

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CHAD BRAZIL, an individual, on his own)
behalf and on behalf of all others similarly)
situated,)
)
Plaintiff,)
v.)
DOLE PACKAGED FOODS, LLC,)
)
Defendant.)

Case No.: 12-CV-01831-LHK

ORDER GRANTING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT, AND DENYING AS
MOOT DEFENDANT’S MOTION TO
STRIKE

Before the Court is a Motion for Summary Judgment and Motion to Strike brought by Defendant Dole Packaged Foods, LLC (“Dole”), a subsidiary of Dole Food Company, Inc. ECF No. 168 (“Mot.”). Plaintiff Chad Brazil (“Brazil”) opposed the motion, ECF No. 180 (“Opp.”), and Dole replied, ECF No. 203 (“Reply”). Having considered the submissions of the parties, the relevant law, and the record in this case, the Court hereby GRANTS Dole’s Motion for Summary Judgment. The Court also DENIES as moot Dole’s Motion to Strike.

I. BACKGROUND
A. Factual Background

Dole, a limited liability corporation with principal place of business in Westlake Village, California, “is a leading producer of retail food products” that sells “to consumers through grocery and other retail stores throughout the United States.” Third Amended Complaint (“TAC”), ECF

1 No. 148 ¶¶ 16-17. Brazil is a California consumer who “cares about the nutritional content of food
2 and seeks to maintain a healthy diet.” *Id.* ¶¶ 15, 76. From April 11, 2008, to the present, Brazil has
3 spent over \$25.00 on Dole’s food products, which he contends are “misbranded” in violation of
4 state law. *Id.* ¶¶ 1, 5, 76. In particular, Brazil alleges that he purchased the following three food
5 products:

- 6 (1) Dole Frozen Wildly Nutritious Signature Blends—Mixed Fruit (12 oz. bag);
- 7 (2) Dole Mixed Fruit in 100% Fruit Juice (4 oz. cups); and
- 8 (3) Dole Tropical Fruit in Light Syrup & Passion Fruit Juice (15.25 oz. can).

9 *Id.* ¶ 2. Brazil refers to these products collectively as the “Purchased Products.” *Id.*

10 The TAC also alleges claims based on seven additional products that Brazil did not
11 purchase, but which are, according to Brazil, substantially similar to those that he did purchase in
12 that they “(i) make the same label representations . . . as the Purchased Products and (ii) violate the
13 same regulations.” TAC ¶ 3. They include:

- 14 (4) Diced Peaches in 100% Fruit Juice (4 oz. plastic cups);
- 15 (5) Diced Apples in 100% Fruit Juice (4 oz. plastic cups);
- 16 (6) Diced Pears in 100% Fruit Juice (4 oz. plastic cups);
- 17 (7) Mandarin Oranges in 100% Fruit Juice (4 oz. plastic cups);
- 18 (8) Pineapple Tidbits in 100% Pineapple Juice (4 oz. plastic cups);
- 19 (9) Tropical Fruit in 100% Juice (4 oz. plastic cups); and
- 20 (10) Red Grapefruit Sunrise in 100% Juice (4 oz. plastic cups).

21 *Id.* ¶ 4. Brazil refers to this second group of products as the “Substantially Similar Products.” *Id.*

22 ¶ 3.

23 Brazil alleges that Dole makes representations on the labels of these ten products that are
24 unlawful, as well as false and misleading, under California law. TAC ¶¶ 8-14. Specifically, Brazil
25 contends that all ten of the products listed above contain the label statement “All Natural Fruit,”
26 which Brazil alleges is misleading because all ten products contain ascorbic acid (commonly
27 known as Vitamin C) and citric acid, both allegedly synthetic ingredients. ECF No. 218 (“Decert
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1 Order”) at 3.

