

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. 12-1586 SC
)	
MARKUS WILSON and DOUG CAMPEN,)	ORDER GRANTING IN PART AND
individually and on behalf of)	DENYING IN PART DEFENDANT'S
all others similarly situated,)	MOTION TO DISMISS PLAINTIFFS'
)	<u>SECOND AMENDED COMPLAINT</u>
Plaintiffs,)	
)	
v.)	
)	
FRITO-LAY NORTH AMERICA, INC.,)	
)	
Defendant.)	
)	
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)	

I. INTRODUCTION

Now before the Court is Defendant Frito-Lay North America, Inc.'s ("Defendant") motion to dismiss Plaintiffs Markus Wilson and Doug Campen's ("Plaintiffs") second amended complaint. ECF Nos. 47 ("SAC"), 59 ("MTD"). The motion is fully briefed, ECF Nos. 64 ("Opp'n"), 68 ("Reply"), and suitable for decision without oral argument, Civ. L.R. 7-1(b). For the reasons explained below, the Court GRANTS in part and DENIES in part Defendant's motion.

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1 **II. BACKGROUND**

2 **A. Factual Background**

3 The parties are familiar with this case's basic facts, as
4 summarized below. Defendant makes snack food products, including
5 "Lay's Classic Potato Chips," "Lay's Classic Potato Chips," "Lay's
6 Honey Barbeque Potato Chips," "Lay's Kettle Cooked Mesquite BBQ
7 Potato Chips," "Cheetos Puffs," and "Fritos Original Corn Chips"
8 (collectively the "Purchased Products"). Plaintiffs bought the
9 Purchased Products, and claim to have been misled by their labels,
10 between March 29, 2008 and March 29, 2012 (the "Class Period"). In
11 their SAC, they also bring claims on behalf of a putative class of
12 people in California and elsewhere who bought a variety of
13 Defendant's other Products that the named Plaintiffs did not buy.¹

14 Plaintiffs allege that Defendant's marketing of the Products
15 is misleading because: (1) some Products are labeled "All Natural"
16 despite containing artificial or unnatural ingredients, flavoring,
17 coloring, or preservatives; (2) some Products are labeled as
18 containing "0 Grams Trans Fat" despite having total fat levels that
19 render such a claim misleading; (3) some Products contain MSG but
20 are labeled as having "No MSG"; and (4) Defendant's website, whose
21 address appears on some Products' labels, is a "label" subject to
22 FDA regulations, and it makes claims about the Products that are
23 misleading and unlawful.

24 Plaintiffs claim that they care about buying healthy foods,
25 e.g., foods with artificial ingredients or high levels of fat, and

26
27 ¹ When the Court discusses these non-purchased products alongside
28 the Purchased Products, the Court refers to them collectively as
the "Products." Separately, they are the "Non-Purchased Products".

1 that they would not have bought any of the Products if they knew
2 that Defendant's claims about such ingredients were not true. See,
3 e.g., SAC ¶¶ 46-47, 60, 64-65, 80, 82, 86-87, 104, 128, 141, 154.

4 **B. Procedural Background**

5 In their FAC, Plaintiffs asserted nine causes of action
6 against Defendant: (1-3) violations of the "unlawful," "unfair,"
7 and "fraudulent" prongs of California's Unfair Competition Law's
8 ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.; (4-5) violations
9 of the "misleading and deceptive" and "untrue" prongs of
10 California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code
11 § 17500, et seq.; (6) violations of California's Consumers Legal
12 Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.; (7)
13 restitution based on unjust enrichment or quasi-contract; (8)
14 breach of warranty under California's Song-Beverly Act, Cal. Civ.
15 Code § 1790, et seq.; and (9) breach of warranty under the federal
16 Magnuson-Moss Act, 15 U.S.C. § 2301, et seq.

17 Defendant moved to dismiss the FAC. The Court granted
18 Defendant's motion in part and denied it in part, dismissing
19 Plaintiffs' breach of warranty claim with prejudice but granting
20 Plaintiffs leave to amend their other claims. ECF No. 46 ("Apr. 1
21 Order") at 31-32. Specifically, the Court allowed Plaintiffs to
22 plead more specific facts about the Non-Purchased Products and
23 about how Defendant's website could constitute "labeling" such that
24 claims asserted on it could predicate Plaintiffs' various causes of
25 action.

26 In their SAC, Plaintiffs include more facts about the Non-
27 Purchased Products and Defendant's website. With their breach of
28 warranty claim having been dismissed with prejudice, and with

1 Plaintiffs having chosen not to re-plead their restitution claim,
2 the only causes of action remaining in the case are Plaintiffs'
3 UCL, FAL, and CLRA claims. The SAC elaborates on Plaintiffs'
4 theories for their UCL, FAL, and CLRA claims, and also alleges new
5 violations based on the Non-Purchased Products. Defendant now
6 moves to dismiss the SAC.

