she “is damaged by a failure to comply
 21 with any obligation under this chapter or under an implied or express warranty or
 22 service contract may bring an action for the recovery of damages and other legal and
 23

24 ¹ Defendants argue that leave to amend should not be granted because Plaintiff
 25 previously amended her complaint and because amendment would be futile. (*See*
 26 *ECF No. 4 at 17.*) It appears from the record that the previous amendment only
 27 related to naming the correct parties, and did not affect the allegations in the
 28 complaint. Additionally, the Court does not find that amendment would be futile at
 this point. Thus, in light of the liberal leave to amend standard, the Court finds it
 appropriate to grant in part Defendants’ motion with leave to amend. *See Desertrain*
v. City of Los Angeles, 754 F.3d 1147, 1154 (9th Cir. 2014) (stating the well-
 established principle that a “court should freely give leave when justice so requires”
 and to apply this policy with “extreme liberality”).

1 equitable relief.” To allege a breach of implied warranty of merchantability, a
2 plaintiff must show that the product “did not possess even the most basic degree of
3 fitness for ordinary use.” *Mocek v. Alfa Leisure, Inc.*, 7 Cal. Rptr. 3d 546 (Cal. Ct.
4 App. 2003). For this claim, Plaintiff alleges that the Carafe Filter had an implied
5 warranty of merchantability that it would be compatible and operate with all Keurig
6 1.0 and 2.0 machines to brew coffee and that Defendants are merchants of these
7 goods. (See FAC ¶¶ 41, 43.) Based on her experience, Plaintiff alleges that the Carafe
8 Filter does not operate with Keurig machines in any way and this prevented any use
9 of the product, including using the product to brew coffee. (*Id.*)

10 The second cause of action asserts a breach of express warranty under
11 California Commercial Code section 2313. (*Id.* ¶¶ 49-62.) “In order to plead a cause
12 of action for breach of express warranty, one must allege the exact terms of the
13 warranty, plaintiff’s reasonable reliance thereon, and a breach of that warranty which
14 proximately causes plaintiff injury.” *Williams v. Beechnut Nutrition Corp.*, 229 Cal.
15 Rptr. 605, 608 (Ct. App. 1986); see Cal. Com. Code § 2313. Section 2313(1)(a) states
16 that an express warranty is “any affirmation of fact or promise made by the seller to
17 the buyer which relates to the goods and becomes part of the basis of the bargain
18 creates an express warranty that the goods shall conform to the affirmation or
19 promise.” For this claim, Plaintiff alleges that (1) Defendants expressly warranted
20 that the Carafe Filter was “Keurig® 1.0 and 2.0 compatible” as expressly stated on
21 its packaging, (2) that she reasonably relied on these statements, and (3) that the
22 product’s incompatibility, which was a breach of the warranty, proximately caused
23 Plaintiff to lose at least \$9.92 because she could not use the product in her Keurig
24 machine. (See FAC ¶¶ 28-33, 53, 56, 58.)

25 Plaintiff’s third cause of action alleges a breach of implied warranty of fitness
26 for a particular purpose under section 2315 of the California Commercial Code. (*Id.*
27 ¶¶ 63-70.) Every retail product purchased in California has an implied warranty of
28 fitness for its intended purpose by the seller. See *Williams v. Beechnut Nutrition*

1 *Corp.*, 229 Cal. Rptr. 605, 608 (Ct. App. 1986). The Court must determine that the
2 seller had reason to know “any particular purpose for which the goods are required
3 and that the buyer is relying on the seller’s skill or judgment to select or furnish” a
4 suitable product. Cal. Com. Code § 2315.

5
6 A “particular purpose” differs from the ordinary purpose
7 for which the goods are used in that it envisages a specific
8 use by the buyer which is peculiar to the nature of his
9 business whereas the ordinary purposes for which goods
are used are those envisaged in the concept of
merchantability and go to uses which are customarily made
of the goods in question.

10 *Mills v. Forestex Co.*, 108 Cal. App. 4th 625, 635 n. 4 (Cal. Ct. App.
11 2003) (quotations and citations omitted). Plaintiff alleges that Defendants knew that
12 consumers, like Plaintiff, would rely on their specific compatibility statements and
13 seek use the Carafe Filter in the Keurig 2.0 coffee machines because the Carafe
14 Filter’s packaging, and Brew & Save’s website, expressly advertised the product for
15 the specific purpose of using it in these specific machines. (FAC ¶¶ 36, 66-68.)

