

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

EVAN PARENT, an individual on behalf of himself, a class of persons similarly situated, and the general public,

Plaintiff,

v.

MILLERCOORS LLC, a Delaware Limited Liability Company authorized to do business in California, and DOES 1-50, inclusive,

Defendant.

CASE NO. 3:15-cv-1204-GPC-WVG

ORDER GRANTING DEFENDANT MILLERCOORS LLC'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

[ECF No. 22]

Before the Court is Defendant MillerCoors LLC's ("Defendant" or "MillerCoors") Motion to Dismiss Plaintiff's First Amended Complaint. Def. Mot. Dismiss ("Def. Mot."), ECF No. 22. The motion has been fully briefed. Pl. Resp., ECF No. 23; Def. Reply, ECF No. 24. Upon consideration of the moving papers and the applicable law, and for the reasons set forth below, the Court **GRANTS** Defendant's motion.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case concern "Blue Moon," a popular brand of Belgian-style wheat beer owned by Defendant MillerCoors. MillerCoors is a major beer manufacturer

1 with many well-known beer brands, including Coors Light, Miller Genuine Draft,
2 Miller High Life, Ice house, Milwaukee's Best, Keystone, and Olde English. First
3 Amended Complaint ("Am. Compl.") 3, ECF No. 19. Plaintiff Evan Parent
4 ("Plaintiff"), a "beer aficionado and home brewer," alleges that from 2011 until mid-
5 2012, he regularly paid a price premium purchasing Blue Moon beer from San Diego-
6 area retailers for personal and family consumption because MillerCoors created the
7 deceptive and misleading impression that Blue Moon is a "craft beer." *Id.* at 9.

8 **I. Initial Complaint and First Motion to Dismiss**

9 On April 24, 2015, Plaintiff, a resident of California, brought suit on behalf of
10 himself and others similarly situated against Defendant, a limited liability company
11 incorporated in Delaware and with its principal place of business in Illinois, in San
12 Diego Superior Court. Compl. 1, ECF No 1. Plaintiff pled three causes of action for (1)
13 deceptive practices and misrepresentation in violation of California's Consumers Legal
14 Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*; (2) untrue and misleading
15 advertising in violation of California's False Advertising Law ("FAL"), Cal. Bus. &
16 Prof. Code § 17500 *et seq.*; and (3) unlawful, fraudulent and unfair business practices
17 in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code
18 § 17200 *et seq.*

19 In the initial Complaint, Plaintiff alleged that Blue Moon does not qualify as a
20 "craft beer" because such beers are produced by "small, independent and traditional"
21 craft breweries as defined by the Brewers Association, a trade organization for
22 American craft brewers, and MillerCoors is not such a brewery. *Id.* at 4. More
23 specifically, according to the Brewers Association, "[t]o qualify as an American craft
24 brewer, a brewery must: (a) Produce less than 6 million barrels of beer annually; (b) Be
25 less than 25 percent owned or controlled by a non-craft brewer; and (c) Make beer
26 using only traditional or innovative brewing ingredients." *Id.* Plaintiff alleged that
27 MillerCoors produces more than 76 million barrels of beer on an annual basis. *Id.*

28 Plaintiff alleged that even though Blue Moon is not really a craft beer,

1 MillerCoors engages in deceptive and misleading business practices to misrepresent
2 it as a craft beer in order to capture a slice of the burgeoning craft beer market and
3 “charge up to 50% more for Blue Moon beer than it charges for other MillerCoors
4 products.”¹ *Id.* at 4–5.