2 **B. Procedural History**

3 Brazil filed his original Complaint on April 11, 2012, naming both Dole Packaged Foods,
4 LLC, and Dole Food Company, Inc., as Defendants. ECF No. 1. As relevant here, Brazil brought
5 claims under California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et*
6 *seq.*; False Advertising Law (“FAL”), *id.* § 17500 *et seq.*; and Consumers Legal Remedies Act
7 (“CLRA”), Cal. Civ. Code § 1750 *et seq.* Defendants filed a Motion to Dismiss on July 2, 2012.
8 ECF No. 16. Rather than responding to the motion, Brazil filed a First Amended Complaint
9 (“FAC”) on July 23, 2012. ECF No. 25. The Court then denied Defendants’ Motion to Dismiss as
10 moot. ECF No. 28.

11 On August 13, 2012, Defendants filed a Motion to Dismiss the FAC. ECF No. 29. Brazil
12 opposed the motion on August 31, 2012, ECF No. 35, and Defendants replied on September 14,
13 2012, ECF No. 37. After holding a motion hearing on January 24, 2013, ECF No. 53, the Court
14 granted in part and denied in part the Motion to Dismiss on March 25, 2013, ECF No. 59. The
15 Court granted leave to amend, and Brazil filed a Second Amended Complaint (“SAC”) on April
16 12, 2013. ECF No. 60. In response to the SAC, Defendants again filed a Motion to Dismiss on
17 April 29, 2013. ECF No. 62. Brazil opposed the motion on May 20, 2013, ECF No. 68, and
18 Defendants replied on June 3, 2013, ECF No. 71. The Court granted in part and denied in part the
19 Motion to Dismiss on September 23, 2013. ECF No. 76. The parties then stipulated to the
20 dismissal of several products that Brazil testified he had never purchased. ECF No. 88 at 2. In
21 addition, the stipulation dismissed Defendant Dole Food Company, Inc., from the case. *Id.*

22 Brazil filed a Motion for Class Certification on January 31, 2014. ECF No. 96. Dole
23 opposed the motion on March 6, 2014, ECF No. 105, and Brazil replied on March 27, 2014, ECF
24 No. 117. The Court granted in part and denied in part the Motion for Class Certification on May
25 30, 2014. ECF No. 142. The Court certified two classes. The first, certified under Rule 23(b)(2)
26 of the Federal Rules of Civil Procedure (the “Injunction Class”), was a nationwide class of
27 consumers “who, from April 11, 2008, until the date of notice, purchased a Dole fruit product
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1 bearing the front panel label statement ‘All Natural Fruit’ but which contained citric acid and
 2 ascorbic acid.” *Id.* at 35. The second, certified under Rule 23(b)(3) (the “Damages Class”), was a
 3 California class of consumers “who, from April 11, 2008, until the date of notice, purchased a Dole
 4 fruit product bearing the front panel label statement ‘All Natural Fruit’ but which contained citric
 5 acid and ascorbic acid.” *Id.*

6 On June 6, 2014, Dole requested leave to move for reconsideration, ECF No. 145, and on
 7 June 12, 2014, Brazil filed his TAC, asserting six causes of action under the UCL, FAL, and
 8 CLRA, *see* TAC ¶¶ 97-161. The Court denied Dole’s request for reconsideration on June 16, 2014,
 9 electing to await the close of expert discovery before revisiting the certification question. ECF No.
 10 150.

11 On August 21, 2014, Dole filed a Motion to Decertify. ECF No. 171. Brazil filed his
 12 Opposition on September 11, 2014. ECF No. 177. Dole filed a Reply on September 25, 2014.
 13 ECF No. 202. On November 6, 2014, the Court granted in part and denied in part Dole’s Motion
 14 to Decertify.¹ Decert Order at 25. Specifically, the Court decertified the Damages Class because
 15 Brazil could not show that the hedonic regression model he had proposed was “capable of
 16 controlling for all other factors and isolating the price premium attributable to Dole’s ‘All Natural
 17 Fruit’ label only.” *Id.* at 21. As the regression model was unable to measure the damages
 18 attributable only to the defendant’s conduct under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426,
 19 1433 (2013), the Court concluded that Brazil had “not satisfied the Rule 23(b)(3) requirement that
 20 common issues predominate over individual ones.” Decert Order at 21, 23. The Court allowed the
 21 Injunction Class to remain certified, but with an amended start date of January 1, 2009.² *Id.* at 24-
 22 25. On November 19, 2014, Brazil sought leave to move for reconsideration. ECF No. 228.

