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CENTRAL DISTRICT OF CALIFORNIATIMOTHY BORIS, BONNIE COOPER, TONY F.
GIRARD, and ERIKA NEWSOME, on behalf of
themselves and all others similarly situated, PLAINTIFF(S),
v.
WAL-MART STORES, INC. and WALMART.COM
DEFENDANT(S).

CASE NUMBER:

CV13-07090-ABC-(FFM)

NOTICE OF APPEAL

Plaintiffs, Timothy Boris, Bonnie Cooper, Tony F.
Girard, and Erika Newsome
NOTICE IS HEREBY GIVEN that _____ hereby appeals to
Name of Appellant
the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

- ☐
- Conviction only [F.R.Cr.P. 32(j)(1)(A)]
-
- ☐
- Conviction and Sentence
-
- ☐
- Sentence Only (18 U.S.C. 3742)
-
- ☐
- Pursuant to F.R.Cr.P. 32(j)(2)
-
- ☐
- Interlocutory Appeals
-
- ☐
- Sentence imposed:

☐ Bail status:

Civil Matter

- ☒
- Order (specify):
-
- Granting Defendant's Motion to Dismiss on April 9, 2014 and the
-
- Court's Order Dismissing the case with prejudice on May 5, 2014.
-
- ☐
- Judgment (specify):
-
- ☐
- Other (specify):

Imposed or Filed on May 5, 2014. Entered on the docket in this action on May 5, 2014.

A copy of said judgment or order is attached hereto.

Date

5/8/14

Signature

☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

TIMOTHY BORIS, BONNIE COOPER, TONY F.
GIRARD, and ERIKA NEWSOME, on behalf of
themselves and all others similarly situated,

Case CV13-07090 ABC (FFMx)

Plaintiffs,

v.

WAL-MART STORES, INC. and WALMART.COM,

Defendants.

REPRESENTATION STATEMENT PURSUANT TO LOCAL RULE 3.2

Pursuant to Local Rule 3.2, Counsel for Plaintiffs/Appellants Timothy Boris, Bonnie Cooper, Tony F. Girard, and Erika Newsome submit the following representation statement identifying the names and addresses of all parties to the Orders being appealed:

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Dated: 5/8/14

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TIMOTHY BORIS, BONNIE COOPER,
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CV 13-7090 ABC (FFMx)

ORDER GRANTING MOTION TO
DISMISS

Pending before the Court is Defendant Wal-Mart Stores, Inc., and Wal-Mart.com's ("Wal-Mart") Motion to Dismiss ("Motion," docket no. 25), filed on January 24, 2014. Plaintiffs Timothy Boris, Bonnie Cooper, Tony F. Girard, and Erika Newsome ("Plaintiffs") filed an Opposition and Wal-Mart filed a Reply. The Court heard oral argument on April 7, 2014. For the following reasons, the Court GRANTS the Motion.

I. BACKGROUND

In this putative class action lawsuit, plaintiffs Timothy Boris, Bonnie Cooper, Tony F. Girard, and Erika Newsome allege that Wal-Mart deceptively markets its Equate Migraine medication in violation of several laws. Plaintiffs contend that Equate Migraine and Equate Extra Strength Headache Relief ("Equate ES") - both over-the-counter medications - contain the exact same active ingredients in the same amounts, yet Wal-Mart charges two to three times more for Equate Migraine than it does for Equate ES, and Equate Migraine's package has a red background while Equate ES's package has a green background. First Amended Complaint ("FAC," docket no. 18) ¶ 2. Plaintiffs contend that Equate Migraine's price differential along with its package's red background "deceived [consumers] into thinking that Equate Migraine was better (stronger, more effective) for treating headaches (both migraine and non-migraine)" than Equate ES. Id. Plaintiffs also contend that Wal-Mart further misleads consumers into thinking Equate Migraine is more effective than Equate ES because Wal-Mart's website lists all three active ingredients for Equate Migraine, but lists only one active ingredient for Equate ES. Id. ¶ 13.

Based on the foregoing allegations, Plaintiffs assert the following claims: (1) false advertising in violation of California's False Advertising Law ("FAL," Cal. Bus. & Prof. Code § 17500 *et seq.*); (2) unfair and unlawful conduct in violation of California's Unfair Competition Law ("UCL," Cal. Bus. & Prof. Code § 17200 *et seq.*); (3) for violation of the California Consumer Legal Remedies Act ("CLRA," Cal. Civ. Code § 1750 *et seq.*); (4) violation of the New Jersey Consumer Fraud Act ("NJCFA," N.J.S.A. 56:8-1 *et seq.*); (5) violation of New York General Business Law ("NYGBL," New York General Business

1 Law § 349); (6) unjust enrichment/restitution; and (7) breach of the
2 covenant of good faith and fair dealing. All of Plaintiffs' claims
3 are based on the same conduct, except the NJCFA, NYGBL, and unjust
4 enrichment/restitution claims do not incorporate the website
5 allegation.

