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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KATIE KANE, <i>et al.</i> , individuals, on behalf of themselves and all others similarly situated,)	Case No.: 12-CV-02425-LHK
)	
Plaintiffs,)	ORDER GRANTING DEFENDANT’S
)	MOTION TO DISMISS PLAINTIFFS’
v.)	THIRD AMENDED COMPLAINT WITH
)	PREJUDICE
CHOBANI, INC.,)	
)	
Defendant.)	
)	

Before the Court is Defendant Chobani, Inc.’s (“Defendant” or “Chobani”) Motion to Dismiss Plaintiffs’ Third Amended Complaint. ECF No. 158. Plaintiffs Katie Kane, Arianna Rosales, and Darla Booth (collectively “Plaintiffs”) oppose the motion, ECF No. 160. Defendant has replied. ECF No. 161. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court GRANTS Defendant’s Motion to Dismiss the Third Amended Complaint with prejudice.

I. BACKGROUND
A. Plaintiffs’ Factual Allegations

Plaintiffs allege that they purchased Defendant’s yogurt products. ECF No. 154, ¶ 2 (Third Amended Complaint, hereinafter “TAC”). Specifically, Plaintiffs allege that they purchased the

1 pomegranate, lemon, peach, vanilla, strawberry, and blueberry flavors of Defendant’s Chobani
 2 Greek Yogurt. TAC ¶ 2. Plaintiffs contend that Defendant’s “Chobani Greek Yogurt” and
 3 “Chobani Greek Yogurt Champions” (collectively, “Yogurts”) are mislabeled. TAC ¶¶ 3-5.
 4 Plaintiffs do not allege that they purchased any flavor of Chobani Greek Yogurt Champions.¹
 5 Plaintiffs’ mislabeling allegations fall into two categories:

6 *Evaporated Cane Juice (“ECJ”) Allegations* - Plaintiffs allege that Defendant’s labels refer
 7 to the sweetener in Defendant’s Yogurts as “evaporated cane juice” (“ECJ”). TAC ¶ 19. Plaintiffs
 8 contend that ECJ is essentially just “sugar” or “dried cane syrup.” TAC ¶¶ 26-27. Plaintiffs allege
 9 that the use of the term ECJ to describe this ingredient is false and misleading and conceals the fact
 10 that the sweetening ingredient is “sugar” or “dried cane syrup.” TAC ¶¶ 54-60. Plaintiffs further
 11 allege that Defendant’s use of the term ECJ violates various Food and Drug Administration
 12 (“FDA”) regulations requiring manufacturers to refer to ingredients in food products by their
 13 “common and usual names.” TAC ¶ 71 (citing 21 C.F.R. §§ 101.3, 101.4, 102.5); *id.* ¶ 61 (FDA
 14 Draft Guidance for Industry: Ingredients Declared as Evaporated Cane Juice) (stating that it is the
 15 “FDA’s view that the term ‘evaporated cane juice’ is not the common or usual name of any type of
 16 sweetener”). Plaintiffs further allege that because the Standard of Identity for Yogurt, which
 17 governs when a product may be called a “yogurt,” does not list ECJ as an authorized sweetener,
 18 Defendant was prohibited from marketing its products as yogurt. TAC ¶¶ 136-137 (citing 21
 19 C.F.R. § 131.200 (“Standard of Identity for Yogurt”). To the extent Plaintiffs’ claims are based on
 20 Defendant’s use of the term ECJ on the Yogurts’ labeling, the Court refers to these claims
 21 generally as the “ECJ Claims.”

22 *All Natural Claims* - Plaintiffs also allege that Defendant has falsely stated that its Yogurts
 23 contain “[o]nly natural ingredients” and are “all natural.” TAC ¶¶ 5, 9. The Court refers to
 24 Defendant’s representations regarding the Yogurts’ natural quality and use of natural ingredients as
 25 the “All Natural Representations.” Plaintiffs allege that these representations appeared on the
 26

27 ¹ Plaintiffs do not allege that they purchased the following flavors of Defendant’s Chobani Greek
 28 Yogurt: apple-cinnamon, black-cherry, blood-orange, mango, passion fruit, pineapple, raspberry,
 and strawberry banana. *See* TAC ¶ 5, Table 1.

1 labeling for Defendant’s Yogurts and on Defendant’s website. TAC ¶ 22. Plaintiffs allege that
 2 these representations were false and misleading because the Yogurts include artificial colors. TAC
 3 ¶ 140. Because “fruit and vegetable juice (for color)” and “turmeric (for color)” are the only
 4 unnatural ingredients that Plaintiffs have specifically identified from Defendant’s labels, *see id.* ¶¶
 5 149, 167, Plaintiffs’ claims alleging that the Yogurts included unnatural ingredients are limited to
 6 these ingredients. Plaintiffs further allege that the All Natural Representations were “false and
 7 misleading” because “the fruit and vegetable juices . . . were highly processed unnatural substances
 8 far removed from the fruits or vegetables they were supposedly derived from and in fact were more
 9 akin to synthetic dyes like coal tar dyes.” TAC ¶ 161. The Court refers to Plaintiffs’ claims based
 10 on the All Natural Representations as the “All Natural Claims.”

11 Plaintiffs allege that they each “read the labels on Defendant’s [Yogurts], including the
 12 [i]ngredient, ‘evaporated cane juice’ and the ‘[a]ll [n]atural,’ ‘[a]ll [n]atural [i]ngredients’ and/or
 13 ‘[o]nly [n]atural [i]ngredients’ claims on the labels, before purchasing them.” TAC ¶¶ 187, 189,
 14 191. Plaintiffs allege that they “believed Defendant’s [Yogurts] contained only natural sugars from
 15 milk and fruit and did not contain added sugars or syrups” and that the Yogurts “contained only
 16 natural ingredients.” *Id.* Plaintiffs also allege that, “[h]ad Plaintiff[s] known Defendant’s [Yogurts]
 17 that [they] purchased contained added sugar or syrup and unnatural and artificial ingredients, [they]
 18 would not have purchased” them. *Id.* Plaintiffs further allege that they “would not have purchased
 19 Defendant’s [Yogurts] had they known they were not capable of being legally sold or held.” TAC ¶
 20 195.

21 Plaintiffs allege six causes of action. Plaintiffs’ first cause of action is for violation of the
 22 unlawful prong of the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.*,
 23 predicated on violations of: (1) the False Advertising Law (“FAL”), Cal. Bus. & Prof. Code
 24 §§ 17500 *et seq.*; (2) the Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 *et*
 25 *seq.*; and (3) California’s Sherman Food, Drug, and Cosmetic Act (“Sherman Law”), Cal. Health &
 26 Safety Code §§ 109875 *et seq.* TAC ¶¶ 213-215. The Sherman Law incorporates “[a]ll [federal]
 27 food labeling regulations and any amendments to those regulations.” Cal. Health & Safety Code §
 28 110100(a). Plaintiffs also allege causes of action for: (1) violation of the UCL’s unfair prong, TAC

1 ¶¶ 220-228; (2) violation of the UCL’s fraud prong, TAC ¶¶ 229-235; (3) violation of the FAL
2 because Defendant’s labeling and advertising are “misleading and deceptive,” TAC ¶¶ 236-243; (4)
3 violation of the FAL because Defendant’s advertising is “untrue,” TAC ¶¶ 244-251; and (5)
4 violation of the CLRA, TAC ¶¶ 252-264.