5 First, Plaintiff alleged that “Defendant goes to great lengths to disassociate Blue
6 Moon beer from the MillerCoors name.” *Id.* at 4. Even though Blue Moon is owned by
7 MillerCoors, MillerCoors’ ownership of Blue Moon is not disclosed on the bottle or
8 the outer packaging of Blue Moon beers, which instead states that the product is
9 manufactured by “Blue Moon Brewing Co.” *Id.* In fact, Blue Moon is brewed by
10 MillerCoors at its Golden, Colorado, and Eden, North Carolina breweries, which also
11 produce all of MillerCoors’ other beers. *Id.* The Blue Moon Brewing Company
12 (“BMBC”) website also contains no reference to MillerCoors’ ownership of the brand,
13 although MillerCoors’ own website lists Blue Moon among its “craft beer” brands. *Id.*
14 Second, Plaintiff argued that Defendant’s use of the registered trademark “Artfully
15 Crafted” in the labeling and advertising for Blue Moon beer misleads consumers into
16 thinking Blue Moon is a craft beer. *Id.* at 5. Third, Plaintiff argued that Blue Moon’s
17 “premium price,” in line with other craft beers, as well as its “placement among other
18 craft beers” in San Diego-area retailers, misled him into believing Blue Moon was a
19 craft beer. *Id.*

20 On May 30, 2015, Defendant removed the case to federal court pursuant to the
21 Class Action Fairness Act, 28 U.S.C. § 1332(d). Notice of Removal 3, ECF No. 1. On
22 July 13, 2015, Defendant filed their first motion to dismiss. ECF No. 6. On October 26,
23 2015, the Court granted the first motion to dismiss. Order Granting Defendant’s
24 Motion to Dismiss (“Dismissal Order”), ECF No. 17.

25 First, the Court found that the safe harbor exception to California’s consumer
26 protection laws applied to the Plaintiff’s UCL, CRLA, and FAL claims to the extent

28 ¹ “On average, a six pack of craft beer typically costs \$2.00 to \$3.00 more than
a six pack of macrobrewed, or mass produced beer.” Compl. 3.

1 that those claims relied on MillerCoors' omission of their ownership interest, or their
2 designation of BMBC as the brewer, on the label or packaging of Blue Moon beers. *Id.*
3 at 12.

4 Second, the Court found that, based on the facts as pled in the initial Complaint,
5 a reasonable consumer was not likely to be deceived by the Defendant's
6 representations. The Court found that: (1) based solely on the facts pled that "there is
7 not a single reference to MillerCoors on the Blue Moon Brewing Company website,"
8 while "Blue Moon is prominently displayed on the MillerCoors website," the Court
9 could not conclude that the reasonable consumer could be misled by Blue Moon's
10 internet presence; (2) standing alone, MillerCoors' use of the "Artfully Crafted"
11 trademark was non-actionable puffery; (3) Plaintiff could not argue that other features
12 of Blue Moon's advertising were deceptive because he had pled no other features of
13 Blue Moon's advertising; (4) Plaintiff could not argue that Blue Moon's "placement
14 among other craft beers" in retail stores was deceptive because Plaintiff did not allege,
15 and provided no factual allegations from which the Court could reasonably infer, that
16 MillerCoors has any control over where retailers place Blue Moon on their shelves; and
17 (5) Plaintiff provided no authority supporting the proposition that the price of a product
18 constitutes a representation or statement about the product. *Id.* at 12–16.

19 The Court then found that Plaintiff's allegations were sufficiently particular to
20 satisfy Fed. R. Civ. P. 9(b)'s heightened pleading requirements for fraud cases, *id.* at
21 17, but that Plaintiff lacked standing to seek injunctive relief, *id.* at 19. The Court
22 permitted Plaintiff leave to amend his complaint, but cautioned that Plaintiff could not
23 rely on MillerCoors' use of the BMBC trade name in Blue Moon's label or packaging
24 or, standing alone, the "Artfully Crafted" trademark to support his consumer protection
25 claims. *Id.* at 20.

26 **II. Amended Complaint and Second Motion to Dismiss**

27 On November 25, 2015, Plaintiff filed a first amended complaint. ECF No. 19.
28 The amended complaint makes the same legal claims as the original complaint, *id.* at

1 11–20, but adds a number of new factual allegations.