6 Plaintiffs assert these claims on behalf of members of the
7 following class and sub-classes who purchased Equate Migraine during
8 the limitations period: a nationwide Class represented by all four
9 representative Plaintiffs (FAC ¶ 33); a California State Subclass
10 represented by California resident Boris (FAC ¶ 34); a New Jersey Sate
11 Subclass represented by New Jersey resident Cooper (FAC ¶ 35); a New
12 York State Subclass represented by New York resident Newsome (FAC ¶
13 37); and an Online Purchaser Subclass represented by Pennsylvania
14 resident Girard (FAC ¶ 36), the only Plaintiff who alleges that he
15 purchased Equate Migraine through Wal-Mart's website.

16 Wal-Mart moves to dismiss all of these claims on several grounds,
17 including for failure to state a claim, for failure to satisfy Fed. R.
18 Civ. Proc. 9(b), as preempted by federal law, and as subject to the
19 Food and Drug Administration's ("FDA") primary jurisdiction. Because
20 the Court finds that Plaintiffs have simply failed to state any claim,
21 it need not reach all of Wal-Mart's other arguments.

22 23 **II. LEGAL STANDARD**

24 Fed. R. Civ. Proc. 8(a)(2) ("Rule 8(a)") requires a pleading to
25 present a "short and plain statement of the claim showing that the
26 pleader is entitled to relief." Under Fed. R. Civ. Proc. 12(b)(6)
27 ("Rule 12(b)(6)"), a defendant may move to dismiss a pleading for
28 "failure to state a claim upon which relief can be granted." Thus, a

1 pleading that does not satisfy Rule 8(a) is subject to dismissal under
2 Rule 12(b)(6). Dismissal is proper under Rule 12(b)(6) where there is
3 either a "lack of a cognizable legal theory" or "the absence of
4 sufficient facts alleged under a cognizable legal theory." Balistreri
5 v. Pacifica Police Dept., 901 F.2d 969, 699 (9th Cir. 1988).

6 "[A] plaintiff's obligation to provide the grounds of his
7 entitlement to relief requires more than labels and conclusions, and a
8 formulaic recitation of the elements of a cause of action will not
9 do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)
10 (internal quotations and alterations omitted). Although this does not
11 require "detailed factual allegations," it "demands more than an
12 unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft
13 v. Iqbal, 555 U.S. 662, 678 (2009). A sufficiently-pled claim must be
14 "plausible on its face." Id. "A claim has facial plausibility when
15 the plaintiff pleads factual content that allows the court to draw the
16 reasonable inference that the defendant is liable for the misconduct
17 alleged." Id. For purposes of a motion to dismiss, allegations of
18 fact are taken as true and are construed in the light most favorable
19 to the nonmoving party. See Newdow v. Lefevre, 598 F.3d 638, 642 (9th
20 Cir. 2010).

21 The first step in determining whether a claim is sufficiently
22 pled is to identify the elements of that claim. See Iqbal, 555 U.S.
23 at 675. The court should then distinguish between the pleading's
24 allegations of fact and its legal conclusions: a court "must take all
25 of the factual allegations in the complaint as true," but should not
26 give legal conclusions this assumption of veracity. Id. at 678. The
27 court must then decide whether the pleading's factual allegations,
28 when assumed true, "plausibly give rise to an entitlement to relief."

1 Id. at 679. The court may not consider material beyond the pleadings
2 other than judicially noticeable documents, documents attached to the
3 complaint or to which the complaint refers extensively, or documents
4 that form the basis of the claims. See United States v. Ritchie, 342
5 F.3d 903, 908 (9th Cir. 2003).

7 **III. DISCUSSION**

8 **A. Overview and Summary of Order**

9 Plaintiffs do not claim that the packaging for Equate Migraine
10 and Equate ES contained any affirmative misrepresentations (Opp'n 4:4-
11 8), omitted necessary information (Opp'n 11, fn. 8), or failed to
12 comply with FDA labeling requirements (Opp'n 16:18-20). Rather, the
13 gravamen of Plaintiffs' case is that by charging more for Equate
14 Migraine and using the color red on its packaging, Wal-Mart deceived
15 Plaintiffs into believing Equate Migraine was more effective than the
16 lower-priced, green-packaged Equate ES when, in fact, both medications
17 contain the same active ingredients in the same doses and are
18 therefore pharmacologically identical. See Opp'n 4:11-14 (stating
19 that the price differential and packaging color are the gravamen of
20 the case). Plaintiffs assert that no reasonable consumer would pay
21 more than \$9 for Equate Migraine when he or she could pay less than \$3
22 for Equate ES unless he or she believed Equate Migraine was more
23 effective than Equate ES. See Opp'n 1:2-5.