16 As an initial matter, these three causes of actions are basic breach of warranty
17 claims, and do not sound in fraud. The underlying allegations for these claims also
18 do not sound in fraud. Therefore, the Court will apply the pleading standing under
19 Rule 8 to determine whether Plaintiff has provided enough facts and law to support
20 her claims.

21 From the facts of this case, Plaintiff alleges that, on a particular date at a
22 specific Wal-Mart store, she purchased the Carafe Filter. (FAC ¶ 23.) Before
23 purchasing the product, Plaintiff alleges that she read the front and back product
24 labels that stated, among other things, that it was compatible with Keurig 1.0 and 2.0
25 coffee machines and/or compatible with “all brewers that accommodate a Keurig 2.0
26 carafe cup.” (*Id.* ¶¶ 25, 28.) Plaintiff also included three pictures of the labels of her
27 exact product in the FAC. (*Id.* ¶ 25.) Plaintiff alleges that she relied on these
28 statements when deciding to purchase the Carafe Filter because she believed the

1 Carafe Filter would be compatible with her “Keuring® 2.0” model. (*Id.* ¶¶ 29, 32.)
2 Plaintiff further alleges that she inserted the product into her Keurig 2.0 coffee
3 machine on multiple occasions, and received an error message each time, preventing
4 her from ever using the product in any way. (*Id.* ¶¶ 30-31.) Lastly, Plaintiff alleges
5 that she was damaged because the product did not function as advertised. (*Id.* ¶ 33.)

6 Based on these allegations, Plaintiff adequately pleads her warranty claims.
7 As discussed above, accepting all factual allegations in the FAC as true, Plaintiff
8 alleges that Defendants expressly and impliedly warranted that the Carafe Filter is
9 compatible with Keurig 2.0 machines, such as the one used by Plaintiff. Plaintiff also
10 expressly states that she relied on these warranties that the product would function
11 with her machine in deciding to purchase the product. Lastly, Plaintiff pleads that
12 she suffered damages when the product would not operate as intended and was
13 useless for the purpose for which she purchased it.

14 Defendants argue that, even despite these allegations, Plaintiff has failed to
15 provide enough allegations because she does not allege which specific model of
16 Keurig 2.0 machines she used² and because she did not allege she followed the
17 packaging instructions. (ECF No. 4 at 1, 4, 11, 13.) However, at this stage, such
18 additional allegations are not needed. The Carafe Filter’s packaging that Plaintiff
19 relied on states that it is “Keurig 2.0 compatible” on the front and top labels and
20 compatible with “all [Keurig 2.0 carafe cup] brewers” on the back label. (*Id.* ¶ 25.)
21 These statements create the alleged warranties relating to the products’ compatibility
22 with all Keurig 1.0 and 2.0 machines. In other words, the warranties at issue in this
23
24

25 ² Defendants attempt to refute Plaintiff’s allegations by including consumer
26 reviews from Walmart’s website that allegedly show that other Carafe Filter
27 purchasers successfully used the product. (ECF No. 4 at 7-5.) Though these reviews
28 may be true (Plaintiff includes other reviews to the contrary), under Rule 12(b)(6),
the Court is required to accept all factual allegations in the FAC as true, and thus
does not consider these contrary consumer reviews when evaluating Plaintiff’s
claims. *See Cahill*, 80 F.3d at 337-38; (*see also* FAC ¶ 34, at Ex. 1.)

1 case do not make distinctions between Keurig 1.0 or 2.0 models.³ And an allegation
2 regarding which Keurig 2.0 model Plaintiff used is not necessary to state her claims.