5 **B. Procedural History**

6 **1. Plaintiff’s Amendment of Complaints**

7 Plaintiffs filed their original Complaint in this case on May 14, 2012. ECF No. 1. On
8 August 3, 2012, the parties stipulated that Plaintiffs would file a First Amended Complaint. ECF
9 No. 12. Plaintiffs filed their First Amended Complaint on August 30, 2012. ECF No. 14. On
10 October 2, 2012, the Court granted the parties’ stipulation to allow Plaintiffs to file a Second
11 Amended Complaint (“SAC”). ECF No. 34. Plaintiffs filed their SAC on October 10, 2012. ECF
12 No. 35. Plaintiffs filed their Third Amended Complaint (“TAC”) on October 10, 2013. ECF No.
13 154.

14 **2. Plaintiffs’ Motion for a Preliminary Injunction**

15 On September 10, 2012, Plaintiffs filed a Motion for a Preliminary Injunction. ECF No. 16.
16 Plaintiffs withdrew this motion on November 1, 2012. ECF No. 37. Three months later, on
17 February 5, 2013, Plaintiffs filed another Motion for a Preliminary Injunction. ECF No. 44.
18 Plaintiffs sought to: (1) enjoin Defendant “from selling, advertising or distributing Chobani Greek
19 Yogurt Products as currently labeled and formulated,” and (2) require Defendant “to remove and
20 recall all Chobani Greek Yogurt products, as currently labeled and formulated, from its distributors
21 and retailers.” ECF No. 44-25 at 1. On April 15, 2013, Defendant filed an Opposition. ECF No. 86.
22 On June 14, 2013, Plaintiffs filed a Reply. ECF No. 103. The Court held a hearing on the motion
23 on July 11, 2013. ECF No. 127. The Court issued an Order denying the motion on July 15, 2013.
24 ECF No. 126.

25 **3. Defendant’s Motion to Disqualify Plaintiffs’ Counsel and Expert**

26 On March 5, 2013, Defendant filed a motion to: (1) Disqualify Plaintiffs’ Counsel; (2) Bar
27 Plaintiffs’ Counsel from Discussing Issues in this Case with Replacement Counsel; and (3) Bar
28 EAS Consulting Group LLC from Discussing Issues in this Case with Plaintiffs’ Counsel or

1 Replacement Counsel. ECF No. 64. On April 15, 2013, Plaintiffs' Counsel filed an Opposition.
2 ECF No. 84. On June 14, 2013, Chobani filed a Reply. ECF No. 110. A hearing was held on the
3 motion on July 25, 2013. ECF No. 143. On July 29, 2013, Plaintiffs filed a Motion to Stay
4 Decision on the Motion to Disqualify and for Leave to Conduct Discovery. ECF No. 133. On July
5 30, 2013, counsel for Chobani sent an e-mail to the Courtroom Deputy, objecting to the Motion to
6 Stay, and on July 31, 2013, Plaintiffs' Counsel sent a reply by e-mail to the Courtroom Deputy. On
7 August 1, 2013, Plaintiffs' Counsel filed a Notice of Withdrawal of the Motion to Stay. ECF No.
8 139. Also on August 1, 2013, Plaintiffs filed another Motion to Stay Decision and for Leave to
9 Conduct Discovery. ECF No. 140. On August 2, 2013, the Court issued an Order granting in part
10 and denying in part Chobani's Motion to Disqualify, and denying as moot Plaintiffs' Second
11 Motion to Stay. ECF No. 141.

12 **4. Defendants' Motions to Dismiss**

13 The Court held a hearing on Defendant's Motion to Dismiss the SAC on March 28, 2013.
14 ECF No. 79. On July 12, 2013, this Court issued an Order granting in part and denying in part
15 Defendant's Motion to Dismiss the SAC. ECF No. 125 ("July 12 Order"). Defendant filed a
16 Motion for Leave to file a Motion for Reconsideration of that Order on July 22, 2013. ECF No.
17 128. Following a Case Management Conference on July 25, 2013, at which the parties addressed
18 Defendant's pending Motion for Leave to file a Motion for Reconsideration and stipulated to
19 allowing Defendant to file a Motion for Reconsideration limited to "(1) the Court's
20 characterization of Plaintiffs' ECJ theory, and (2) whether the doctrine of primary jurisdiction
21 should apply to preclude Plaintiffs' ECJ claims," the Court granted Defendant's Motion for Leave
22 and VACATED the July 12 Order. ECF No. 131, at 1-2. Plaintiffs thereafter filed a Motion for
23 Leave to file their own Motion for Reconsideration, ECF No. 137, which the Court denied on
24 August 14, 2013, ECF No. 144.

25 Defendant filed its Motion to Reconsider the July 12 Order on Defendant's Motion to
26 Dismiss the SAC on August 21, 2013. ECF No. 146. The Court granted the Motion for
27 Reconsideration and dismissed the SAC on September 19, 2013. ECF No. 153 ("September 19
28 Order"). However, the Court granted Plaintiffs leave to amend the pleading deficiencies with

1 respect to the Plaintiffs' UCL, FAL, and CLRA claims. September 19 Order, at 20.

2 Plaintiffs filed their TAC on October 10, 2013. ECF No. 154. Defendant moved to dismiss
3 the TAC on October 28, 2013. ECF No. 158 ("Mot."). Plaintiffs filed an opposition to this motion
4 on November 12, 2013. ECF No. 160 ("Opp'n"). In support of their Opposition, Plaintiffs have
5 filed two Statements of Recent Decision relevant to the pending Motion. ECF No. 164, 165.
6 Defendant filed a Reply on November 19, 2013. ECF No. 161 ("Reply"). In addition, Defendant
7 has filed two Statements of Recent Decision in support of its motion. ECF Nos. 162, 163.

8 **II. LEGAL STANDARD**

9 **A. Rule 12(b)(1)**

10 A defendant may move to dismiss an action for lack of subject matter jurisdiction pursuant
11 to Federal Rule of Civil Procedure 12(b)(1). A motion to dismiss for lack of subject matter
12 jurisdiction will be granted if the Complaint on its face fails to allege facts sufficient to establish
13 subject matter jurisdiction. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th
14 Cir. 2003). In considering a Rule 12(b)(1) motion, the Court "is not restricted to the face of the
15 pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual
16 disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560
17 (9th Cir. 1988). If the plaintiff lacks standing under Article III of the U.S. Constitution, then the
18 court lacks subject matter jurisdiction, and the case must be dismissed. *See Steel Co. v. Citizens for*
19 *a Better Env't*, 523 U.S. 83, 101-02 (1998). Once a party has moved to dismiss for lack of subject
20 matter jurisdiction under Rule 12(b)(1), the opposing party bears the burden of establishing the
21 court's jurisdiction, *see Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir.
22 2010), by putting forth "the manner and degree of evidence required" by whatever stage of the
23 litigation the case has reached, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see also*
24 *Barnum Timber Co. v. Env'tl. Prot. Agency*, 633 F.3d 894, 899 (9th Cir. 2011) (at the motion to
25 dismiss stage, Article III standing is adequately demonstrated through allegations of "specific facts
26 plausibly explaining" why the standing requirements are met).