24 There is a *res ipso loquitur* quality to Plaintiffs' claims: the
25 fact that Plaintiffs paid more than three times more for Equate
26 Migraine speaks for itself, which is to say, demonstrates that
27 Plaintiffs believed Equate Migraine was more effective than Equate ES.
28 However, a consumer's assumptions about a product are not the

1 benchmark for establishing liability under any of the consumer
2 protection statutes Plaintiffs rely on; rather, all of these statutes
3 require some act, statement, or omission by the defendant.¹ Equate
4 Migraine's price and packaging color do not constitute an act or
5 statement on which to premise liability.

6 Plaintiffs' allegation that Wal-Mart's website contained a
7 misleading omission is pled only as a tagalong allegation reinforcing
8 the deceptiveness of Equate Migraine's price and red package, and not
9 as a standalone basis for Plaintiffs' claims. The Court will address
10 the pricing and package color aspects of Plaintiffs' claims first, and
11 reach the tagalong website allegation separately. For the reasons
12 summarized above and explained at length below, Plaintiffs' claims are
13 dismissed in their entirety, with limited leave to amend.

14 **B. All of Plaintiffs' Deception Claims Based on Equate Migraine's**
15 **Price and Red Packaging Fail and are DISMISSED with Prejudice.**

16 **1. Plaintiffs' Claims under the FAL, CLRA, and the UCL's**
17 **"Unlawful" Prong Based on Equate Migraine's Price and Red**
18 **Packaging Fail for Lack of a Statement or Representation.**

19 Plaintiff's FAL and CLRA claims are premised on the same
20 allegations: that Equate Migraine's price and red packaging deceived
21 them into believing that it was more effective than the cheaper,
22 green-packaged Equate ES, and that this deception was reinforced by an
23 omission on Wal-Mart's website. Plaintiffs' claim under the UCL's
24 "unlawful" prong is premised on the FAL violation. See FAC ¶ 57.

25 California's FAL provides in relevant part: "It is unlawful for
26 any person, firm, corporation or association, or any employee thereof
27 with intent directly or indirectly to dispose of real or personal

28 ¹ Such statutes also tend to require the plaintiff's expectations to be reasonable, an issue that the Court does not reach.

1 | property . . . to make or disseminate or cause to be made or
2 | disseminated before the public in this state . . . in any newspaper or
3 | other publication, or any advertising device, or by public outcry or
4 | proclamation, or in any other manner or means whatever, including over
5 | the Internet, any statement, concerning that real or personal property
6 | . . . or concerning any circumstance or matter of fact connected with
7 | the proposed performance or disposition thereof, which is untrue or
8 | misleading, and which is known, or which by the exercise of reasonable
9 | care should be known, to be untrue or misleading . . .” Cal. Bus. &
10 | Prof. Code § 17500. Section 17500 has been broadly construed to
11 | proscribe “not only advertising which is false, but also advertising
12 | which[,] although true, is either actually misleading or which has a
13 | capacity, likelihood or tendency to deceive or confuse the public.”
14 | Kasky v. Nike, Inc., 27 Cal.4th 939, 951 (2002).

15 | The CLRA proscribes certain “unfair methods of competition and
16 | unfair or deceptive acts or practices undertaken by any person in a
17 | transaction intended to result or which results in the sale or lease
18 | of goods or services to any consumer,” including “[u]sing deceptive
19 | representations . . . in connection with goods or services.” Cal.
20 | Civ. Code § 1770(a)(4). The CLRA is also to be “liberally construed
21 | and applied to promote its underlying purposes, which are to protect
22 | consumers against unfair and deceptive business practices and to
23 | provide efficient and economical procedures to secure such
24 | protection.” Cal. Civ. Code § 1760.

25 | The same standard determines whether a representation is
26 | misleading under the FAL and the CLRA. Consumer Advocates v. Echostar
27 | Satellite Corp., 113 Cal.App.4th 1351, 1360 (2003). Whether a
28 | statement is misleading is “judged by the effect it would have on a

1 reasonable consumer." Id. Stated similarly, a "statement [that is]
2 false or likely to be misleading to a reasonable consumer" violates
3 these statutes. Nagel v. Twin Laboratories, Inc., 109 Cal.App.4th 39,
4 53 (2003). "[T]he primary evidence in a false advertising case [of
5 whether a statement is misleading under the statute] is the
6 advertising itself." Brockey v. Moore, 107 Cal.App.4th 86, 100
7 (2003). "The misleading character of a given representation appears
8 on applying its words to the facts." Colgan v. Leatherman Tool Grp.,
9 Inc., 135 Cal.App.4th 663, 679 (2006) (quotations and citations
10 omitted).