2 First, the amended complaint alleges that in addition to the Brewers Association
3 definition, Blue Moon also does not meet the dictionary definition of a craft beer. The
4 term “craft beer” is defined by Merriam-Webster Dictionary as a “specialty beer
5 produced in limited quantities,” by Cambridge Dictionary as “beer made using
6 traditional methods in small, independent breweries,” and by the Oxford English
7 Dictionary as “a beer made in a traditional or non-mechanized way by a small
8 brewery.” *Id.* at 4.

9 Second, the amended complaint alleges that MillerCoors engages in a number
10 of practices to produce the “wholesale fiction” that Blue Moon is a craft beer produced
11 by a small, independent brewery, including: (a) portraying Blue Moon as having being
12 invented independently by Dr. Keith Villa on the BMBC website, when in fact Dr.
13 Villa was a MillerCoors employee who developed Blue Moon at the direction of
14 MillerCoors executives; (b) portraying Blue Moon as being brewed at a “small, limited
15 capacity brewpub known as ‘The SandLot Brewery’” on the BMBC website and
16 YouTube channel, when in fact Blue Moon is brewed at MillerCoors’ Golden,
17 Colorado and Eden, North Carolina brewing facilities; (c) directing retail
18 establishments, through MillerCoors’ network of distributors, to stock Blue Moon in
19 the craft beer section in retail establishments; (d) endorsing retailers’ misrepresentation
20 of Blue Moon as a craft beer by permitting such retailers to use Blue Moon’s trademark
21 protected logo in advertisements identifying Blue Moon as a craft beer; (e) advertising
22 Blue Moon as a craft beer at concert venues through MillerCoors’ sponsorship and
23 distribution agreements; (f) selling Blue Moon as a craft beer in non-retail venues, such
24 as national restaurant chains; and (g) directing Blue Moon to be priced as a craft beer,
25 “[t]hat is, \$2.00 to \$3.00, or up to 50 percent more per six pack than the average
26 macrobrew,” and thereby engaging in a practice of “falsely representing that a product
27 has characteristics that command a premium price, and then actually charging a
28 premium price for the product.” *Id.* at 5–8.

1 This motion to dismiss followed.

2 **LEGAL STANDARD**

3 A Rule 12(b)(6) dismissal may be based on either a “‘lack of a cognizable legal
4 theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’”
5 *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008)
6 (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

7 “To survive a motion to dismiss, a complaint must contain sufficient factual
8 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
9 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550
10 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual
11 content that allows the court to draw the reasonable inference that the defendant is
12 liable for the misconduct alleged.” *Id.* at 679 (citing *Twombly*, 550 U.S. at 556).
13 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
14 statements, do not suffice.” *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555 (noting
15 that on a motion to dismiss the court is “not bound to accept as true a legal conclusion
16 couched as a factual allegation”). “The pleading standard . . . does not require ‘detailed
17 factual allegations,’ but it demands more than an unadorned, the
18 defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citations
19 omitted). “Review is limited to the complaint, materials incorporated into the complaint
20 by reference, and matters of which the court may take judicial notice.” *See Metlzer Inv.*
21 *GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

22 In analyzing a pleading, the Court sets conclusory factual allegations aside,
23 accepts all non-conclusory factual allegations as true, and determines whether those
24 nonconclusory factual allegations accepted as true state a claim for relief that is
25 plausible on its face. *Iqbal*, 556 U.S. at 676–84; *Turner v. City & Cty. of San*
26 *Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015) (noting that “conclusory allegations
27 of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal”)
28 (internal quotation marks and citation omitted). And while “[t]he plausibility standard

1 is not akin to a probability requirement,” it does “ask[] for more than a sheer possibility
2 that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (internal quotation marks
3 and citation omitted). In determining plausibility, the Court is permitted “to draw on
4 its judicial experience and common sense.” *Id.* at 679.