7
8 **III. LEGAL STANDARD**

9 **A. Motions to Dismiss**

10 A motion to dismiss under Federal Rule of Civil Procedure
11 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
12 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
13 on the lack of a cognizable legal theory or the absence of
14 sufficient facts alleged under a cognizable legal theory."
15 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
16 1988). "When there are well-pleaded factual allegations, a court
17 should assume their veracity and then determine whether they
18 plausibly give rise to an entitlement to relief." Ashcroft v.
19 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
20 must accept as true all of the allegations contained in a complaint
21 is inapplicable to legal conclusions. Threadbare recitals of the
22 elements of a cause of action, supported by mere conclusory
23 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
24 Twombly, 550 U.S. 544, 555 (2007)). The court's review is
25 generally "limited to the complaint, materials incorporated into
26 the complaint by reference, and matters of which the court may take
27 judicial notice." Metzler Inv. GMBH v. Corinthian Colls., Inc.,
28 540 F.3d 1049, 1061 (9th Cir. 2008) (citing Tellabs, Inc. v. Makor

1 Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

2 **B. Rule 9(b)**

3 Claims sounding in fraud are subject to the heightened
4 pleading requirements of Federal Rule of Civil Procedure 9(b),
5 which requires that a plaintiff alleging fraud "must state with
6 particularity the circumstances constituting fraud." See Kearns v.
7 Ford Motor Co., 567 F. 3d 1120, 1124 (9th Cir. 2009). "To satisfy
8 Rule 9(b), a pleading must identify the who, what, when, where, and
9 how of the misconduct charged, as well as what is false or
10 misleading about [the purportedly fraudulent] statement, and why it
11 is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys.,
12 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks
13 and citations omitted).

14 **C. Leave to Amend**

15 Under Federal Rule of Civil Procedure 15(a), leave to amend
16 "should be freely granted when justice so requires," bearing in
17 mind that "the underlying purpose of Rule 15 . . . [is] to
18 facilitate decision[s] on the merits, rather than on the pleadings
19 or technicalities." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.
20 2000) (en banc) (internal citations, quotation marks, and
21 alterations omitted). However, a court "may exercise its
22 discretion to deny leave to amend due to 'undue delay, bad faith or
23 dilatory motive on [the] part of the movant, repeated failure to
24 cure deficiencies by amendments previously allowed, undue prejudice
25 to the opposing party . . . , [and] futility of amendment.'" Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 892-93 (9th
26 Cir. 2010) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962))
27 (alterations in original).
28

1 "[W]here the plaintiff has previously been granted leave to
2 amend and has subsequently failed to add the requisite
3 particularity to its claims, the district court's discretion to
4 deny leave to amend is particularly broad." Zucco Partners, LLC v.
5 Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009) (internal
6 quotations, citations, and alterations omitted). Indeed, repeated
7 failure to cure a complaint's deficiencies by previous amendment is
8 reason enough to deny leave to amend. Abagninin v. AMVAC Chem.
9 Corp., 545 F.3d 733, 742 (9th Cir. 2008) (citing Foman, 371 U.S. at
10 182); Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir.
11 1990)).

12 13 **IV. DISCUSSION**

14 **A. The Statutory Framework**

15 The Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et
16 seq., as amended by the Nutrition Labeling and Education Act of
17 1990 ("NLEA"), 21 U.S.C. § 343(r), et seq., is the operative
18 statute in this matter.

19 The many subsections of 21 U.S.C. § 343 establish the
20 conditions under which food is considered "misbranded." Generally,
21 food is misbranded under 21 U.S.C. § 343(a)(1) if "its labeling is
22 false or misleading in any particular." Sections 343(q) and (r)
23 regulate the information that must be included in all packed
24 products' "nutrition box," as well as all other nutrient content
25 claims that appear elsewhere on the label.

26 Section 343(q) governs information that must be disclosed
27 about certain nutrients in food products -- principally in the
28 nutrition box area. Section 343(r) discusses "nutrition levels and

1 health-related claims" about food products made anywhere on their
2 labels. It governs all voluntary statements about nutrition
3 content or health information that a manufacturer includes on the
4 food label or packaging. The Food and Drug Administration ("FDA")
5 has classified these nutrient claims as "express" (e.g., "100
6 calories"), "implied" (e.g., "high in oat bran"), and "health
7 claims," which "characteriz[e] the relationship of any substance to
8 a disease or health-related condition." 21 C.F.R. §§ 101.13,
9 101.14; see also Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d
10 1111, 1116-17 (N.D. Cal. 2010) (describing the statutory scheme).
11 Section 343(r) clarifies that it does not govern nutrition content
12 claims made under Section 343(q) (i.e., inside the nutrition box),
13 though an accompanying regulation, 21 C.F.R. § 101.13, clarifies
14 that "[i]f such information is declared elsewhere on the label or
15 in labeling, it is a nutrition content claim and is subject to the
16 requirements for nutrient content claims [under Section 343(r)]."
17 See Chacanaca, 752 F. Supp. 2d at 1117.