11 All of these cases reflect that false advertising violations must
12 be premised on some statement or representation by the defendant about
13 the product. Although Plaintiffs point out that courts (in
14 California, New York, and New Jersey) have found even literally true
15 statements to be deceptive, see Opp'n ,3:10-24, Plaintiffs' own
16 characterization of the law reflects that liability must be premised
17 on a statement or representation of some kind. Indeed, all of the
18 cases Plaintiffs cite involve some kind of statement or representation
19 by the defendant about the offending product.

20 Here, neither the price of Equate Migraine nor the red background
21 of its packaging constitutes a representation or statement about the
22 product: the price is simply the amount at which the merchant offers
23 to sell the product, and the color of the packaging is a color, not a
24 statement about the product.² Insofar as the color red on a product's

25
26 ² At oral argument, Plaintiffs directed the Court to two cases
27 that they claimed support the proposition that a product's price or
28 color can be an actionable statement. The Court has reviewed both
cases and they are not on point. In Wal-Mart Stores, Inc. v. Samara
Bros., Inc., 529 U.S. 205 (2000), a Lanham Act case, the Supreme Court

1 package communicates anything, its message is necessarily subjective
2 and speculative. A merchant's liability cannot be premised solely on
3 a consumer's assumptions about a product based on a product's price
4 and the color of its packaging. Notably, Plaintiffs do not allege
5 that Equate Migraine's packaging failed to accurately state the
6 correct active ingredients and their dosages, or deny that by simply
7 comparing Equate Migraine's packaging to Equate ES's packaging they
8 could have readily ascertained that these drugs were identical. Thus,
9 Equate Migraine's price and red packaging cannot support Plaintiffs'
10 FAL, CLRA, or UCL "unlawful" prong claims, when considered either by
11 themselves or in conjunction with the accurate active ingredient
12 labeling on both drugs' packaging. The Court therefore **GRANTS** Wal-
13 Mart's Motion to Dismiss these claims

14 **2. Plaintiffs' Claim Under the UCL's "Unfair" Prong Based on**
15 **Equate Migraine's Price and Red Packaging Fail Because they**
16 **Are Not Tethered to Any Specific Constitutional, Statutory,**
17 **or Regulatory Provision.**

18 Plaintiffs also contend that Wal-Mart violated the "unfair" prong
19 of the UCL because Wal-Mart's "misrepresentations and omissions" (FAC

20 held that a product's design, like its color, cannot be inherently
21 distinctive and can only be protected as trade dress if it has
22 acquired secondary meaning. Wal-Mart has no bearing on the consumer
23 false advertising claims in issue here. In Miller v. Ghirardelli
24 Chocolate Co., 2013 WL 1402682 (N.D. Cal. Apr. 5, 2013), the Court
25 found that the plaintiff stated CRLA, FAL, UCL, and fraud claims
26 against Ghirardelli for misleading consumers into believing that its
27 "Ghirardelli Chocolate's Premium Baking Chips—Classic White" ("baking
28 chips") were white chocolate, when in fact the baking chips did not
contain any chocolate ingredients in violation of the FDA's "white
chocolate standard," parallel California regulations, and FDA and
California label requirements. Because the claims in Miller were
premised on an actual statement on the product's package - the word
"chocolate" - it is not analogous to this case. In addition, price
did not play a role in the Miller court's analysis. In short, neither
Wal-Mart nor Miller aid Plaintiffs.

¶ 59) "offend[] established public policy or [are] immoral, unethical, oppressive, unscrupulous, unconscionable, or substantially injurious to Plaintiffs. . ." FAC ¶ 58. Plaintiffs' Opposition admits that their claims are not, in fact, premised on any omissions. See Opp'n 11, fn. 8. Insofar as this claim is premised on "misrepresentations" embodied in Equate Migraine's price or its red packaging, it fails because, as stated above, neither aspect of the product constitutes a representation.

Insofar as Plaintiffs' unfairness claim may be characterized as based on Wal-Mart's conduct - the "conduct" of pricing Equate Migraine and using red packaging - it also fails.

The unfair prong of the UCL prohibits "unfair . . . business act[s] or practice[s]." Cal. Bus. & Prof. Code § 17200. The statute does not define the term "unfair," so articulating its parameters is a task that has fallen to the courts.

In Cel-Tech v. Los Angeles Cellular, the California Supreme Court rejected as "too amorphous and [as] provid[ing] too little guidance to courts and businesses" the very standards for "unfair" that Plaintiffs incorporate into their FAC and rely upon in their Opposition. See Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 185 (1999) ("Cel-Tech") (rejecting the exact standard Plaintiffs cites in FAC ¶ 58, and the cost-benefit analysis that Plaintiffs invoke at Opp'n 13:5-18). Instead, the Court held that "any finding of unfairness to competitors under section 17200 [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." Id. at 187. Notably, Cel-Tech concerned unfairness claims between *competitors*, and the Court expressly stated that its discussion did not relate to *consumer*

1 actions. See id. at 187, fn. 12.