5 DISCUSSION

6 I. Judicial Notice

7 “Although generally the scope of review on a motion to dismiss for failure to
8 state a claim is limited to the Complaint, a court may consider evidence on which the
9 complaint necessarily relies if: (1) the complaint refers to the document; (2) the
10 document is central to the plaintiff[’s] claim; and (3) no party questions the authenticity
11 of the copy attached to the 12(b)(6) motion.” *Daniels–Hall v. Nat’l Educ. Ass’n*, 629
12 F.3d 992, 998 (9th Cir. 2010) (internal quotation marks and citations omitted). Fed.
13 R. Evid. 201(b) permits judicial notice of a fact when it is “not subject to reasonable
14 dispute because it: (1) is generally known within the trial court’s territorial jurisdiction;
15 or (2) can be accurately and readily determined from sources whose accuracy cannot
16 reasonably be questioned.” The court may take notice of such facts on its own, and
17 “must take judicial notice if a party requests it and the court is supplied with the
18 necessary information.” Fed. R. Evid. 201(c).

19 MillerCoors seeks judicial notice of (a) a November 16, 2015 article from The
20 San Diego Union-Tribune entitled “*Ballast Point to be Sold to N.Y. corporation for*
21 *\$1B*,” and (b) a press release from Nasdaq entitled “*Leading Craft Brewer Ballast Point*
22 *Joins Constellation Brands*.” ECF No. 22-4. Facts that become widely known through
23 news or other announcements, including on websites, are subject to judicial notice.
24 *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458–59 (9th Cir. 1995) (taking judicial
25 notice of newspaper article regarding widespread layoffs because the layoffs were “a
26 fact which would be generally known in Southern California and which would be
27 capable of sufficiently accurate and ready determination”). Neither party questions the
28 authenticity of these documents. The Court finds that these documents are appropriate

1 for judicial notice because the acquisition of Ballast Point by Constellation Brands is
2 a fact which is generally known in San Diego and capable of sufficiently accurate and
3 ready determination.

4 Plaintiff seeks judicial notice of the Written Testimony of Bob Pease, Chief
5 Executive Officer of the Brewers Association, before the Senate Committee on the
6 Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights on
7 December 8, 2015, concerning the pending merger between Anheuser-Busch Inbev
8 (“ABI”) and MillerCoors. ECF No. 23-1. Information contained in official documents,
9 including documents appearing on a governmental website, is judicially noticeable. *See*
10 *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (judicial
11 notice of information displayed on school district website); *Sinaloa Lake Owners Ass’n*
12 *v. City of Simi Valley*, 864 F.2d 1475, 1479–80 & n.2 (9th Cir. 1989) (“We take judicial
13 notice of these figures, contained in the reports of a public body, pursuant to Fed. R.
14 Evid. 201(b)(2).”). However, MillerCoors objects to the use of Mr. Pease’s testimony
15 to establish the truth of the matters stated therein, arguing that the Court should only
16 take judicial notice of the limited fact that Mr. Pease made the statements contained in
17 his written testimony. ECF No. 25 at 1–2. “[A] court may not take judicial notice of a
18 fact that is ‘subject to reasonable dispute.’” *Lee v. City of Los Angeles*, 250 F.3d 668,
19 689 (9th Cir. 2001) (citing Fed. R. Evid. 201(b)). Thus, while the Court takes judicial
20 notice of the limited fact that Mr. Pease made the statements contained in his written
21 testimony, the Court declines to rely on Mr. Pease’s testimony to establish the truth of
22 the matters stated therein.

23 II. Motion to Dismiss

24 Defendant argues that the case should be dismissed because Plaintiff fails to
25 allege an actionable misrepresentation, since (1) a reasonable consumer would not be
26 misled by MillerCoors’ advertising; (2) MillerCoors is not liable for third-party
27 representations; and (3) MillerCoors’ alleged pricing of Blue Moon is not a
28 representation. Def. Mot. 6–16. Because the Court agrees, the Court **GRANTS**