3 Further, drawing all reasonable inferences in favor of Plaintiff, the Court can
4 reasonably infer from the FAC that Plaintiff followed the instructions on the
5 packaging, though Plaintiff does not specifically make this allegation. Plaintiff
6 alleges that she inserted the Carafe Filter into her Keurig machine and received an
7 error message to insert a compatible Keurig pod. (FAC ¶ 30.) It is reasonable to infer
8 that, because the Keurig machine determined the product's incompatibility and
9 displayed such an error message, Plaintiff had inserted the Carafe Filter correctly.
10 Moreover, an allegation that Plaintiff followed the packaging instructions is not
11 needed to state Plaintiff's claims. Regardless of whether Plaintiff followed
12 instructions or not, if the Carafe Filter is not compatible with Plaintiff's Keurig
13 machine as advertised, then Defendants breached its warranties.

14 Lastly, Defendants argue that Plaintiff has not alleged how she was damaged.
15 However, Plaintiff alleges she purchased Defendants' product for \$9.92, and the
16 product did not work as advertised. (*See, e.g.*, ECF No. 4 at 10.) Thus, at bottom,
17 Plaintiff alleges that she suffered monetary damages of at least \$9.92 (FAC ¶¶ 24,
18 33), and this argument fails.

19
20
21 ³ Defendants cite to Brew and Save's website, which Plaintiff included in her
22 FAC, to show that the product distinguishes between Keurig machines because the
23 website states that the product is compatible with "most" Keurig machines and
24 because the website includes a list of compatible machines. (ECF No. 4 at 3.) The
25 website's representations are not relevant to the Court's analysis here because
26 Plaintiff does not allege that she relied on those statements when purchasing the
27 product. In fact, Plaintiff specifically does not state that she read or saw the website
28 before purchasing the product and receiving the warranties. She only alleges that she
reasonably relied on the representations on the product's label, which addresses all
Keurig 2.0 models when purchasing the product. Defendants further argue that the
back label's statement that the product is compatible with "all brewers that
accommodate a Keurig 2.0 style *carafe* cup" created a distinction between Keurig
2.0 models. (*See id.*) Taking all the allegations in the complaint as true, including the
other compatibility statements on the product's package, for the purposes of this
motion, the Court does not find this distinction was incorporated into the warranties.

1 Accordingly, the Court **DENIES** the motion to dismiss for Plaintiff’s first,
2 second, and third causes of action.

3
4 **ii. Fourth Cause of Action for Unfair Business Practices**

5 Plaintiff’s Unfair Business Practices claim alleges that the Carafe Filter
6 packaging makes false or misleading representations about the compatibility of the
7 product with Keurig machines. Defendants argue that Rule 9(b) applies to this claim,
8 and that Plaintiff has not pled her claim under this heightened pleading standard.

9 It is well-established that the heightened pleading standard under Rule 9(b)
10 applies to claims under sections 17200 and 17500 *et seq.* of the California Business
11 and Professional Code. *See, e.g., Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125
12 (9th Cir. 2009). Rule 9(b) requires a plaintiff to “state with particularity the
13 circumstances constituting fraud,” and fraud claims must include the “who, what,
14 when, where, and how” of the fraudulent activity. *See Kearns*, 567 F.3d at 1125.
15 “Without such specificity, defendants in [fraud] cases would be put to an unfair
16 advantage, since at the early stages of the proceedings they could do no more than
17 generally deny any wrongdoing.” *See Concha v. London*, 62 F.3d 1493, 1502 (9th
18 Cir. 1995).

19 The Court finds that Plaintiff adequately pled her Unfair Business Practices
20 claims. As discussed above, Plaintiff sufficiently pleads each of the “who, what,
21 when, where, and how” requirements with specificity. Contrary to Defendants’
22 arguments, Plaintiff does not need to identify which model of the Keurig 2.0 series
23 she used with the Brew & Save product. Instead, alleging that she used a “Keurig®
24 2.0” series coffee machine is sufficient to state her claim because the representations
25 on the Carafe Filter’s label does not distinguish between specific Keurig 1.0 or 2.0
26 models. Defendant’s argument that the Brew & Save’s website makes a distinction
27 between Keurig models also fails because Plaintiff’s claim appears to only relate to
28

1 the Carafe Filter’s packaging.⁴ (FAC ¶ 25). Plaintiff does not state nor allege that she
 2 consulted anything other than the product’s label before or after her purchase of the
 3 Carafe Filter at Wal-Mart. (FAC ¶¶ 28-29.) Additionally, as discussed above,
 4 Plaintiff’s claim does not require her to allege that she followed the packaging
 5 instructions. Such information is irrelevant to a false advertising claim.