27 **B. Rule 8(a)**

1 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a
2 short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint
3 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure
4 12(b)(6). The Supreme Court has held that Rule 8(a) requires a plaintiff to plead “enough facts to
5 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
6 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the
7 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
8 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a probability
9 requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*
10 (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, a court
11 “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light
12 most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d
13 1025, 1031 (9th Cir. 2008).

14 However, a court need not accept as true allegations contradicted by judicially noticeable
15 facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and the “[C]ourt may look
16 beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)
17 motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).
18 Nor is the court required to “assume the truth of legal conclusions merely because they are cast in
19 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per
20 curiam) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere “conclusory
21 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.”
22 *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); accord *Iqbal*, 556 U.S. at 678.
23 Furthermore, “a plaintiff may plead herself out of court” if she “plead[s] facts which establish that
24 [s]he cannot prevail on h[er] . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir.
25 1997) (internal quotation marks omitted).

26 C. Rule 9(b)

27 Claims sounding in fraud or mistake are subject to the heightened pleading requirements of
28 Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud “must state with

1 particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b); *see Kearns v. Ford Motor*
 2 *Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy the heightened standard under Rule 9(b), the
 3 allegations must be “specific enough to give defendants notice of the particular misconduct which
 4 is alleged to constitute the fraud charged so that they can defend against the charge and not just
 5 deny that they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.
 6 1985). Thus, claims sounding in fraud must allege “an account of the ‘time, place, and specific
 7 content of the false representations as well as the identities of the parties to the
 8 misrepresentations.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam)
 9 (internal quotation marks omitted). The plaintiff must set forth “what is false or misleading about a
 10 statement, and why it is false.” *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)
 11 (en banc), *superseded by statute on other grounds as stated in Ronconi v. Larkin*, 253 F.3d 423,
 12 429 n.6 (9th Cir. 2001).

13 **D. Leave to Amend**

14 If the court concludes that the complaint should be dismissed, it must then decide whether
 15 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend
 16 “shall be freely given when justice so requires,” bearing in mind “the underlying purpose of Rule
 17 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities.” *Lopez*
 18 *v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks and citation
 19 omitted). Nonetheless, a district court may deny leave to amend a complaint due to “undue delay,
 20 bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by
 21 amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of
 22 the amendment, [and] futility of amendment.” *See Leadsinger, Inc. v. BMG Music Publ’g*, 512
 23 F.3d 522, 532 (9th Cir. 2008).

24 **III. DISCUSSION**

25 Defendant seeks to dismiss Plaintiffs’ TAC on a number of grounds, including lack of
 26 standing; failure to allege facts showing that a “reasonable consumer” is likely to be deceived by
 27 the challenged advertising; preemption; primary jurisdiction; and failure to state a claim for
 28 purposes of Federal Rules of Civil Procedure 9(b). Mot. at 1-2, 18-24; Reply at 11-15. The Court

1 will not address every one of Defendant’s arguments, however, because, as discussed below, the
 2 Court finds that Plaintiffs have failed to cure the deficiencies identified in the Court’s September
 3 19 Order because the TAC fails to adequately demonstrate that Plaintiffs have standing to pursue
 4 their UCL, FAL, and CLRA claims.

5 **A. Standing**

6 **1. Legal Standard**

7 **a. Article III Standing**

8 A federal court must ask whether a plaintiff has suffered sufficient injury to satisfy the
 9 “case or controversy” requirement of Article III of the U.S. Constitution. *See Clapper v. Amnesty*
 10 *Int’l USA*, 133 S. Ct. 1138, 1146 (2013) (“‘One element of the case-or-controversy requirement’ is
 11 that plaintiffs ‘must establish that they have standing to sue.’”) (quoting *Raines v. Byrd*, 521 U.S.
 12 811, 818 (1997)). To satisfy Article III standing, a plaintiff must allege: (1) an injury-in-fact that is
 13 concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to
 14 the challenged action of the defendant; and (3) that the injury is redressable by a favorable ruling.
 15 *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010); *Friends of the Earth, Inc. v.*
 16 *Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Article III’s standing requirements
 17 may be satisfied by allegations that a plaintiff purchased a product he otherwise would not have
 18 purchased, or spent more on such product, in reliance on the defendant’s misrepresentations. *See,*
 19 *e.g., Brazil v. Dole Food Co.*, No. 12–01831, 2013 WL 1209955, at *11-13 (N.D. Cal. Mar. 25,
 20 2013) (holding that “Brazil suffered a concrete and particularized injury . . . [because] he allegedly
 21 was deceived, and then paid money that he would not otherwise have paid had he known about the
 22 true nature of Defendants’ products”). “The party invoking federal jurisdiction bears the burden of
 23 establishing these elements. . . . with the manner and degree of evidence required at the successive
 24 stages of the litigation.” *Lujan*, 504 U.S. at 561.

25 **b. UCL, FAL, and CLRA Standing**

26 In addition to the requirements imposed by Article III, the UCL, FAL, and CLRA all
 27 require Plaintiffs to demonstrate standing. To have standing under the FAL and the CLRA, a
 28 plaintiff must allege that she relied on the defendant’s alleged misrepresentation and that she

1 suffered economic injury as a result. *See, e.g.*, Cal. Bus. & Prof. Code § 17535 (providing that a
 2 plaintiff must have “suffered injury in fact and ha[ve] lost money or property as a result of a
 3 violation of this chapter”); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010)
 4 (finding plaintiff’s CLRA claim failed because plaintiff failed to allege facts showing that he
 5 “relied on any representation by” defendant).

6 Turning to the UCL, the UCL prohibits business practices that are unlawful, unfair, or
 7 fraudulent. As this Court discussed in its September 19 Order, courts have held that, to establish
 8 standing under the UCL’s fraud prong, a plaintiff must demonstrate that she actually relied upon
 9 the allegedly fraudulent misrepresentation. *See* September 19 Order, at 10; *In re Tobacco II Cases*,
 10 46 Cal. 4th 298, 326 (2009). Courts have also extended this actual reliance requirement to claims
 11 under the UCL’s unlawful prong to the extent “the predicate unlawful conduct is based on
 12 misrepresentations.” *Durell*, 183 Cal. App. 4th at 1363. Moreover, in *Kwikset Corp. v. Superior*
 13 *Court*, the California Supreme Court suggested that the actual reliance requirement applies
 14 whenever the underlying misconduct in a UCL action is fraudulent conduct. *See* 51 Cal. 4th 310,
 15 326 (2011) (holding that plaintiff was required to demonstrate actual reliance to establish standing
 16 to pursue claims under the UCL’s unlawful prong because his claims were “based on a fraud theory
 17 involving false advertising and misrepresentations to consumers” (internal quotation marks
 18 omitted)). Thus, as stated in this Court’s September 19 Order, the actual reliance requirement also
 19 applies to claims under the UCL’s unfair prong to the extent such claims are based on fraudulent
 20 conduct. *See* September 19 Order, at 11; *see also In re Actimmune Mktg. Litig.*, No. 08-2376, 2010
 21 WL 3463491, at *8 (N.D. Cal. Sept. 1, 2010) *aff’d*, 464 F. App’x 651 (9th Cir. 2011) (holding “that
 22 a plaintiff must plead ‘actual reliance,’ even if their [*sic*] claim arises under the unlawful or unfair
 23 prongs, so long as the pleadings assert a cause of action grounded in misrepresentation or
 24 deception.”).² In this case, because “the gravamen of Plaintiffs’ claims under the UCL’s unlawful,
 25 unfair, and fraud prongs is that Defendant’s labeling was deceptive,” the Court concludes, as it did
 26

27 ² The Court also reiterates, as it held in its September 19 Order, that Plaintiffs must satisfy the
 28 heightened pleading standards for fraud under Rule 9(b) with respect to each of their UCL, FAL,
 and CLRA claims. *See* September 19 Order, at 12 n.4.