18 Plaintiffs' state law claims are based on California's Sherman
19 Food, Drug, and Cosmetic Act ("Sherman Act"), Cal. Health & Safety
20 Code § 109875 et seq., which adopts and incorporates the FDCA. See
21 Sherman Act § 110100 ("All food labeling regulations and any
22 amendments to those regulations adopted pursuant to the federal
23 acts in effect on January 1, 1993, or adopted on or after that date
24 shall be the food regulations of this state."). This specifically
25 includes provisions of the FDCA and NLEA that set forth food
26 labeling and packing requirements.

27 **B. Standing as to the Non-Purchased Products**

28 To satisfy Article III standing, plaintiffs must allege: (1) a

1 concrete, particularized, actual or imminent injury-in-fact; (2)
2 that the injury is traceable to the defendant's action; and (3)
3 that a favorable ruling could redress the injury. See Friends of
4 the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167,
5 180-81 (2000). Plaintiffs in a case like this one can show Article
6 III standing by alleging that they purchased a product they
7 otherwise would not have purchased, or that they spent too much on
8 such a product, in reliance on a defendant's representations in ads
9 or on labels. See, e.g., Brazil v. Dole Food Co., Inc., -- F.
10 Supp. 2d --, 2013 WL 1209955, at *11-13 (N.D. Cal. Mar. 25, 2013).
11 It is Plaintiffs' burden to show standing. Lujan v. Defenders of
12 Wildlife, 504 U.S. 555, 561 (1992).

13 The parties do not dispute whether Plaintiffs have pled
14 standing as to the Purchased Products. The question is whether
15 they have standing as to the Non-Purchased Products.

16 In putative class actions like this one, this Court has often
17 held that plaintiffs can demonstrate standing at the pleading stage
18 if they plead sufficiently detailed facts that the non-purchased
19 products are "substantially similar" to the purchased products for
20 which they have standing. See, e.g., Astiana v. Dreyer's Grand Ice
21 Cream, Inc., No. C 11-2910 EMC, 2012 WL 2990766, at *11 (N.D. Cal.
22 July 20, 2012). Factors that other courts have considered include
23 whether the challenged products are of the same kind, whether they
24 are comprised of largely the same ingredients, and whether each of
25 the challenged products bears the same alleged mislabeling. See
26 id. at *13.

27 Defendant argues that Plaintiffs fail to establish standing or
28 state a claim for the Non-Purchased Products. MTD at 5-6. First,

1 Defendant notes that Plaintiffs added eighty-five new products --
2 the Non-Purchased Products -- to their SAC. Plaintiffs do not
3 plead to have bought these products. Instead they simply provide
4 long lists of products that they flatly state contain unlawful or
5 misleading statements. SAC ¶¶ 44 ("All Natural" labeling), 62
6 ("All Natural" and "No MSG" labeling), 84 ("0 Grams Trans Fat"
7 labeling). The SAC provides no other detail about these products.
8 Defendant argues that because Plaintiffs allege no facts stating
9 that the Non-Purchased Products are "the same or similar" to the
10 Purchased Products with respect to Plaintiffs' claims, Plaintiffs
11 cannot -- even in a putative class action -- assert causes of
12 action as to products that are not in fact substantially similar to
13 the products they actually bought. See MTD at 6-9. Defendant also
14 notes that while Plaintiffs include purported images of the Non-
15 Purchased Products' labels in their SAC, see SAC Ex. 8 (product
16 labels), the SAC does not state that any Plaintiff actually saw
17 these labels. MTD at 9-10.

18 Plaintiffs oppose these arguments, contending that the eighty-
19 five Non-Purchased Products are "substantially similar" to the five
20 Purchased Products. According to Plaintiffs, all of the Products
21 are "potato chips, corn chips, and puffed corn products," all of
22 which they allege to be unlawfully or misleadingly labeled. See
23 Opp'n at 3-4. Plaintiffs claim that all of the Products are made
24 by the same manufacturer and, with the exception of flavors,
25 contain the same ingredients and implicate the same concerns. Id.
26 at 4.

27 Defendant is right. Plaintiffs have failed to allege
28 substantial similarity among the Purchased Products and the Non-

1 Purchased Products. Plaintiffs have taken lists of snack foods,
2 appended them to paragraphs of their SAC, and asserted in their
3 briefs -- not in their pleadings -- that they are all basically the
4 same. The Court is not convinced, and the exhibits Plaintiffs
5 provide do not help. Plaintiffs take no time to explain how each
6 of the eighty-five new Products are actionably mislabeled, and the
7 Court is not inclined to pore over each ingredient list and guess.
8 The Court instructed Plaintiffs to be clear about why any Non-
9 Purchased Products were similar enough to the Purchased Products
10 for standing purposes. Order at 12 (setting forth clear guidelines
11 for amendment on this point). Plaintiffs fail to do so.