1 Defendant's motion to dismiss.²

2 **A. Legal Standard**

3 Claims under the UCL, FAL, and CLRA that representations are misleading are
4 governed by the "reasonable consumer" test, which asks whether "members of the
5 public are likely to be deceived." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938
6 (9th Cir. 2008) ("The California Supreme Court has recognized that these laws prohibit
7 not only advertising which is false, but also advertising which[,] although true, is either
8 actually misleading or which has a capacity, likelihood or tendency to deceive or
9 confuse the public."). A likelihood of deception means that "it is probable that a
10 significant portion of the general consuming public or of targeted consumers, acting
11 reasonably in the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105
12 Cal. App. 4th 496, 508 (2003). Whether a business practice is deceptive generally
13 presents a question of fact that cannot be resolved on a motion to dismiss. *See*
14 *Williams*, 552 F.3d at 938. In rare circumstances, however, courts can conclude as a
15 matter of law that members of the public are not likely to be deceived. *See id.* at 939.

16 **B. Whether a Reasonable Consumer Could Be Misled By**
17 **MillerCoors' Advertising**

18 Defendant overstates the scope of the Court's previous findings when it argues
19 that "[t]he Court has already found that no reasonable consumer could be misled by
20 Blue Moon's internet presence." Def. Mot. 6. What the Court found was that, "[b]ased
21 on those facts standing alone" that "there is not a single reference to MillerCoors on
22 the Blue Moon Brewing Company website" while "Blue Moon is prominently
23 displayed on the MillerCoors web site," the Court could not conclude that a reasonable
24 consumer could be misled by Blue Moon's internet presence. Dismissal Order 13.

25
26 _____
27 ² Because the Court finds that Plaintiff fails to allege an actionable
28 misrepresentation, the Court need not address Defendant's additional arguments that (1) Plaintiff failed to plead his claims with the requisite particularity; (2) Plaintiff failed to allege reliance; (3) Plaintiff failed to allege materiality; and (4) Plaintiff lacks standing to pursue injunctive relief because he has no intent to purchase Blue Moon beer in the future. *See* Def. Mot. 16–24.

1 Plaintiff has now alleged additional features of MillerCoors' internet advertising of
2 Blue Moon on both the BMBC website and YouTube channel that must be considered
3 by the Court. Am. Compl. 5–6.

4 That said, the Court agrees with Defendant that the three internet advertisements
5 identified by Plaintiff and featured on the BMBC website
6 (bluemoonbrewingcompany.com) and YouTube channel, "The Story of Blue Moon,"
7 "The SandLot Guys," and "Our Approach to Brewing," constitute non-actionable
8 puffery.

9 "[T]o be actionable as an affirmative misrepresentation, a statement must make
10 a specific and measurable claim, capable of being proved false or of being reasonably
11 interpreted as a statement of objective fact." *Vitt v. Apple Computer, Inc.*, 469 Fed.
12 Appx. 605, 607 (9th Cir. 2012) (internal quotation marks omitted) (affirming finding
13 that descriptors "mobile," "durable," "portable," "rugged," "built to withstand
14 reasonable shock," "reliable," "high performance," "high value," an "affordable
15 choice," and an "ideal student laptop" were "generalized, non-actionable puffery
16 because they are 'inherently vague and generalized terms' and 'not factual
17 representations that a given standard has been met'"); *see also McKinney v. Google,*
18 *Inc.*, 2011 WL 3862120, at *6 (N.D. Cal. Aug. 30, 2011) ("Although misdescriptions
19 [sic] of specific or absolute characteristics of a product are actionable, generalized,
20 vague, and unspecified assertions constitute mere puffery upon which a reasonable
21 consumer could not rely." (internal punctuation marks omitted) (citations omitted)).

22 Upon review of the three advertisements, the Court finds that Plaintiff has not
23 identified any affirmative misrepresentations made therein. The contents of the
24 advertisements are as follows: "The Story of Blue Moon" is a 1 minute, 40 second
25 video on YouTube wherein Keith Villa describes his background as a brewer, the
26 influence of Belgium himself and his development of Blue Moon, and the ingredients
27 and flavor profile of Blue Moon beer. *See* Def. Mot., Ex. B. "Our Approach to
28 Brewing" is a 2 minute, 9 second video on the BMBC website which depicts Keith

1 Villa and a number of other brewers at the “Sandlot” brewery discussing the
2 development of seasonal varietals of Blue Moon featuring ingredients such as
3 spearmint and frankincense. *See id.* Finally, “Meet the Brewers” is a webpage on the
4 BMBC website which offers biographies of Keith Villa and four other BMBC
5 employees, including the three “SandLot Guys.” *See id.*, Ex. G.