1 in its September 19 Order, that “Plaintiffs must demonstrate actual reliance and economic injury.”
2 September 19 Order, at 11.

3 In their Opposition, Plaintiffs ask the Court to reconsider its position that Plaintiffs must
4 demonstrate reliance in order to bring their UCL claim under the UCL’s “unlawful” prong. Opp’n
5 at 7-14. Plaintiffs concede that the “Court looked unfavorabl[y] on [Plaintiffs’] theory in its order
6 on Defendant’s motion to dismiss [the SAC].” Opp’n at 8. In addition to presenting the same
7 arguments Plaintiffs set forth in their opposition to the Defendant’s motion to dismiss the SAC,
8 Plaintiffs cite four food labeling opinions issued since this Court’s July 12 Order that have
9 concluded that a plaintiff need not demonstrate reliance to bring a claim under the UCL’s
10 “unlawful” prong, but need only plead facts to show that it is plausible that the defendant broke a
11 law. *See id.* (citing *Swearingen v. Yucatan Foods, LP*, No. 13-3544, 2014 WL 553537, at *6-7
12 (N.D. Cal. Feb. 7, 2014); *Morgan v. Wallaby Yogurt Co.*, No. 13-00269, 2013 WL 5514563, at *9
13 (N.D. Cal. Oct. 4, 2013); *Gitson v. Trader Joe’s Co.*, No. 13-01333, 2013 WL 5513711, at *9
14 (N.D. Cal. Oct. 4, 2013); *Trazo v. Nestlé USA, Inc.*, No. 12-2272, 2013 WL 4083218, at *9 (N.D.
15 Cal. Aug. 9, 2013)).

16 The Court addresses each of Plaintiffs’ contentions in turn, and rejects the Plaintiffs’
17 request for reconsideration for the following reasons. First, Plaintiffs themselves concede in their
18 opposition that the California Supreme Court, in *Kwikset*, held that where a UCL claim brought
19 under the “unlawful prong” is premised on “misrepresentation and deception, reliance [is] a[]
20 [required] element.” Opp’n at 11 n.4. Second, the Court declines to change its position in light of
21 the continued impact of Proposition 64 and *Kwikset* since the Court’s September 19 ruling. *See,*
22 *e.g., Wilson v. Frito-Lay N. Am., Inc.*, No. 12–1586, 2013 WL 5777920, at *7-8 (N.D. Cal. Oct. 24,
23 2013) (citing *Kwikset* and similarly rejecting Plaintiffs’ argument that a mislabeling claim can be
24 brought under the UCL’s unlawfulness prong absent allegations of reliance); *Bruton v. Gerber*
25 *Prods. Co.*, No. 12–02412, 2014 WL 172111, at *6 (N.D. Cal. Jan. 15, 2014) (holding that there is
26 a reliance requirement for claims brought under the UCL’s unlawful prong to the extent “the
27 predicate unlawful conduct is based on misrepresentations.”) (citation omitted); *Figy v. Amy’s*
28 *Kitchen*, No. 13–3816, 2013 WL 6169503, at *3-4 (N.D. Cal. Nov. 25, 2013) (same). As this Court

1 explained in its September 19 Order, “the voters enacted Proposition 64 in 2004 as a means of
2 ‘confin[ing] standing to those actually injured by a defendant’s business practices and []
3 curtail[ing] the prior practice of filing suits on behalf of clients who have not used the defendant’s
4 product or service, viewed the defendant’s advertising, or had any other business dealing with the
5 defendant.’” September 19 Order, at 16-17 (quoting *Kwikset*, 51 Cal. 4th at 321). Third, Plaintiffs’
6 citations to *Morgan*, *Swearingen*, *Gitson*, and *Trazo* do not persuade the Court to change course
7 because these cases do not discuss the impact of Proposition 64 and *Kwikset* on the standing
8 requirements under the UCL, and thus do not address clear California Supreme Court authority on
9 this point. Notably, in *In re Tobacco II Cases*, the California Supreme Court cited *People v.*
10 *Cooper*, 27 Cal. 4th 38, 45 (2002) for the proposition that “[t]o determine the meaning of a statute,
11 we seek to discern the sense of its language, in full context, in light of its purpose,” and thereafter
12 concluded that an actual reliance requirement exists under the UCL “in light of [the] intention
13 [behind the enactment of Proposition 64] to limit [private enforcement] actions.” 46 Cal. 4th at
14 326.

15 Further, Plaintiffs’ citation to *Berger v. Home Depot USA, Inc.*, No. 11–55592, 2014 WL
16 350082, at *4 (9th Cir. Feb. 3, 2014), is unavailing. ECF No. 165. Citing to *In re Tobacco II’s*
17 background discussion of pre-Proposition 64 cases, *Berger* states that alleging “the victim’s
18 reliance on the false statements—[] which [is an] element[] of common-law fraud claims—[is] not
19 required to show a violation of California’s UCL.” 2014 WL 350082, at *4 (citing *In re Tobacco*
20 *II*, 46 Cal. 4th at 312). Plaintiffs’ reliance on this statement in the instant case is erroneous,
21 however, because the parties in *Berger* were concerned with pleading requirements for *absent* class
22 members, not representative plaintiffs. See Appellant’s Opening Brief at 2, *Berger v. Home Depot*
23 *USA, Inc.*, No. 11–55592 (“The district court does not at all discuss the leading California Supreme
24 Court opinion *In re Tobacco II Cases* . . . which holds that absent class members are never required
25 to prove reliance. Did the district court therefore apply an incorrect legal standard to Plaintiff’s
26 claims . . . when it denied the motion for class certification based on a belief that class members
27 would have to establish reliance on an individual basis?”). More specifically, *In re Tobacco* stands
28 for two propositions: (1) that even after the enactment of Proposition 64, absent class members still

1 do not have to plead reliance; and (2) that Proposition 64 “imposes an actual reliance requirement
 2 on [representative] plaintiffs prosecuting a private enforcement action under the UCL’s fraud
 3 prong.” 46 Cal. 4th at 324, 326. When citing *In re Tobacco*, the Ninth Circuit, in *Berger*, was
 4 referencing the traditional pleading requirements for absent class members, who are not at issue in
 5 the instant case, and was not referencing the law regarding pleading requirements for representative
 6 plaintiffs.

7 Finally, Plaintiffs’ citations to *Medrazo v. Honda of North Hollywood*, 205 Cal. App. 4th 1
 8 (2012), and *Steroid Hormone Product Cases*, 181 Cal. App. 4th 145 (2010), are similarly
 9 unavailing. Opp’n at 9-11. *Steroid Hormone* was decided *prior* to the California Supreme Court’s
 10 decision in *Kwikset* and the alleged unlawful conduct in that case was not based on a statute
 11 prohibiting specific types of misrepresentations. *Steroid Hormone*, 181 Cal. App. 4th at 150 n.4
 12 (alleging unlawful conduct based on a law prohibiting the sale of a schedule III controlled
 13 substance without a prescription). *Medrazo* contains no discussion of *Kwikset*’s statement that the
 14 actual reliance requirement applies to claims under the unlawful prong of the UCL where the
 15 alleged unlawful conduct is based on a statute that prohibits specific types of misrepresentations.