12 In their SAC, Plaintiffs simply provide a list of Non-
13 Purchased Products, attach barely-legible labels (purportedly as
14 they appeared during the Class Period), and assert that these
15 labels are unlawful or misleading. See SAC ¶¶ 42, 62, 84. This is
16 not enough -- the Court cannot just assume that every one of the
17 Non-Purchased Products' labels is actionable in the same way as the
18 more fully described Purchased Products' labels are. For example,
19 the label on the purportedly actionable "Lay's Balsamic Sweet
20 Onion" package, SAC Ex. 8 at 25, has a stamp that, unlike any other
21 product, reads "Made With All Natural Potatoes and Seasonings,"
22 which is not the same as the labels discussed in the Court's Order
23 on the FAC, which state "Made With All Natural Ingredients."
24 Similarly, the "Miss Vickie's Sea Salt & Vinegar" package, SAC Ex.
25 8 at 35, has a stamped ribbon that reads only "All Natural."

26 The Court will not assume that each of these subtly different
27 Products is like all the others. To meet the plausibility standard
28 of Rule 8, Plaintiffs have to say more, especially when they are

1 asserting standing as to Products they did not purchase --
2 otherwise their pleadings amount to unacceptably bare legal
3 conclusions. Iqbal, 556 U.S. at 663; Twombly 550 U.S. at 370.
4 Plaintiffs' SAC's allegations about the Non-Purchased Products are
5 not detailed or plausible enough to survive a motion to dismiss.

6 Plaintiffs' boilerplate claims as to the Non-Purchased
7 Products are therefore DISMISSED. This dismissal is with
8 prejudice, since the Court has already given Plaintiffs leave to
9 amend on this point, as well as clear instructions on how to do so
10 successfully.

11 **C. Whether Websites Mentioned on Product Labels Constitute**
12 **Labeling**

13 In their FAC, Plaintiffs contended that Defendant's website
14 constitutes "labeling" of the Products under the FDCA. The Court
15 dismissed Plaintiffs' claims that were based on the website,
16 because the Court did not find that Plaintiffs had sufficiently
17 alleged that any of Plaintiffs' cited website language was drawn
18 closely enough to any Product to merit the website's constituting
19 "labeling" under the FDCA.

20 Now Plaintiffs cite extensive language from the website and
21 claim that it explains and supplements Defendant's other statements
22 about the Products, such that the Court should find that the
23 website language constitutes labeling. See Opp'n at 9-10 (citing
24 SAC ¶¶ 105-54). Plaintiffs also cite several FDA warning letters
25 about other companies' websites, which they say deserve deference.
26 Id. at 10-12.²

27 _____
28 ² Plaintiffs also cite a third-party website's language about MSG
and food labeling. Opp'n at 22 n.11. The Court declines to take
judicial notice of this website, since it has not been referenced

1 Section 321(m) defines "labeling" as "all labels and other
2 written, printed, or graphic matter (1) upon any article or any of
3 its containers or wrappers, or (2) accompanying such article." The
4 issue here is whether statements made on the www.fritolay.com
5 website "accompany" the Named Products such that they can be
6 classified as "labeling" under the FDCA.

7 It is true that statements not actually printed on a label
8 itself can constitute "labeling" for FDCA purposes. What matters
9 is whether the separate material serves the purpose of labeling,
10 which is to supplement or explain the product. Kordel v. United
11 States, 335 U.S. 345, 349-350 (1950) ("One article or thing is
12 accompanied by another when it supplements or explains it . . . No
13 physical attachment one to the other is necessary. It is the
14 textual relationship that is significant."); Alberty Food Prods.
15 Co. v. United States, 185 F.2d 321, 324-25 (9th Cir. 1950) (citing
16 Kordel for this proposition); see also United States v. Harkonen,
17 No. C 08-0164 MHP, 2009 WL 1578712, at *9 (N.D. Cal. June 4, 2009)
18 (stating that Kordel "remains the leading Supreme Court authority
19 on the scope of the labeling provision."). In this matter,
20 Plaintiffs base their claims on the fact that some of the Named
21 Products include phrases like "Visit our website @ fritolay.com" in
22 tiny print at the bottom of their back labels. From this
23 Plaintiffs claim that Defendant's marketing language on the
24 www.fritolay.com or www.lays.com websites constitutes mislabeling
25 under the FDCA.

26 The Court is not persuaded by Plaintiffs' argument that the
27

28 in any pleading and Plaintiffs do not explain why it should be
incorporated now.

1 Court owes deference to two warning letters that the FDA sent to
2 two other companies. It is true that an agency's informal
3 interpretation of its own ambiguous regulation is controlling
4 unless "plainly erroneous or inconsistent with the regulation."
5 Bassiri v. Xerox Corp., 463 F.3d 927, 930 (9th Cir. 2006) (quoting
6 Auer v. Robbins, 519 U.S. 452, 461 (1997)). However, no party in
7 this case has contended that the FDA's regulations on labeling are
8 ambiguous, and the Court does not find that they are. Indeed, the
9 FDA's regulation is very clear on this point, and when the FDA has
10 directly referenced it, the agency's instruction mirrors the
11 Supreme Court precedent discussed above:

12 [I]f the label for a product contained a
13 statement that referred the consumer to a
14 specific website for additional information
15 about a claim for the product, the website
16 is likely to be 'labeling.' The websites,
17 in these cases, are considered written,
printed, or graphic matter that supplements
or explains the product and is designed for
use in the distribution and sale of the
product.