6 Plaintiff alleges that the three advertisements “falsely represent that Blue Moon
7 is brewed by a small, independent craft brewery, rather than the second largest brewing
8 company in the United States” by (1) depicting Blue Moon as being brewed in 10-
9 barrel, or 310 gallon brew tanks, when Blue Moon is generally brewed in 60,000 to
10 80,000 gallon tanks; (2) depicting MillerCoors employee Keith Villa as “founder” and
11 brew master; (3) depicting a small, brick building with a sign that reads “Blue Moon
12 Brewing Company at The SandLot” as the brewery that produces Blue Moon beer; and
13 (4) suggesting that Blue Moon is brewed at “The SandLot” by referring to the Blue
14 Moon brewers as “The SandLot Guys.” Am. Compl. 5–6; Pl. Mot. 15–16. Finally,
15 Plaintiff argues that although the BMBC website and YouTube channel “stop short of
16 calling Blue Moon a craft beer, they feature all of the elements necessary to depict a
17 craft beer.” Pl. Mot. 16.

18 However, Plaintiff fails to point to any “specific and measurable claim[s],
19 capable of being proved false or of being reasonably interpreted as a statement of
20 objective fact” made in the advertisements. First, while “The Story of Blue Moon” does
21 contain brief images of a Blue Moon brewery with comparatively small brewing tanks,
22 nowhere in the video is it stated that the brewery depicted is the only place in which
23 Blue Moon is produced. *See* Def. Mot., Ex. B.

24 Second, while the video does depict Keith Villa as the “brewmaster” and the
25 formulator of Blue Moon’s original recipe, “Belgian White,” MillerCoors claims, and
26 Plaintiff does not dispute, that Keith Villa did create Blue Moon Belgian White in
27 1995. *See* Def. Mot. 8. More importantly, nowhere in either “The Story of Blue Moon”
28 or “Our Approach to Brewing” videos is it stated that Blue Moon originated from an

1 independent brewery.

2 Third, MillerCoors claims, and Plaintiff does not dispute, that “the SandLot”
3 brewery was indeed where Blue Moon Belgian White was first produced in 1996. Def.
4 Mot. 10. And again, nowhere in the “Our Approach to Brewing” video is it represented
5 that Blue Moon is currently produced only out of the SandLot brewery. *See* Def. Mot.,
6 Ex. B.

7 Fourth, the biographies of the “SandLot Guys” brewers on the BMBC website
8 do not contain any affirmative representations that Blue Moon is brewed by a small,
9 independent brewery. *See* Def. Mot., Ex. G.

10 Finally, as Plaintiff acknowledges, nowhere in these advertisements is Blue
11 Moon described as or stated to be a craft beer.

12 Thus, the Court agrees with Defendant that at best, these advertisements contain
13 “generalized, vague, and unspecified assertions” that amount to “mere puffery upon
14 which a reasonable consumer could not rely.”³

15 C. Whether Defendant is Liable for Third-Party Representations

16 Defendant argues that Plaintiff’s claims must be dismissed to the extent that they
17 are premised on third-party conduct. The Court agrees. Plaintiff alleges that
18 MillerCoors “requires that retail establishments stock Blue Moon among the craft
19 beers,” “endorses third-party representations that misidentify[] Blue Moon as a craft
20 beer,” “[t]hrough its sponsorship and distribution agreements . . . falsely advertises
21 Blue Moon as a craft beer at various concert and sporting venues,” and either directs
22 or consents to the selling of blue Moon as a craft beer in non-retail establishments, such
23