2 However, the amorphous tests Cel-Tech rejected were from consumer
3 cases, and many California appellate courts have adapted Cel-Tech's
4 reasoning to consumer actions. This makes sense, because Cel-Tech's
5 rationale for tethering competitor unfairness claims to specific
6 statutory or regulatory provisions also applies to consumer unfairness
7 claims: "[a]n undefined standard of what is 'unfair' fails to give
8 businesses adequate guidelines as to what conduct may be challenged
9 and thus enjoined and may sanction arbitrary or unpredictable
10 decisions about what is fair or unfair," id. at 185, regardless of
11 whether the unfairness claim is asserted by a competitor or by a
12 consumer.

13 In Durrell v. Sharp Healthcare, 183 Cal.App.4th 1350 (2010), the
14 Court persuasively adapted Cel-Tech to consumer unfairness suits.
15 Citing its own previous cases, the Court found that Cel-Tech "may
16 signal a narrower interpretation of the prohibition of unfair acts or
17 practices *in all unfair competition actions* and provides reason for
18 caution in relying on the broad language in earlier decisions that the
19 court found to be 'too amorphous.'" Durrell, 183 Cal.App.4th at 696
20 (citing Gregory v. Albertson's, Inc., 104 Cal.App.4th 845, 854 (2002)
21 (emphasis added). As such, for unfairness cases predicated on public
22 policy, "Cel-Tech [] require[s] that the public policy which is a
23 predicate to the action must be 'tethered' to specific constitutional,
24 statutory or regulatory provisions." Durrell, 183 Cal.App.4th at 696.
25 Alternatively, "[t]o show a business practice is unfair, the plaintiff
26 must show the conduct 'threatens an incipient violation of an
27 antitrust law, or violates the policy or spirit of one of those laws
28 because its effects are comparable to or the same as a violation of

1 the law, or otherwise significantly threatens or harms competition.'"
2 Id. (quoting Byars v. SCME Mortgage Bankers, Inc., 109 Cal.App.4th
3 1134, 1147 (2003)). The Court believes that the California Supreme
4 Court is likely to accept this approach because it maintains the UCL's
5 purpose of deterring and remedying unfair business conduct yet avoids
6 exposing business to arbitrary or unpredictable liability - values the
7 Court itself balanced in Cel-Tech. As such, the Court will apply this
8 approach here.

9 Plaintiffs have not pointed to any specific constitutional,
10 statutory, or regulatory provision that embodies a policy that Equate
11 Migraine's price and red packaging violate. And the Court is aware of
12 none. Absent some legislative enactment, price setting is ordinarily
13 left to the business judgment of merchants.³ Taken to its logical
14 conclusion, Plaintiffs' claim requires the judiciary to make pricing
15 decisions, such as ruling that pharmacologically identical drugs must
16 be the same price or may have only a limited price differential, or
17 imposing liability for differential pricing on a necessarily
18 unpredictable case-by-case basis.

19 To state this result is to demonstrate that it is untenable:
20 price regulation is a political question beyond the judiciary's
21 authority. A question is a political question and therefore
22 nonjusticiable when, for example, there is "a lack of judicially
23 discoverable and manageable standards for resolving it [] or the

24
25 ³ Wal-Mart attempts to justify the price difference between
26 Equate Migraine and Equate ES as related to different FDA approval
27 processes applicable to each medication. Procedurally, matters beyond
28 the pleadings generally cannot be considered when deciding a motion to
dismiss. Substantively, as discussed herein, the Court is aware of no
law requiring Wal-Mart to justify this price difference in the first
place.

1 impossibility of deciding without an initial policy determination of a
2 kind clearly for nonjudicial discretion. . .” Baker v. Carr, 369 U.S.
3 186, 217 (1962). California courts have consistently described price
4 regulation as “a question of economic policy . . . It is the
5 Legislature’s function, not ours, to determine the wisdom of economic
6 policy. Judicial intervention in such economic issues is improper.”
7 Lazar v. Hertz Corp., 69 Cal.App.4th 1494, 1509 (1999) (a law allowing
8 car rental companies to impose a surcharge for underage drivers and
9 imposing a “reasonableness” requirement on the age threshold, does not
10 also impose a “reasonableness” limit on the surcharge, so claims
11 challenging reasonableness of surcharge are not viable); see also
12 Princess Cruise Lines, Ltd. v. Superior Court, 179 Cal.App.4th 36, 46
13 (2009) (“ . . . in the absence of legislatively crafted standards, it
14 is not for us to lay down economic policy that passes on the
15 reasonableness of charges.”). Thus, to the extent the state regulates
16 prices, it does so through the legislature and not through the courts
17 because price regulation is a quintessentially political question and
18 thus nonjusticiable. The “fairness” of a product’s packaging color
19 is, on its face, similarly non-justiciable.