18 SAC Ex. 20 (FDA Letter, "Guidance for Industry and FDA: Dear
19 Manufacturer Letter Regarding Food Labeling") at 3.

20 On this point, the Court declines to analogize to the
21 situations the FDA considers in its warning letters. Those letters
22 do not address how the FDA regulations on labeling are to apply.
23 Instead they discuss specific websites that the FDA had
24 independently concluded constituted labeling. The FDA has made no
25 such specific conclusions about Defendant's Products in this case,
26 and the Court does not find that labels' references to Defendant's
27 website constitute "labeling" for FDA regulatory purposes. The
28 website address appears below Defendant's physical address, not

1 near the ingredients list or any nutritional facts. Nowhere on any
2 Product's packaging does Defendant direct consumers to its website
3 for more facts about the labeled Product. The Court therefore does
4 not find that Defendant's website constitutes "labeling" under the
5 FDCA.

6 "Labeling" as a regulatory matter aside, Plaintiffs also fail
7 to plead that they ever saw, read, or were even aware of any
8 website before this suit. Plaintiffs admit this but claim it is
9 irrelevant because, according to them, there is no requirement that
10 a purchaser rely on a particular statement in order to bring a UCL
11 unlawfulness claim based on that statement. Opp'n at 13.
12 According to Plaintiffs, misbranded food products are unlawful by
13 nature and therefore actionable. Id. Plaintiffs are wrong.
14 Holding for them on this point would be an affront to state and
15 federal standing rules. Federal standing requires an injury, and
16 California law requires UCL plaintiffs to plead injury and reliance
17 -- a legislative decision based specifically on curtailing lawsuits
18 by plaintiffs who have had no contact with advertising, for
19 example. Kwikset Corp. v. Super. Ct., 51 Cal. 4th 310, 326 (Cal.
20 2011) (affirming that UCL and FAL claims must be pled with injury
21 and reliance). Ignoring these basic legal rules would invite
22 lawsuits by all manner of plaintiffs who could simply troll grocery
23 stores and the Internet looking for any food product that might
24 form the basis of a class-action lawsuit. Surely that is not the
25 point of these consumer protection laws.

26 Since Plaintiffs have twice failed to indicate how Defendant's
27 website could form the basis of a good-faith UCL, FAL, or CLRA
28 cause of action, Plaintiffs' claims based on Defendant's website

1 are DISMISSED WITH PREJUDICE.

2 **D. Plaintiffs' Remaining Claims**

3 The CLRA, FAL, and UCL, which are the basis of Plaintiffs'
4 first through sixth causes of action, are California consumer
5 protection statutes. The UCL makes actionable any "unlawful, unfair
6 or fraudulent business act or practice." Cal. Bus. & Prof. Code §
7 17200. The FAL makes it unlawful to make or disseminate any
8 statement concerning property or services that is "untrue or
9 misleading." Id. § 17500. The CLRA also prohibits "unfair methods
10 of competition and unfair or deceptive acts or practices." Cal.
11 Civ. Code § 1770.

12 Plaintiffs' case, broadly, has two parts: (1) the UCL
13 unlawfulness claims based on Plaintiffs' contention that
14 Defendant's products are misbranded as a matter of law and
15 therefore are predicates for a UCL unlawfulness violation, and (2)
16 the rest of Plaintiffs' tort claims, which are premised on
17 Plaintiffs' allegations that Defendant's labels are misleading,
18 unfair, and fraudulent. See SAC ¶¶ 4, 8.

19 **i. Plaintiffs' Misbranding Theory**

20 Plaintiffs' UCL "misbranding theory" -- as distinct from the
21 portion of their UCL claim based on Plaintiffs allegedly having
22 been misled or deceived by Defendant's labels -- is that
23 Defendant's labels are unlawfully misbranded under the FDCA and the
24 Sherman Law, and are therefore actionable under the UCL's
25 unlawfulness prong even absent allegations of reliance. See Opp'n
26 at 13-14. In other words, Plaintiffs' theory of liability for this
27 facet of their UCL claim is that Defendant's mere alleged violation
28 of the underlying regulations, without more, is enough to state a

1 claim for a UCL unlawfulness prong violation.

2 As a threshold issue, the parties dispute whether Rule 9(b)'s
3 particularity requirements govern Plaintiffs' UCL unlawfulness
4 claims. The Court finds that it does at least as to Plaintiffs'
5 UCL unlawfulness claims based on the CLRA and FAL, because all of
6 those theories rely on allegations of a unified course of
7 fraudulent conduct -- i.e., the mislabeled Products. Ness v. Ciba-
8 Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003); Kearns v.
9 Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009) (holding that,
10 where "TAC allege[d] a unified fraudulent course of conduct,"
11 claims were "grounded in fraud" and the "entire complaint" had to
12 be pled "with particularity"). Plaintiffs contend that their
13 misbranding theory is not grounded in misrepresentation or
14 deception, but the Court finds otherwise. It is clear from
15 Plaintiffs' SAC that the behavior that Plaintiffs allege violated
16 FDA regulations and the Sherman Law is misrepresentation or
17 deception, because Plaintiffs are asserting that Defendant used
18 deceptive labeling practices to hide the truth of the Products'
19 ingredients. However, the Court finds that this dispute is a wash:
20 Plaintiffs are subject to Rule 9(b) pleading standards for their
21 unlawfulness claim, but they met it. The only question is whether
22 they must also plead reliance for an unlawfulness claim, as they
23 must for UCL unfairness and fraud claims.