16 Accordingly, the Court declines to change its prior holding that Proposition 64, as
 17 interpreted by *Kwikset*, requires actual reliance when a claim brought under the UCL’s “unlawful
 18 prong” is grounded in fraud, as in the instant case.

19 2. Analysis of Reliance

20 In the Court’s September 19 Order addressing Plaintiffs’ SAC, the Court concluded
 21 that because Plaintiffs had failed to adequately plead the reliance element of their “ECJ” and “All
 22 Natural” Claims, Plaintiffs had failed to demonstrate that they had standing to bring those claims.
 23 *See* September 19 Order, at 14, 18. However, the Court gave Plaintiffs leave to amend to cure the
 24 pleading deficiencies identified in the Order.³ *Id.* at 20. The Court further noted that Plaintiffs’

25 _____
 26 ³ In the first two versions of Plaintiffs’ Complaint, Plaintiffs had alleged UCL, FAL, and CLRA
 27 claims based on “No Sugar Added” representations on Defendant’s website. September 19 Order,
 28 at 15. Defendant takes issue with Plaintiffs’ citations to different website representations
 throughout the TAC, and requests that the “No Sugar Added” claims be dismissed with prejudice.
 Mot. at 6-7; *see, e.g.*, TAC ¶¶ 22, 27. However, in their opposition to the instant motion to dismiss,
 Plaintiffs assert that the TAC no longer alleges a claim based on the “No Sugar Added”

1 “failure to cure the deficiencies identified in this Order will result in a dismissal with prejudice.”
 2 *Id.* Defendant now argues that the TAC fails to cure these deficiencies because the TAC still fails
 3 to allege a coherent, plausible theory of reliance. Mot. at 1-9. The Court agrees. Below, the Court
 4 addresses why the TAC does not adequately allege reliance with respect to both categories of
 5 Defendant’s alleged misrepresentations.

6 **a. ECJ Claims**

7 As in their Second Amended Complaint, Plaintiffs continue to allege that Defendant’s use
 8 of the term “evaporated cane juice” is misleading because it conceals the fact that the ingredient is
 9 essentially white sugar or dried cane syrup. *See, e.g.*, TAC ¶¶ 29, 55, 60, 86. Plaintiffs also
 10 continue to assert they did not know ECJ was sugar, *see* TAC ¶¶ 188, 190, 192, and they instead
 11 believed the sugars present in the products “were naturally occurring sugars that were found
 12 naturally in the ingredients used by Chobani such as fruit (fructose) and milk (lactose).” TAC ¶ 85.

13 In their TAC, Plaintiffs also now emphasize that they would not have purchased
 14 Defendant’s products had they known that the products contained sugar that was “*added* as an
 15 ingredient into Defendant’s yogurt during [the products’] processing or preparation.” *Id.* (emphasis
 16 in original); *id.* ¶ 188 (“Had [Plaintiff] known ‘evaporated cane juice’ was the same thing as added
 17 sugar or syrup, Plaintiff would not have purchased Defendant’s yogurt product.”). Unlike the SAC,
 18 the TAC alleges that while Plaintiffs “did not know what evaporated cane juice was at the time
 19 [they] purchased Defendant’s yogurt product, because of the fact [the labels] used the term ‘juice,’
 20 it sounded like something healthy.” TAC ¶¶ 188, 190, 192.

21 Plaintiffs’ TAC alleges essentially two theories of reliance with respect to Plaintiffs’ ECJ
 22 claims: (1) Plaintiffs had no idea that ECJ was a sweetener, *see* TAC ¶¶ 188, 190, 192; and (2)
 23 Plaintiffs had no idea that ECJ was a sweetener but believed it was “some type of ingredient that
 24 was healthier than sugar,” *see id.* ¶ 193. The Court agrees with Defendant that neither theory, as
 25 alleged in the TAC, cures the deficiencies identified in this Court’s September 19 Order.

26
 27 representations. *See* Opp’n at 5. Because Plaintiffs have disclaimed a theory of misrepresentation
 28 based on Chobani’s “No Sugar Added” representations, the Court need not address Defendant’s
 request.

1 The Court first addresses Plaintiffs’ theory that Plaintiffs had no idea that ECJ was a
2 sweetener. The Court rejected this theory as implausible in its September 19 Order, holding:

3 [T]he SAC fails to explain how Plaintiffs could have realized that dried cane syrup was a
4 form of sugar, but nevertheless believed that evaporated cane *juice* was not. What is more,
5 the SAC fails to allege what Plaintiffs believed evaporated cane juice to be if not a form of
6 sugar. Indeed, Plaintiffs do not allege that there is some other form of cane besides sugar
7 cane. Absent *some* factual allegation concerning what Plaintiffs believed ECJ to be if not a
8 form of sugar or a juice containing some form of sugar, Plaintiffs’ allegations that they read
9 the label, were aware that the Yogurts contained ECJ, and nevertheless concluded that the
10 Yogurts contained “only natural sugars from milk and fruit and did not contain added
11 sugars or syrups” is simply not plausible.

12 September 19 Order, at 13 (emphases in original). The Court begins its analysis by first
13 noting that like in the SAC, Plaintiffs’ allegations in the TAC continue to suggest that Plaintiffs
14 understood that dried cane syrup was a form of sugar because Plaintiffs repeatedly refer to sugar
15 and dried cane syrup interchangeably throughout the TAC. *See, e.g.*, TAC ¶ 26 (“[T]he ingredient
16 section fails to list ‘sugar’ or ‘dried can syrup’ as an added ingredient”); *id.* ¶ 27 (“Chobani fails to
17 disclose the fact that that [sic] ‘evaporated can juice’ is, in its ordinary and commonly understood
18 terms, ‘sugar,’ and/or ‘dried cane syrup’”); *id.* ¶ 75 (stating that “dried cane syrup” is an
19 “alternative term” for sugar); *id.* ¶ 138 (describing ECJ as “a false and misleading name for another
20 food or ingredient that has a common or usual name, namely sugar or dried cane syrup”); *id.* ¶ 139
21 (“ECJ is different sweetener from sugar or dried cane syrup”); *id.* ¶ 193 (“ECJ is really sugar or
22 dried cane syrup”). Moreover, Plaintiffs Kane and Booth submitted declarations in support of their
23 preliminary injunction motion stating that they would not have bought Defendant’s products if they
24 had known the products contained “dried cane syrup,” which indicates that both Plaintiffs
25 understood dried cane syrup was equivalent to sugar. *See* ECF Nos. 109-1, 112.

26 However, the TAC, like the SAC, continues to fail to explain how Plaintiffs could have
27 realized that dried *cane* syrup was a form of sugar, but nevertheless believed that evaporated *cane*
28 juice was not. The TAC fails to do so despite the fact that the September 19 Order explicitly put
Plaintiffs on notice of this deficiency in the SAC. In other words, Plaintiffs still fail to explain what
they believed evaporated cane juice to be, if *not* a form of sugar. Instead, Plaintiffs simply add the
new allegation that they were “looking for ‘added sugar’” and that “Plaintiffs scanned the

1 ingredient lists of the Chobani products for forms of added sugar and failed to recognize the term
 2 ‘evaporated cane juice’ as a form of added sugar.” TAC ¶ 112; *see also* Opp’n at 2-3. While
 3 Plaintiffs now cite to public health guidelines that describe the harmful properties of “added
 4 sugars,” *see* TAC ¶¶ 87-109, these allegations do not answer the question of what Plaintiffs
 5 believed evaporated cane juice was when they purchased Defendant’s products.