20 In the absence of any provision that even remotely supports
21 Plaintiffs’ price and packaging color argument, there is no predicate
22 for adjudicating the alleged “unfairness” of Equate Migraine’s price
23 or the propriety of its red packaging. As noted, the Court is without
24 authority to create, in effect, *ad hoc* pricing regulations or
25 arbitrary package color rules. As such, Plaintiffs’ claim that Equate
26 Migraine’s price and red packaging amount to an unfair business
27 practice under the “unfair” prong of the UCL fails. The Court
28 therefore **GRANTS** Wal-Mart’s Motion to Dismiss this claim.

1 **3. Plaintiffs' Claims Under the NJCFA and NYGBL Based on Equate**
2 **Migraine's Price and Red Packaging Also Fail.**

3 The NJFCA prohibits, in relevant part, "[t]he act, use or
4 employment by any person of any unconscionable commercial practice,
5 deception, fraud, false pretense, false promise, misrepresentation, or
6 the knowing, [sic] concealment, suppression, or omission of any
7 material fact with intent that others rely upon such concealment,
8 suppression or omission, in connection with the sale or advertisement
9 of any merchandise." N.J. Stat. Ann. 56-8:2. To prevail on a cause
10 of action for consumer fraud, a plaintiff must demonstrate an
11 "ascertainable loss." Scibek v. Longette, 339 N.J.Super. 72, 78
12 (App.Div.2001). An unlawful practice typically involves an
13 affirmative act of fraud and can arise from an affirmative act, an
14 omission, or a violation of an administrative regulation. Id. at 78.

15 The NYGBL states, in relevant part, "Deceptive acts or practices
16 in the conduct of any business, trade or commerce or in the furnishing
17 of any service in this state are hereby declared unlawful." N.Y. Gen.
18 Bus. Law § 349(a). A § 349 claim consists of three elements: "first,
19 that the challenged act or practice was consumer-oriented; second,
20 that it was misleading in a material way; and third, that the
21 plaintiff suffered injury as a result of the deceptive act." Stutman
22 v. Chem. Bank, 95 N.Y.2d 24, 29 (2000). "Whether a representation or
23 omission is a 'deceptive act or practice' depends on the likelihood
24 that it will 'mislead a reasonable consumer acting reasonably under
25 the circumstances.'" Gomez-Jimenez v. New York Law Sch., 956 N.Y.S.2d
26 54, 58 (2012). "[A] party does not violate GBL 349 by simply
27 publishing truthful information and allowing consumers to make their
28 own assumptions about the nature of the information." Id. at 59.

1 Although acts, practices, statements, or omissions may be
2 actionable under both the NJCFA and the NYGBL, none of the ten cases
3 Plaintiffs cite suggest that either state views a product's price or
4 package color as an act, practice, statement, or omission. The cases
5 Plaintiffs cite involve misstatements or omissions (eight cases), or
6 were dismissed (two cases). See Reply 12:10-14:7 (characterizing
7 Plaintiffs' New Jersey and New York cases). As discussed above,
8 neither Equate Migraine's price nor its red packaging constitutes a
9 statement or omission. Plaintiffs have presented no authority
10 supporting the implausible premise that a product's price and package
11 color is a sufficient basis for liability under the NJCFA or the
12 NYGBL. As such, the Court **GRANTS** the Motion as to Plaintiffs' NJCFA
13 and NYGBL claims.

14 For the foregoing reasons, Plaintiff's FAL, CLRA, and UCL claims
15 based on Equate Migraine's price and red packaging, and their NJCFA
16 and NYGBL claims, fail. Because amendment cannot cure the defects
17 noted above, these claims are **DISMISSED WITH PREJUDICE**.

18 **C. Insofar as Plaintiffs' FAL, CLRA, and UCL Claims are Premised in**
19 **Part on their Website Allegation, they are DISMISSED with Leave**
to Amend.

20 **1. The FAC Does Not Plead the Alleged Misrepresentation on the**
21 **Website as an Independent Basis for Plaintiffs' FAL, CLRA,**
and UCL Claims.