24 ³ Defendant also argues that the terms “craft” and “craft beer” are not actionable
25 statements. Def. Mot. 12. However, the Court need not decide the issue of whether
26 “craft” or “craft beer” can ever be an actionable statement, because as Defendant points
27 out, *id.*, Plaintiff nowhere alleges that MillerCoors refers to Blue Moon as a craft beer
28 in its advertising, *see* Am. Compl. 5–6. Plaintiff did previously allege that MillerCoors
referred to Blue Moon as a craft beer on its own corporate website, but as the Court
previously observed, “the Court cannot conclude that the reasonable consumer,
viewing Blue Moon’s identification as a craft beer on MillerCoors’ company website,
could be misled into believing that Blue Moon is an ‘independently brewed, hand-
crafted beer’ not owned by Miller Coors.” Dismissal Order 14.

1 as “national restaurant chains such as Applebee’s and TGI Friday’s.” Def. Mot. 5–8.

2 However, as Defendant correctly points out, unfair competition claims cannot
3 be predicated on vicarious liability. *Emery v. Visa Internat. Serv. Ass’n*, 95 Cal. App.
4 4th 952, 960 (2002) (“The concept of vicarious liability has no application to actions
5 brought under the unfair business practices act.” (quoting *People v. Toomey*, 157 Cal.
6 App. 3d 1, 14 (1984)) (internal quotation marks omitted)). In the context of false
7 advertising, there is no duty to investigate the truth of statements made by others. *Id.*
8 at 964 (citing *McCulloch v. Ford Dealers Advertising Assn.*, 234 Cal. App. 3d 1385,
9 1391 (1991); *Walters v. Seventeen Magazine*, 195 Cal. App. 3d 1119, 1122 (1987)).
10 “A defendant’s liability must be based on his personal ‘participation in the unlawful
11 practices’ and ‘unbridled control’ over the practices that are found to violate section
12 17200 or 17500.” *Id.* (citing *Toomey*, 157 Cal. App. 3d at 15).

13 Plaintiff does not allege such “personal participation” or “unbridled control”
14 here. Specifically, Plaintiff alleges that the way Defendant “requires that retail
15 establishments stock Blue Moon among the craft beers” is that Defendant “contracts
16 with a network of distributors, who in turn contract with retailers based on Defendant’s
17 requirements, to ensure that Blue Moon is stocked and sold in the retailer’s craft beer
18 section.” Am. Compl. 6. Plaintiff does not plead any specific features of the alleged
19 agreements between MillerCoors and the distributors that would enable MillerCoors
20 to be able to exercise “unbridled control” by proxy over the retailers, who are alleged
21 to contract with the distributors, not MillerCoors. And indeed, in the next sentence of
22 the amended complaint, Plaintiff retreats from the claim that Defendant actually
23 “requires” retailers to stock Blue Moon in the craft beer section, continuing,
24 “[a]ccordingly, Defendant is not only aware that this practice occurs, but encourages
25 it, and *whenever possible*, requires it.” *Id.* (emphasis added). Plaintiff’s allegations in
26 this regard thus appear to be conclusory, and lacking in the factual content that would
27 allow the Court to draw the reasonable inference that the defendant is liable for the
28 misconduct alleged.

1 Next, Plaintiff alleges, without any factual support, that Defendant endorses third
2 party advertisements for craft beer sales, which include Blue Moon, based on the
3 advertisements featuring Defendant’s trademark. At best, Plaintiff alleges that because
4 advertisements created by third parties “feature Defendant’s trademark protected logo,”
5 such advertisements “were created with Defendant’s knowledge and consent, if not at
6 Defendant’s direction.” *See, e.g.,* Am. Compl. 7. However, “the law is clear and
7 dispositive [that a] trademark owner’s grant of permission to another to use the owner’s
8 mark, combined with efforts to ‘police’ such use, do not make the user the agent or
9 intermediary of the owner. The owner may retain sufficient control to protect and
10 maintain its interest in the mark without establishing an agency relationship.” *Emery,*
11 95 Cal. App. 4th at 961 (citation omitted). Put another way, “[t]he use of such a mark
12 does not constitute an endorsement.” *Id.* at 964 (citing *New Kids on the Block v. New*
13 *America Pub., Inc.*, 971 F. 2d 302, 308–309 (9th Cir. 1992)).