24 According to Plaintiffs, unlawful conduct is the only
25 necessary element for UCL unlawfulness liability, unlike the
26 fraudulent or unfairness prongs which require particularity as to
27 reliance and injury. See id. This is incorrect. Plaintiffs'
28 "misbranding theory" is not divorced from its other UCL theories:

1 they are all connected, since, as noted above, Plaintiffs'
2 misbranding theory is essentially of a piece with their other
3 theories.

4 The California Supreme Court has interpreted the UCL as
5 requiring plaintiffs to have suffered economic injury "as a result
6 of" the unfair competition they allege. Kwikset, 51 Cal. 4th at
7 326. Otherwise plaintiffs who had no contact with the allegedly
8 unlawful activity would have standing to sue. This would, as the
9 Court noted above and as the California Supreme Court stated in
10 Kwikset, be an invitation to shakedown suits. See Kwikset, 51 Cal.
11 4th at 335 n.21 (stating that this rule exists to curb "shakedown
12 suits by parties who had never engaged in any transactions with
13 would-be defendants"). Other courts agree with this
14 interpretation, finding that in accordance with California law,
15 plaintiffs must show that they lost money or property because of
16 reliance on an allegedly unlawful practice, in order to establish
17 standing for UCL unlawfulness claims. See, e.g., In re iPhone
18 Application Litig., 844 F. Supp. 2d 1040, 1071 (N.D. Cal. 2012); In
19 re Actimmune Mktg. Litig., No. C 08-02376 MHP, 2010 WL 3463491, at
20 *8 (N.D. Cal. Sept. 1, 2010), aff'd, 464 F. App'x 651 (9th Cir.
21 2011) (alleging unlawfulness alone, without reliance, "only
22 accomplishes half of [the plaintiff's] burden in a UCL unlawful
23 prong action," since "as a result of" in the statutory language
24 places a burden of reliance on the plaintiff); Durell v. Sharp
25 Healthcare, 183 Cal. App. 4th 1350, 1363 (Cal. Ct. App. 2010).

26 "Reliance is proved by showing that the defendant's
27 misrepresentation or nondisclosure was 'an immediate cause' of the
28 plaintiff's injury-producing conduct." In re Tobacco II Cases, 46

1 Cal. 4th 298, 326 (Cal. 2009) (citation and alteration omitted).
2 "A plaintiff may establish that the defendant's misrepresentation
3 is an immediate cause of the plaintiff's conduct by showing that in
4 its absence[,] the plaintiff in all reasonable probability would
5 not have engaged in the injury-producing conduct." Id. (citation
6 and quotation marks omitted).

7 The issue at this point is therefore whether Plaintiffs
8 establish, at the pleading stage, that Defendant's alleged
9 violation of labeling laws alone -- separate from any alleged fraud
10 or deception connected with Plaintiffs' reliance or injury --
11 supports a UCL unlawfulness claim. On this point, the Court finds
12 for Defendant. To the extent that Plaintiffs' first cause of
13 action for UCL unlawfulness relies solely on Defendant's alleged
14 violation of the Sherman Law or FDA regulations, that claim is
15 DISMISSED WITH PREJUDICE because Plaintiffs fail to allege reliance
16 under this theory. Plaintiffs' argument that they were harmed
17 because the allegedly misbranded products were "legally worthless
18 and had no economic value," see Opp'n at 13, is insufficient to
19 save this claim. Plaintiffs' SAC supports their allegations of
20 having been harmed by being deceived into buying Products whose
21 ingredients they specifically wanted to avoid, not that they were
22 harmed in some non-specific way by purchasing Products that they
23 later learned were "legally worthless."

24 Plaintiffs do, however, plausibly allege violations of the FAL
25 and CLRA, as the Court found in its April 1 Order. Accordingly,
26 Plaintiffs' UCL unlawfulness claim survives to the extent that it
27 is predicated on violations of those laws.

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1 ii. **"All Natural" and "0 Grams Trans Fat" Claims**

2 Defendant argues that Plaintiffs' claims based on Defendant's
3 "All Natural" and "0 Grams Trans Fat" statements should be
4 dismissed, because Plaintiffs have failed to allege injury,
5 deception, or reliance under Twombly and Rule 9(b). Reply at 10.
6 Plaintiffs assert that this is an attempt to reargue the motion to
7 dismiss that the Court denied, see Opp'n at 15, 19, but Defendant
8 insists that it is raising new arguments as to the sufficiency of
9 Plaintiffs' pleadings, Reply at 10.