22 Plaintiffs' FAC does allege a misrepresentation or omission: that
23 Wal-Mart's website misstated the active ingredients of Equate ES. See
24 FAC ¶ 23 ("With regard to the online marketing of Equate Migraine,
25 Defendants' website falsely lists Equate ES as having only one active
26 ingredient, acetaminophen 250 mg, while listing three active
27 ingredients for Equate Migraine (acetaminophen 250 mg, **plus** aspirin
28 250mg, and caffeine 65 mg)."). However, while Plaintiffs' FAL, CLRA,

1 and UCL claims incorporate this allegation, a fair reading of the FAC
2 reveals that Plaintiffs rely on this allegation not as an independent
3 basis for their claims, but to bolster their claims that Equate
4 Migraine's higher price and red packaging are misleading. See, e.g.,
5 FAC ¶ 22 ("Defendant's deception is reinforced by the manner in which
6 Wal-Mart displays Equate ES and Equate Migraine side-by-side on its
7 shelves and in close proximity on the Walmart.com web site [sic].");
8 see also Opp'n 4:10-13 ("The gravamen of Plaintiffs' allegations is
9 that the use of color and pricing creates a false and misleading
10 perception among consumers that Equate Migraine is substantially more
11 potent and effective than equate ES."). As discussed above, the Court
12 finds that Equate Migraine's higher price and red packaging are not
13 actionable. Given the state of the FAC, the Court cannot find that
14 Plaintiffs' allegation about the website, standing alone, supports
15 Plaintiffs' claims because the FAC does not base its claims on that
16 allegation standing alone. In addition, Plaintiffs have disavowed any
17 claim based on FDA labeling requirements. See Opp'n 16:18-20. The
18 Court therefore **GRANTS** the Motion as to the website components of
19 Plaintiffs' FAL, CLRA, and UCL claims. If Plaintiffs wish to pursue
20 their FAL, CLRA, and UCL claims based on alleged misrepresentations on
21 Wal-Mart's website, they may attempt to replead them.

22
23 //

24 //

25 //

2. Plaintiff Girard's Website Allegations Do Not Comply with Rule 9(b).⁴

Fed. R. Civ. Proc. 9(b) ("Rule 9(b)") requires a party to "state with particularity the circumstances constituting fraud or mistake." "Rule 9(b) demands that the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009) (citations omitted). Thus, "averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.'" Id. (citations omitted). See also Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9th Cir. 1991) (to satisfy Rule 9(b), a plaintiff alleging fraud must "detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme").

Rule 9(b) applies to claims under California's consumer protection statutes when such claims are "grounded in fraud" or "sound in fraud." Kearns, 567 F.3d at 1125-26 (CLRA and UCL claims that Ford conspired with dealerships to misrepresent the benefits of its certified pre-owned vehicle program in order to sell more cars and increase revenue sound in fraud and are subject to Rule 9(b)).

Here, Plaintiffs allege that Wal-Mart's alleged misrepresentation on its website was part of its fraudulent scheme to deceive consumers into purchasing the more expensive Equate Migraine product rather than

⁴ Because Plaintiffs' claims insofar as they are based on Equate Migraine's price and red packaging are dismissed with prejudice for failure to state a claim, the Court will not address whether they comply with Rule 9(b).

1 the cheaper but pharmacologically equivalent Equate ES. Plaintiffs
2 even use the word "fraud" to characterize Wal-Mart's conduct. See,
3 e.g., FAC ¶ 51. Therefore, Plaintiffs' claims sound in fraud and are
4 subject to Rule 9(b).

5 The FAC's website allegations do not satisfy Rule 9(b).
6 Plaintiff Girard - the only representative plaintiff associated with
7 any website-related allegation and the sole representative of the
8 Online Purchaser Class - does not specify when he viewed Wal-Mart's
9 website or when he relied on it in deciding to buy Equate Migraine.
10 See FAC ¶ 13 (allegations pertaining to Girard). Wal-Mart contends
11 that because the content of its website changes from time to time, it
12 needs to know when Girard viewed the website in order to defend
13 against this claim, rather than simply deny any wrongdoing. The Court
14 agrees.

15 Furthermore, the FAC does not expressly allege that Girard viewed
16 the Walmart.com webpages listing each medicine's active ingredients.
17 See FAC ¶ 13. At best, the FAC invites the reader to *infer* Girard
18 viewed these webpages, but this is insufficient to state a claim:
19 absent an express allegation that Girard viewed the misleading
20 content, there can be no reliance and the claim fails under Rules 8(a)
21 and 9(b).

22 **3. Plaintiffs' Online Purchaser Class Definition Is Inadequate.**

23 In light of the foregoing rulings, the only claims that may
24 survive if Plaintiffs file an amended complaint are their FAL, CLRA,
25 and UCL claims based on Wal-Mart's alleged misrepresentation on its
26 website. Presumably, these claims are asserted on behalf of the
27 Online Purchaser Class. But the definition of this class is
28 inadequate because it fails to mention Wal-Mart's website in any way,

1 let alone allege that its members purchased Equate Migraine online.
2 Thus, Plaintiffs have failed to state a claim for the Online Purchaser
3 Class.