6 The Court notes that while Plaintiffs, in their TAC, allege that there are other less common
 7 forms of cane apart from *sugar* cane, including bamboo cane and sorghum cane, TAC ¶ 128;⁴ *see*
 8 *also* Opp’n at 3 (noting these other forms of cane), Plaintiffs nowhere allege in their TAC that
 9 Plaintiffs believed that ECJ actually referred to these other forms of cane when Plaintiffs read the
 10 ingredient list on Defendant’s products. Furthermore, Plaintiffs’ counsel’s own statements support
 11 the conclusion that it is implausible that Plaintiffs believed that the term “cane” in “evaporated
 12 cane juice” referred to these other less common forms of cane when Plaintiffs read the term
 13 “evaporated cane juice” in the ingredient list on Defendant’s products. At the July 11, 2013 hearing
 14 regarding Plaintiffs’ motion for a preliminary injunction, the Court asked Plaintiffs’ counsel,
 15 “[W]hat kind of cane is there other than sugar cane?” ECF No. 127 at 17. Plaintiffs’ counsel
 16 answered, “None.” *Id.* The Court then asked Plaintiffs’ counsel what people generally think of
 17 when people read “cane juice.” *Id.* Plaintiffs’ counsel responded: “Well, I don’t know – what they
 18 are thinking of.” *Id.* Plaintiffs’ counsel’s own admission that he was unaware of any kinds of cane
 19 other than sugar cane, combined with the fact that he answered “I don’t know – what [people] [are]
 20 thinking of” at a hearing which occurred after Plaintiffs had already filed three complaints in this
 21 case and three and a half months after the Court’s March 28, 2013 hearing on Defendant’s motion
 22 to dismiss the SAC, further supports a finding that it is simply implausible that Plaintiffs actually
 23 thought that the term “cane” in “evaporated cane juice” referred to other forms of cane when
 24 Plaintiffs read the term “evaporated cane juice” on Defendant’s products.

25
 26 _____
 27 ⁴ Specifically, TAC ¶ 128 states: “The term ‘cane’ is not exclusively a reference to sugar or sugar
 28 cane. Many other types of cane exist and are used in foods, for example, bamboo cane and
 sorghum cane, both which produce juice. . . . Corn is a form of cane. There are over 1000 species
 just of bamboo and over 10,000 members of the family of plants that includes corn and sugar
 cane.”

1 Furthermore, the TAC repeatedly acknowledges that “fruit juice concentrate” is a well-
2 known added sugar. *See* TAC ¶¶ 90, 94, 96, 98, 109. This not only undermines Plaintiffs’
3 purported reliance on the word “juice” in “evaporated cane juice” as denoting something “healthy,”
4 but also renders implausible Plaintiffs’ belief that Defendant’s yogurt products contained no
5 “added sugars,” given that Plaintiffs allege that they read the ingredient “fruit and vegetable juice
6 concentrate” on the Defendant’s product labels. *See* TAC ¶¶ 187-193 (alleging that Plaintiffs read
7 Defendant’s product labels); *see, e.g.*, ECF Nos. 154-2; 154-7 (displaying how Defendant’s
8 product labels included the term “fruit and vegetable juice concentrate”).

9 Accordingly, without further factual allegations in support of Plaintiff’s theory, the Court
10 rejects Plaintiffs’ reliance theory – that Plaintiffs didn’t know ECJ was a sweetener and instead
11 believed the sugars present in the products were only “naturally occurring sugars” and not “added
12 sugars” – as implausible for the same reasons stated in this Court’s September 19 Order. September
13 19 Order, at 13-14.

14 Before addressing Plaintiffs’ second theory that Plaintiffs had no idea that ECJ was a
15 sweetener but believed it was “some type of ingredient that was healthier than sugar,” TAC ¶ 193,
16 the Court notes that it appears that the TAC makes various statements, like the SAC did, *see* SAC
17 ¶¶ 62-64, concerning the allegedly healthful properties of unprocessed sugar cane by implying that
18 unlike ECJ and other refined sugars, natural sugar cane is “healthy and nutritious, containing
19 vitamins, minerals, enzymes, fibers, and phytonutrients . . .” TAC ¶ 129. Relying on these similar
20 allegations present in the SAC, the July 12 Order had concluded that even though Plaintiffs failed
21 to adequately plead reliance based on a theory that they were unaware that Defendant’s yogurts
22 contained any sweeteners beyond “natural sugars from milk and fruit,” Plaintiffs had nevertheless
23 adequately pleaded reliance by alleging that the term ECJ plausibly suggested to Plaintiffs that ECJ
24 was a form of sugar that is healthier than refined sugars and syrups. July Order at 11-12 (citing
25 SAC ¶¶ 62-64). However, Plaintiffs expressly disavowed this theory at the July 25, 2013 Hearing
26 on Defendant’s Motion to Disqualify Plaintiffs’ counsel and expert, *see* ECF No. 143, at 14:3-9,
27 and stipulated to allowing Defendant to file a Motion for Reconsideration of the Court’s July 12
28 Order, *see id.* at 40:9-41:1. Because Plaintiffs’ Opposition to the Motion for Reconsideration

1 similarly disavowed this theory, *see* ECF No. 147 at 4 (“Plaintiffs do not claim that Plaintiffs
 2 believed ECJ was a healthier form of sugar . . .”), the Court concluded in the September 19 Order
 3 that the SAC failed to plead reliance based on a theory that Defendant’s ECJ statements deceived
 4 Plaintiffs into thinking that ECJ was a healthier form of sugar. September 19 Order, at 14.
 5 Plaintiffs do not resurrect this theory in their opposition to the instant motion to dismiss the TAC,
 6 and in fact now expressly disavow the theory in their TAC. *See* TAC ¶ 193 (“Plaintiffs[] are not
 7 claiming that they believed ECJ was a ‘healthier sugar’ or ‘healthier form of sugar’”). Accordingly,
 8 the Court does not address this theory as a basis to find Plaintiffs have adequately pleaded reliance.

9 However, instead of claiming that ECJ was a “healthier form of sugar,” Plaintiffs assert that
 10 they believed ECJ was “some type of ingredient that was healthier than sugar . . .” TAC ¶ 193.
 11 Plaintiffs did not specifically allege this theory in the SAC but alleged it for the first time in
 12 Plaintiffs’ opposition to Defendant’s Motion to Dismiss the SAC. Plaintiffs also assert this theory
 13 in the TAC. The Court rejected this theory in the September 19 Order because, in addition to not
 14 having been specifically alleged in the SAC, Plaintiffs’ theory was essentially “just a restatement”
 15 that Plaintiffs believed Defendant’s yogurts contained only “natural sugars from milk and fruit”
 16 because they did not know ECJ was a sweetener — a theory that the Court had already rejected as
 17 implausible. *See* September 19 Order, at 13. The September 19 Order specifically stated:

18 Although Plaintiffs’ Opposition to the Motion for Reconsideration disavows the July 12
 19 Order’s “healthier than refined sugars and syrups” theory, the same Opposition
 20 simultaneously distances itself from this disavowal by claiming that the SAC adequately
 21 pleads reliance based on allegations that Plaintiffs “believed ECJ was some type of
 22 ingredient that was healthier than sugar.” This argument fails. For one thing, it is just a
 23 restatement of the theory that Plaintiffs believed the Yogurts contained “only natural
 24 sugars from milk and fruit,” which the Court has already concluded is not plausible. In
 25 addition, this “some type of healthier ingredient” theory of reliance does not appear in the
 26 SAC.