10 The Court agrees with Plaintiffs. The Court has already found
11 Plaintiffs' pleadings on these points sufficient to survive a
12 motion to dismiss. If it had not, it would have dismissed them
13 under Twombly and Rule 9(b) in its first Order. The Court declines
14 to reconsider the matter. Defendant's motion on this point is
15 DENIED. Plaintiffs plead enough about having been misled or
16 deceived by these claims to survive a motion to dismiss.

17 iii. **"No MSG" Claims**

18 In the April 1 Order, the Court found that Plaintiffs' claims
19 based on Defendant's "No MSG" labels were not preempted by federal
20 regulations. Apr. 1 Order at 19-20. The regulation in question
21 was actually the FDA's interpretation of its own rules about MSG,
22 made in a November 2012 announcement that the Court found warranted
23 deference. Id. However, the Court noted that while the FDA's
24 November 2012 regulatory statement was a binding interpretation of
25 the FDA's own rules, the parties had not explained how (if at all)
26 that interpretation could apply retroactively to Defendant's labels
27 as they appeared during the Class Period, prior to the November
28 2012 statement. Id. at 21 n.4. Now the parties dispute whether

1 the FDA's binding interpretation applies retroactively, thereby
2 making Defendant's pre-November 2012 "No MSG" labels actionable.
3 Defendant contends that Plaintiffs' claims are preempted because
4 they would impose restrictions that did not exist before November
5 2012.

6 Plaintiffs claim that the November 2012 statement was just an
7 affirmation of an FDA policy that had been in place for decades: in
8 short, any ingredient that is a source of MSG as opposed to being
9 MSG itself (like torula yeast) will bar a food product from being
10 labeled "No MSG," even though that ingredient itself must be
11 labeled by its common name in the product's ingredient box. See
12 Opp'n at 21-24. So according to Plaintiffs, any Product labeled
13 "No MSG" prior to November 2012 would still be actionably
14 mislabeled if it contained an ingredient that was a source of MSG.
15 Id. Plaintiffs point to several FDA warning letters, sent between
16 1990 and 1996, which all inform companies that their food products
17 were mislabeled because the products contained ingredients that
18 were sources of MSG. See Opp'n at 22-23 (citing Opp'n Exs. 4-5).
19 Plaintiffs also cite an August 31, 1995 FDA Backgrounder that
20 states "the FDA considers foods whose labels say 'No MSG' or 'No
21 Added MSG' to be misleading if the food contains ingredients that
22 are sources of free glutamates, such as hydrolyzed protein." Opp'n
23 Ex. 15 ("1995 Backgrounder").³

24 Defendant first argues that the Court had ruled that
25 Plaintiffs' claims could proceed as to claims based on purchases
26 made after November 19, 2012. Reply at 13. That is a misreading

27
28 ³ The Court takes judicial notice of these documents under Federal
Rule of Evidence 201.

1 of the April 1 Order: the Court expressly made no finding as to
2 retroactivity there. See Apr. 1 Order at 19-21. The more
3 important parts of Defendant's argument concern the significance of
4 the FDA's 1995 Backgrounder and the mid-1990s warning letters.
5 First, Defendant argues that the 1995 Backgrounder was only
6 evidence of an abandoned rule, not of FDA Policy. Reply at 13.
7 Second, Defendant argues that the warning letters Plaintiffs cite
8 were sent during 1990 and 1996, when the FDA was considering the
9 rule -- discussed in the 1995 Backgrounder -- that it later
10 abandoned. Id. Finally, Defendant claims that in any event, FDA
11 policy until November 19, 2012 only required ingredients containing
12 MSG to be labeled separately from MSG, and nothing more. Id.
13 Defendant's arguments are underpinned by the Court's conclusion
14 that the FDA's November 2012 statement clarified an ambiguous
15 regulation, and by the Ninth Circuit's holding that retroactive
16 application of such a regulatory clarification contravenes due
17 process. United States v. AMC Entm't, Inc., 549 F.3d 760, 770 (9th
18 Cir. 2008).

19 Defendant is correct. Plaintiffs cite the 1996 proposed
20 rulemaking and several pre-1996 warning letters, but as the Court
21 stated in its April 1 Order, the FDA's regulations between then and
22 November 19, 2012 were ambiguous. The November 2012 statement
23 resolved that ambiguity. To insist that Defendant should have been
24 complying with a regulation that was not explicitly clarified until
25 November 19, 2012 would buck due process and Ninth Circuit
26 precedent. The Court declines to do either.

27 Before the FDA's November 2012 clarification, the only
28 information about the FDA's MSG regulations that would have been

1 available to Defendant were warning letters based on specific
2 factual circumstances and a proposed rule that was abandoned.
3 Defendant was simply not on notice during the Class Period that its
4 labels did not comply with the FDA rule. AMC Entm't, 549 F.3d at
5 770. These amount, as the Court found concerning pre-2012 FDA
6 regulations generally, to ambiguous statements about the
7 regulation. See FCC v. Fox Television Station, Inc., 132 S. Ct.
8 2307, 2319 (2012) (holding that an isolated, ambiguous agency
9 statement did not fulfill the fair notice requirement when the
10 government wanted to impose a large fine on a television network).
11 Plaintiffs' claims based on Defendant's "No MSG" labels predating
12 the November 19, 2012 clarification are DISMISSED WITH PREJUDICE.