6 Therefore, the Court finds that Plaintiff sufficiently pled this claim by
 7 providing the “who, what, when, where, and how” elements. Accordingly, the Court
 8 **DENIES** the motion to dismiss for Plaintiff’s Unfair Business Practices claim.

9

10 **D. Damages for Unfair Business Practices Claim**

11 Lastly, Defendants seek to dismiss Plaintiff’s request for nonrestitutionary
 12 disgorgement of profits and attorneys’ fees for her Unfair Business Practices claim,
 13 which are brought pursuant to sections 17200 and 17500 *et seq.* of the California
 14 Business and Professional Code. Plaintiff does not dispute this argument.⁵ The
 15 California Supreme Court has made it clear that these damages are unavailable for
 16 individual private actions under these statutes. *See Korea Supply Co. v. Lockheed*
 17 *Martin Corp.*, 63 P.3d 937, 946 (Cal. 2003) (finding that only restitution is available

19 ⁴ The Court finds that incorporating the Brew & Save website
 20 (www.brewandsave.com) into the FAC by reference is appropriate here. Even if a
 21 document is not attached to the complaint, it may be incorporated by reference. *See*
 22 *Fed. R. Civ. P. 10(c); United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“[A
 23 document] may be incorporated by reference . . . if the plaintiff refers extensively to
 24 the document or if the document forms the basis of the plaintiff’s claim”); *Branch v.*
 25 *Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith*
 26 *v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (“We hold that documents
 27 whose contents are alleged in a complaint and whose authenticity no party questions,
 28 but which are not physically attached to the pleading, may be considered in ruling on
 a Rule 12(b)(6) motion to dismiss.”). Because Plaintiff directly refers to the Brew &
 Save website in the FAC (FAC ¶¶ 26, 43), and because neither party contests the
 authenticity of the website, the Court will incorporate the Brew & Save website into
 the FAC by reference.

⁵ While addressing Defendants’ insufficient pleading argument for her Unfair
 Business Practices claims, Plaintiff states that she has standing to seek “injunctive
 relief, disgorgement of profits and attorneys’ fees” under sections 17200 *et seq.* and
 17500 *et seq.* (ECF No. 7 at 20-21.) However, she does not provide any law or
 argument that these sections allow her to recover damages in the form of
 disgorgement of profits and attorney fees.

1 under the UCL for individual actions, specifically discussing that attorney fees and
2 “nonrestitutionary disgorgement of profits” are not available remedies under the
3 UCL); *Grisham v. Philip Morris U.S.A., Inc.*, 151 P.3d 1151, 1153 (Cal. 2007)
4 (rejecting claims for “disgorgement of defendant's profits and other equitable
5 remedies” because “[c]ompensatory damages are unavailable under” sections 17200
6 and 17500 *et seq.*); *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663,
7 675 n.7 (Cal. Ct. App. 2006).

8 Accordingly, the Court **GRANTS WITHOUT LEAVE TO AMEND** the
9 motion to dismiss Plaintiff’s request for these damages for her Unfair Business
10 Practices claim.

11
12 **IV. CONCLUSION**

13 For the foregoing reasons, Defendants’ Motion to Dismiss is granted in part
14 and denied in part. Specifically, the Court:

- 15 1. **GRANTS WITH LEAVE TO AMEND** the motion to dismiss
16 Plaintiff’s claims for injunctive relief;
17 2. **GRANTS WITHOUT LEAVE TO AMEND** the motion to
18 dismiss Plaintiff’s request for nonrestitutionary disgorgement of
19 profits and attorneys’ fees for the Unfair Business Practices claim;
20 and
21 3. **DENIES** the motion to dismiss the remaining claims.

22 Accordingly, Plaintiff may file a Second Amended Complaint that only
23 provides additional factual allegations relating to her request for injunctive relief **no**
24 **later than June 19, 2018.** If Plaintiff does not file a Second Amended Complaint,
25 Defendants must answer the First Amended Complaint **no later than June 29, 2018.**

26 **IT IS SO ORDERED.**

27
28 **DATED: June 5, 2018**


Hon. Cynthia Bashant
United States District Judge