4 **D. Plaintiffs' Claim for Breach of the Covenant of Good Faith and**
5 **Fair Dealing Fails.**

6 The parties agree that the same legal standard applies to
7 Plaintiffs' claim for breach of the covenant of good faith and fair
8 dealing regardless of whether it is brought under California, New
9 Jersey, or New York law. The implied covenant of good faith and fair
10 dealing is read into a contract "'to prevent a contracting party from
11 engaging in conduct which (while not technically transgressing the
12 express covenants) frustrates the other party's rights to the benefits
13 of the contract.'" Racine & Laramie, Ltd. v. Dept. of Parks & Rec.,
14 11 Cal.App.4th 1026, 1031-32 (1992).

15 Plaintiffs do not contend that Wal-Mart somehow frustrated their
16 ability to enjoy the benefits of their contract (their purchase of
17 Equate Migraine). Rather, they complain that Wal-Mart charged them
18 too much. Such conduct is not actionable as a breach of the implied
19 covenant. This claim is therefore dismissed with prejudice.

20 **E. Plaintiffs' Claim for Unjust Enrichment/Restitution Fails.**

21 The Court need not reach the question of whether unjust
22 enrichment is a claim or just a remedy, or whether, as Plaintiffs
23 urge, this whole question is merely semantic. This is because
24 Plaintiffs' claim seeks relief based on the FAC's deception-based
25 claims, all of which have been dismissed. Because there remains no
26 actionable conduct upon which to premise a claim or remedy for unjust
27 enrichment/restitution, this aspect of the FAC is dismissed.
28

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** Wal-Mart's Motion to Dismiss as follows:

- Plaintiffs' FAL, CLRA, and UCL claims based on Equate Migraine's price and red packaging, and their NJCFA claim, NYGBL claim, breach of the covenant claim, and unjust enrichment/restitution claim based on the foregoing predicate claims, fail. Because amendment cannot cure the defects in these claims, they are **DISMISSED WITH PREJUDICE**. Because these are the only claims alleged by Boris, Cooper, and Newsome, these Plaintiffs are **DISMISSED**.
- Plaintiffs' FAL, CLRA, and UCL claims based on the alleged website misrepresentation fail as pled and are therefore **DISMISSED**. However, if Plaintiffs can do so consistent with Fed. R. Civ. Proc. 11, they may attempt to cure the deficiencies noted above by filing a Second Amended Complaint within twenty-one (21) days of the issuance of this Order. If Plaintiffs do not timely file a Second Amended Complaint, the action will be deemed dismissed with prejudice.

IT IS SO ORDERED.

DATED: April 9, 2014

Audrey B. Collins

AUDREY B. COLLINS
U.S. DISTRICT COURT JUDGE

JS-6

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 7

8 UNITED STATES DISTRICT COURT
 9 CENTRAL DISTRICT OF CALIFORNIA
 10

11 TIMOTHY BORIS, BONNIE COOPER,)
 TONY F. GIRARD, and ERIKA)
 12 NEWSOME, on behalf of themselves)
 and all others similarly situated,)

13 Plaintiffs,

14 vs.

15 WAL-MART STORES, INC. and)
 WALMART.COM,)

16 Defendants.
 17)
 18)

Case No. CV13-07090-ABC-(FFM)

Judge: Hon. Audrey B. Collins
 Ctrm.: 680

**[PROPOSED] ORDER DISMISSING
 CASE WITH PREJUDICE**

[Filed concurrently with Application for
 Entry of Order Dismissing Case with
 Prejudice]

Complaint filed: 9/24/13
 FAC filed: 12/13/13

19
 20 On April 9, 2014, the Court dismissed with prejudice all claims, except for
 21 Plaintiffs' claims under the FAL (Cal. Bus. & Prof. Code § 17500 et seq.), UCL (Cal.
 22 Bus. & Prof. Code § 17200 et seq.), and CLRA (Cal. Civ. Code § 1750 et seq.) to the
 23 extent they are predicated on an alleged website misrepresentation ("website claims"),
 24 which were dismissed without prejudice. The Court granted Plaintiffs twenty-one
 25 (21) days to file a second amended complaint to cure deficiencies in the website
 26 claims. (See Ex. A at 20.)
 27
 28

1 Plaintiffs failed to file a second amended complaint within the time prescribed
2 by the April 9, 2014 Order. Accordingly, for the reason set forth in the Court's April
3 9, 2014 Order, **IT IS HEREBY ORDERED** that this case is dismissed in its entirety
4 with prejudice.

Audrey B. Collins

5
6 Dated: 5/5/14

Hon. Audrey B. Collins
United States District Court Judge