13 **iv. Plaintiffs' Non-California Purchases**

14 Finally, Defendant states that Plaintiffs' SAC seeks to expand
15 their case to include a nationwide putative class of consumers.
16 MTD at 22. Defendant argues that such claims must fail, because
17 Plaintiffs sue only based on violations of California law, and the
18 Supreme Court of California has clarified that state statutes like
19 the UCL, FAL, and CLRA presumptively do not apply to occurrences
20 outside California. Id. (citing Sullivan v. Oracle Corp., 51 Cal.
21 4th 1191, 1207 (Cal. 2011)). Plaintiffs respond that Defendant's
22 argument is better suited for the class certification stage, not a
23 motion to dismiss. Opp'n at 24-25.

24 Defendant is correct. California law presumes that the
25 legislature did not intend a statute to be "operative, with respect
26 to occurrences outside the state, . . . unless such intention is
27 clearly expressed or reasonably to be inferred from the language of
28 the act or from its purpose, subject matter or history." Sullivan,

1 51 Cal. 4th at 1207 (citations and quotations omitted). With
2 regard to the UCL, FAL, and CLRA, non-California residents' claims
3 are not supported "where none of the alleged misconduct or injuries
4 occurred in California." Churchill Village, LLC v. Gen. Elec. Co.,
5 169 F. Supp. 2d 1119, 1126 (citing Norwest Mortg. Inc. v. Super.
6 Ct., 72 Cal. App. 4th 214, 222 (Cal. Ct. App. 1999)); see also In
7 re Toyota Motor Corp., 785 F. Supp. 2d 883, 918 (C.D. Cal. 2011).
8 In determining whether California law should apply to a certain
9 claim, courts consider facts like where the defendant is located,
10 where the class members are located, and where decisions about the
11 behavior in question were made. See In re Toyota, 785 F. Supp. 2d
12 at 917. In this case, Plaintiffs are located in California,
13 Defendant is located in Texas, and Plaintiffs have not alleged any
14 activity within California except their own purchase of the
15 Purchased Products.

16 First, the Court is not persuaded by Plaintiffs' argument that
17 this issue should wait until the class certification stage. Class
18 allegations typically are tested on a motion for class
19 certification, not at the pleading stage. See Collins v. Gamestop
20 Corp., C10-1210-TEH, 2010 WL 3077671, at *2 (N.D. Cal. Aug. 6,
21 2010). However, "[s]ometimes the issues are plain enough from the
22 pleadings to determine whether the interests of the absent parties
23 are fairly encompassed within the named plaintiff's claim." Gen.
24 Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982). Thus, some
25 courts have struck class allegations where it is clear from the
26 pleadings that class claims cannot be maintained. E.g., Sanders v.
27 Apple Inc., 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009).

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1 Second, at this point, those claims fail as a matter of law
2 because nothing in Plaintiffs' complaint alleges that any of the
3 out-of-state purchases were directed from California or had
4 anything to do with California. Plaintiffs' allegations on these
5 points amount to nothing more than conclusions of law without any
6 supporting facts. Non-California citizens who made purchases in
7 California could assert the same California causes of action that
8 Plaintiffs do, but there is no plausible way for a non-California
9 citizen who purchased Defendant's Products outside California to
10 bring these claims.

11 Plaintiffs' California law claims based on activity occurring
12 in other states are all DISMISSED WITH PREJUDICE. In two amended
13 complaints, Plaintiffs have failed to give a plausible account of
14 how or why a non-California plaintiff could sue under California
15 tort law for purchases made outside the state from a Texan company
16 that, at most, advertises and sells its products in California.

17

18 **V. CONCLUSION**

19 For the reasons explained above, Defendant Frito-Lay North
20 America, Inc.'s motion to dismiss Plaintiffs Markus Wilson and Doug
21 Campen's second amended complaint is GRANTED in part and DENIED in
22 part. The Court orders as follows:

23

- 24 • Plaintiffs' claims based on the Non-Purchased Products
25 are DISMISSED WITH PREJUDICE.
- 26 • Plaintiffs' claims based on the "All Natural" and "0
27 Grams Trans Fat" statements are undisturbed. Defendant's
28 motion is DENIED as to those claims.

- Plaintiffs' UCL unlawfulness claim is DISMISSED WITH PREJUDICE to the extent that it is based on misbranding laws.
- Plaintiffs' "No MSG" claims are DISMISSED WITH PREJUDICE to the extent that those claims are predicated on activity predating the FDA's November 19, 2012 guidance.
- Plaintiffs' claims based on purchases that occurred outside California are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: October 24, 2013



UNITED STATES DISTRICT JUDGE

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