24 *Id.* at 14. In the TAC, Plaintiffs do not provide any further allegations in support of this theory that
 25 ECJ was “some type of ingredient that was healthier than sugar” other than to add the new
 26 allegation that “because of the fact [the yogurt labels] used the term ‘juice’, it sounded like
 27 something healthy.” TAC ¶¶ 188, 190, 192. However, the TAC undermines Plaintiffs’ allegation.
 28 The TAC repeatedly acknowledges that “fruit juice concentrate” is a well-known added sugar. *See*

1 TAC ¶¶ 90, 94, 96, 98, 109. Moreover, the TAC cites various lists published by the National
2 Institute of Health and the American Heart Association which identify “fruit *juice* concentrate” as
3 an added sugar to watch out for. *See, e.g.*, TAC ¶¶ 96, 98 (emphasis added).

4 The Court is unpersuaded by Plaintiffs’ new allegation, as Plaintiffs’ vague reformulation
5 of this general theory of reliance still fails to meet the heightened pleading requirement under Rule
6 9(b), wherein a plaintiff must allege “the who, what, when, where, and how” of the misconduct
7 charged. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997) (internal quotation marks omitted).
8 Again, the Court concludes that Plaintiffs’ theory is essentially just a restatement that Plaintiffs
9 believed Defendant’s yogurts contained only “natural sugars from milk and fruit” because they did
10 not know ECJ was a sweetener — a theory that the Court again rejects as implausible above.

11 In sum, the Court finds that the TAC’s allegations concerning Plaintiffs’ reliance on
12 Defendant’s ECJ statements are still insufficiently pleaded under Rules 8(a) and 9(b). Because
13 Plaintiffs have failed to cure the pleading deficiencies identified by the Court, the Court GRANTS
14 Defendant’s motion to dismiss Plaintiffs’ ECJ Claims with prejudice due to Plaintiffs’ lack of
15 standing. The Court dismisses these claims without leave to amend not only because the September
16 19 Order held that Plaintiffs’ failure to cure the deficiencies in the SAC would result in a dismissal
17 with prejudice, *see* September 19 Order, at 20, but also because amendment appears to be futile.
18 *Leadsinger*, 512 F.3d at 532 (a district court may deny leave to amend due to “repeated failure to
19 cure deficiencies by amendments previously allowed” and “futility of amendment”); *Swartz v.*
20 *KPMG LLP*, 476 F.3d 756, 761 (9th Cir. 2007) (futility alone can justify the denial of leave to
21 amend). Thus far, Plaintiffs have had the opportunity to file an original complaint as well as *three*
22 amended complaints. In addition, Plaintiffs have had multiple chances throughout this litigation to
23 present their claims and theories at various hearings, including a preliminary injunction hearing, a
24 hearing on Defendant’s motion to dismiss the SAC, a hearing on Defendant’s motion to disqualify
25 Plaintiffs’ counsel and Plaintiffs’ expert, and a case management conference in which the parties
26 addressed Defendant’s Motion for Leave to File a Motion for Reconsideration of the Court’s July
27 12 Order. The Court concludes that if Plaintiffs had a legitimate basis to set forth a plausible ECJ
28 claim, Plaintiffs would already have articulated it in a meaningful way in one of their four

1 complaints. This is especially true given that this Court’s September 19 Order set forth precisely
2 what deficiencies Plaintiffs needed to address with respect to their ECJ claims. Accordingly, the
3 Court refuses to allow Plaintiffs essentially a fifth bite at the apple because amendment appears to
4 be futile. *Carvalho*, 629 F.3d at 892; *Ruiz v. Natl. City Bank*, 2:09CV01586JAMGGH, 2010 WL
5 1006412, at *5 (E.D. Cal. 2010) (“[D]ismissal with prejudice is appropriate given that the Plaintiff
6 has been given two chances to try to plead proper claims against this Defendant.”). The Court
7 further notes that because of Plaintiffs’ filing of four complaints and Defendant’s filing of two
8 motions to dismiss those complaints, this litigation has been pending since Plaintiffs filed their
9 original complaint in May of 2012 and has not moved beyond the pleadings stage. The Court
10 concludes that Defendant should not be required to respond to a continually moving target, and at
11 some point, the litigation must be resolved. *See Franczak v. Suntrust Mortg., Inc.*, Case No. 5:12-
12 cv-01453 EJD, 2013 U.S. Dist. LEXIS 126977, *11-12 (N.D. Cal. Sept. 5, 2013) (denying leave to
13 amend third amended complaint and dismissing case with prejudice because allowing further
14 amendments after Plaintiff has already amended his pleading twice would unduly prejudice
15 defendant who had to continually respond to a “moving target”). This action began in May 2012 —
16 approximately one year and nine months ago — and Plaintiffs have been given multiple chances to
17 cure the deficiencies in their complaints. Given that this Court’s discretion to deny leave to amend
18 is particularly broad where a complaint has already been amended, *see Cafasso, U.S. ex rel. v.*
19 *General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011), the Court dismisses
20 Plaintiff’s ECJ claims with prejudice.

21 **b. All Natural Claims**

22 Consistent with their SAC, Plaintiffs allege that Defendant’s “All Natural”
23 misrepresentations were deceptive because Defendant’s products were artificially colored using
24 fruit or vegetable juice concentrate. TAC ¶¶ 140, 149, 156 (describing turmeric and “fruit and
25 vegetable juice” as artificial coloring in various flavors of Chobani Yogurt). Plaintiffs further
26 allege that Plaintiffs would not have purchased the products had Plaintiffs known Defendant’s
27 products had artificial colors. TAC ¶ 163. The Court rejected these allegations as implausible in the
28 September 19 Order because the Defendant’s labeling explicitly discloses that Defendant adds

1 “fruit or vegetable juice [*for color*],” and Plaintiffs had purported to read the label, including the
2 ingredient list. September 19 Order, at 17-18 (emphasis added). The Court reasoned that because
3 the labels clearly disclosed the presence of fruit or vegetable juice concentrate in the yogurts for
4 color, it is not plausible that Plaintiffs believed that the Yogurts did not contain added fruit juice for
5 coloring purposes. *Id.* at 18.

6 Plaintiffs now contend that they have cured this pleading deficiency with respect to their
7 “All Natural Claims” by “clarifying that it was not just the presence of fruit or vegetable juice for
8 color that made the ‘only natural ingredients’ or ‘all natural’ representations unlawful and
9 deceptive, it was also the fact that the coloring agents themselves were not natural products.”
10 Opp’n at 6. Specifically, the TAC adds the following new allegation:

11 Plaintiffs allege that the fruit and vegetable juices added to the artificially colored
12 yogurt they purchased were not merely artificial because they were “color
13 additives” and “artificial colors” and forms of “artificial coloring” and thus artificial
14 ingredients but also because these juices were highly processed unnatural substances
15 far removed from the fruits or vegetables they were supposedly derived from and in
16 fact were more akin to synthetic dyes like coal tar dyes. Representing such dyes as
17 natural is false and misleading.