14 Similarly, the claims regarding false advertising at concert and sporting venues
15 are based on unspecified sponsorship agreements and a concession stand which
16 features the Blue Moon logo and reads “craft beer,” while the claims regarding false
17 advertising at non-retail venues are based on the control allegedly exercised by
18 MillerCoors by proxy through its distributors and the menus and print advertisements
19 of national restaurant chains such as Applebee’s and TGI Friday’s. Am. Compl. 7.
20 Again, a third party’s use of a trademark does not constitute an endorsement by the
21 trademark owner.⁴

22 Accordingly, the Court finds that Defendant is not liable for the third party
23 representations of Blue Moon as a craft beer alleged by Plaintiff.

24
25 ⁴ Plaintiff also argues that MillerCoors might be liable for the actions of third
26 parties under an “aiding and abetting” theory. Pl. Resp. 20. Again, however, Plaintiff
27 does not plead a conspiracy to defraud between MillerCoors and third parties. *See*
28 *People v. Bestline Products, Inc.*, 61 Cal. App. 3d 879, 918 (1976). Similarly, in his
response, Plaintiff for the first time alleges that “[b]ecause MillerCoors owns many of
its distributors in the state of California, the trier of fact could reasonably find that an
agency relationship exists.” Pl. Resp. 20. However, Plaintiff did not allege that
MillerCoors owned any of its distributors anywhere in the amended complaint.

1 **D. Whether Defendant’s Pricing of Blue Moon Constitutes a**
2 **Representation**

3 Finally, Defendant argues that MillerCoors’ pricing of Blue Moon cannot
4 constitute a misrepresentation. The Court agrees. The Court previously found that
5 Plaintiff had failed to point to any case “supporting the proposition that the price of a
6 product can constitute a representation or statement about the product.” Dismissal
7 Order 16 (citing *Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163, 1169 (C.D. Cal.
8 2014) (finding that the price of a migraine medication did not constitute a
9 representation or statement about the product that could support consumer claims
10 against retailer under the UCL, CLRA, or FAL)). Plaintiff has again failed to do so
11 here. *See* Pl. Resp. 11 (acknowledging that courts “generally” only “consider product
12 pricing in consumer protection litigation . . . in the context of calculating damages”).

13 **III. Leave to Amend**

14 Fed. R. Civ. P. 15 provides that courts should freely grant leave to amend when
15 justice requires it. Accordingly, when a court dismisses a complaint for failure to state
16 a claim, “leave to amend should be granted unless the court determines that the
17 allegation of other facts consistent with the challenged pleading could not possibly cure
18 the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992)
19 (internal quotation marks omitted). Amendment may be denied, however, if amendment
20 would be futile. *See id.*

21 The Court already granted Plaintiff leave to amend once before in order to cure
22 the deficiencies identified in the original complaint. *See* Dismissal Order 20. In that
23 Order, the Court stated that it “d[id] not find it impossible that the Plaintiff could allege
24 other facts as to MillerCoors’ advertising or sales practices that would support their
25 claim that MillerCoors deceptively or misleadingly represents Blue Moon as a craft
26 beer.” *Id.* Having already given Plaintiff a second opportunity to plead his case, and
27 having found the merits lacking, the Court finds that at this juncture, amendment would
28 be futile. Accordingly, the Court **DENIES** Plaintiff leave to amend.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that:

1. Defendant MillerCoors' Motion to Dismiss Plaintiff's First Amended Complaint, ECF No. 22, is **GRANTED**.
2. Plaintiff is **DENIED** leave to amend.

IT IS SO ORDERED.

DATED: June 16, 2016


HON. GONZALO P. CURIEL
United States District Judge