18 TAC ¶ 161.

19 The Court agrees with Defendant that this sole allegation is insufficient to plead reliance
20 with the particularity required by Rule 8(a) and Rule 9(b). Mot. at 8 n.7. For one thing, Plaintiffs’
21 statement that the turmeric and fruit and vegetable juice concentrate used for color in Defendant’s
22 products is more akin to “coal tar dyes” than the “fruits and vegetables they were supposedly
23 derived from,” TAC ¶ 161, is merely conclusory. Essentially, Plaintiffs, in the TAC, now allege,
24 for the first time after having filed *three* previous complaints and after participating in multiple
25 hearings before this Court, including a preliminary injunction hearing, a hearing on Defendant’s
26 motion to dismiss the SAC, a hearing on Defendant’s motion to disqualify Plaintiffs’ counsel and
27 expert, and a case management conference in which the parties addressed Defendant’s Motion for
28 Leave to File a Motion for Reconsideration of the Court’s July 12 Order, that the fruit and
vegetable juice concentrate ingredient is not natural due to some undisclosed aspect of that
ingredient’s processing. While Plaintiffs contend in other parts of the TAC that “natural ingredients

1 are ingredients that occur naturally in nature and are not synthetic or highly processed,” *see* TAC ¶
2 164, Plaintiffs do not provide any other factual allegations nor provide any basis to support their
3 claim that the color additives which Defendant uses in its yogurts are in fact “highly processed
4 unnatural substances.” Plaintiffs also provide no basis whatsoever to support their allegation that
5 fruit and vegetable juice is somehow unnatural, nor explain with any specificity what they contend
6 is “unnatural” about these particular ingredients. Plaintiffs simply restate in other parts of the TAC
7 that “there was no disclosure that any of these ingredients were artificial or unnatural or synthetic.”
8 TAC ¶ 167. Furthermore, Plaintiffs fail to explain how or why Defendant’s juices were in fact “far
9 removed from the fruits or vegetables they were supposedly derived from.” TAC ¶ 161.

10 Simply put, Plaintiffs do not allege how they thought these juices were processed, nor
11 provide any explanation as to how Defendant “highly processed” the juices in such a way as to
12 render them “unnatural,” or how the processing fell short of Defendant’s labeling representations.
13 For these reasons, the Court concludes that Plaintiffs’ allegations fail under Rule 9(b)’s heightened
14 pleading standard, whereby a plaintiff must set forth precisely “what is false or misleading about a
15 statement, and *why* it is false,” *see In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir.
16 1994) (en banc), *superseded by statute on other grounds*, (emphasis added), and must allege “the
17 who, what, when, where, and how” of the misconduct charged. *Cooper v. Pickett*, 137 F.3d 616,
18 627 (9th Cir. 1997) (internal quotation marks omitted). *See also Pelayo v. Nestle USA Inc.*, No. 13-
19 5213, 2013 WL 5764644, at *5 (C.D. Cal. Oct. 25, 2013) (dismissing plaintiffs’ claim that
20 defendant’s “all natural” representations were misleading because defendant’s ingredients were
21 allegedly “unnatural,” where plaintiff failed to plausibly allege that the ingredients were in fact
22 unnatural). A reasonable consumer could plausibly believe that “turmeric” and “fruit and vegetable
23 juice” are, in fact, “natural ingredients,” and Plaintiffs have failed to allege facts that persuade the
24 Court to conclude it was plausible that Plaintiffs believed otherwise. Because Plaintiffs have failed
25 to sufficiently plead reliance with respect to their “All Natural” claims against Defendant’s
26 products, Plaintiffs have failed to demonstrate standing to bring their claims. This is because
27 Plaintiffs must allege that they relied on Defendant’s alleged misrepresentations in order to
28 demonstrate standing under the FAL, CLRA, and the UCL. Accordingly, the Court GRANTS

1 Defendant's motion to dismiss the Plaintiffs' "All Natural Claims" because of Plaintiffs' lack of
2 standing. As the Court found with respect to Plaintiffs' ECJ claims, the Court dismisses Plaintiffs'
3 "All Natural Claims" without leave to amend not only because the September 19 Order held that
4 Plaintiffs' failure to cure the deficiencies in the SAC would result in a dismissal with prejudice, *see*
5 September 19 Order, at 20, but also because amendment appears to be futile. *Leadsinger*, 512 F.3d
6 at 532. Again, as set forth above, Plaintiffs have already had the opportunity to file a total of four
7 complaints in this case and have had multiple hearings to present their theories and claims,
8 including a preliminary injunction hearing, a hearing on Defendant's motion to dismiss the SAC, a
9 hearing on Defendant's motion to disqualify Plaintiffs' counsel and Plaintiffs' expert, and a case
10 management conference in which the parties addressed Defendant's Motion for Leave to File a
11 Motion for Reconsideration of the Court's July 12 Order. The Court concludes that if Plaintiffs had
12 a legitimate basis to claim that Defendant's juices were "unnatural," Plaintiffs would already have
13 articulated such a plausible theory in a meaningful way in one of their first four complaints or at
14 one of the Court's various hearings. The Court thus dismisses Plaintiffs' "All Natural Claims" with
15 prejudice due to futility of amendment, and also because Defendant should not be required to
16 respond to a continually moving target. *See Franczak v. Suntrust Mortg., Inc.*, Case No. 5:12-cv-
17 01453 EJD, 2013 U.S. Dist. LEXIS 126977, *11-12 (N.D. Cal. Sept. 5, 2013) (denying leave to
18 amend third amended complaint and dismissing case with prejudice because allowing further
19 amendments after Plaintiff has already amended his pleading twice would unduly prejudice
20 defendant who had to continually respond to a "moving target"). Given that Plaintiffs have had
21 multiple chances to cure the deficiencies in their complaints since the inception of this action in
22 May 2012, the Court exercises its discretion to deny leave to amend by dismissing Plaintiffs' "All
23 Natural Claims" with prejudice.⁵

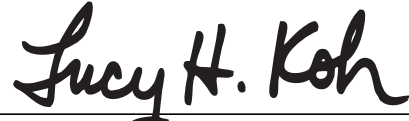
24 ⁵ The Court notes that Plaintiffs' allegations regarding reliance for the ECJ and All Natural claims
25 fail both with respect to products they purchased and products they do not alleged to have
26 purchased, for the same reasons as set forth above, *see supra* Part III.A.2.a-b. *Accord*, September
27 19 Order at 18 ("Plaintiffs' allegations regarding reliance for products they did not purchase fail for
28 the reasons discussed above. *Supra* Part III.A.2.a-c."). This is because Plaintiffs claim that
Defendant made "the same label misrepresentations" with respect to products they do not allege to
have purchased, *see* TAC ¶ 3, and the TAC does not include any additional allegations solely with
respect to these unpurchased products. Thus, the Court again finds, as it did in its September 19

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' UCL, FAL, and CLRA claims with prejudice. The Clerk shall close the case file.

IT IS SO ORDERED.

Dated: February 20, 2014



LUCY H. KOH
United States District Judge

United States District Court
For the Northern District of California

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Order, that Plaintiffs have failed to adequately demonstrate standing with regard to products they do not allege to have purchased.