23 ¹ Previously, on June 13, 2014, Dole had filed a Petition for Permission to Appeal the
 24 Court’s class certification order under Rule 23(f) of the Federal Rules of Civil Procedure. ECF No.
 25 149. On September 22, 2014, the Ninth Circuit issued an order holding the petition, as well as
 26 Brazil’s “conditional cross-petition,” in abeyance pending this Court’s resolution of Dole’s Motion
 27 to Decertify. ECF No. 193, Ex. A. On November 17, 2014, the Ninth Circuit granted Dole’s
 28 motion to withdraw its Petition for Permission to Appeal, and the petition was dismissed. ECF No.
 227.

² The Court amended the start date to January 1, 2009, because the sales data relied on by
 Brazil’s damages expert was unavailable prior to that date. *See* Decert Order at 24.

1 Dole filed the instant Motion for Summary Judgment and Motion to Strike on August 21,
2 2014. Mot. at 15. Brazil opposed the motion on September 11, 2014, Opp. at 19, and Dole replied
3 on September 25, 2014, Reply at 12.

4 **II. LEGAL STANDARD**

5 Summary judgment is appropriate if, viewing the evidence and drawing all reasonable
6 inferences in the light most favorable to the nonmoving party, there are no genuine disputes of
7 material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a);
8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986). At the summary judgment stage, the Court
9 “does not assess credibility or weigh the evidence, but simply determines whether there is a
10 genuine factual issue for trial.” *House v. Bell*, 547 U.S. 518, 559-60 (2006). A fact is “material” if
11 it “might affect the outcome of the suit under the governing law,” and a dispute as to a material fact
12 is “genuine” if there is sufficient evidence for a reasonable trier of fact to decide in favor of the
13 nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

14 The moving party bears the initial burden of identifying those portions of the pleadings,
15 discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*,
16 477 U.S. at 323. Where the moving party will have the burden of proof on an issue at trial, it must
17 affirmatively demonstrate that no reasonable trier of fact could find other than for the moving
18 party. *Id.* at 322-23. But on an issue for which the opposing party will have the burden of proof at
19 trial, the party moving for summary judgment need only point out that “the nonmoving party has
20 failed to make a sufficient showing on an essential element of her case with respect to which she
21 has the burden of proof.” *Id.* at 323. Once the moving party meets its initial burden, the
22 nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, “specific facts
23 showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 250.

24 If evidence produced by the moving party conflicts with evidence produced by the
25 nonmoving party, a court must assume the truth of the evidence set forth by the nonmoving party
26 with respect to that fact. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999). “Bald
27 assertions that genuine issues of material fact exist,” however, “are insufficient.” *See Galen v.*

1 *Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007); *see also United States ex rel. Cafasso v. Gen.*
 2 *Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011) (“To survive summary judgment, a
 3 plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory
 4 allegations.”). “If the evidence is merely colorable, or is not significantly probative, summary
 5 judgment may be granted.” *Anderson*, 477 U.S. at 249-50 (citations omitted).

6 **III. DISCUSSION**

7 Dole advances several bases on which the Court may grant summary judgment. First, Dole
 8 argues that there is no evidence the challenged products are anything but “natural.” Mot. at 3-6.
 9 Second, Dole contends that there is no evidence of classwide deception because Brazil has made no
 10 showing that reasonable consumers likely would have been misled by Dole’s “All Natural Fruit”
 11 label. *Id.* at 6-9. Third, Dole claims that there is no evidence reasonable consumers would
 12 consider the “All Natural Fruit” label material to their purchasing decision. *Id.* at 9-12. Fourth,
 13 Dole argues that the Court should, at the very least, grant summary judgment as to Brazil’s
 14 “unlawful” claim because there is no evidence that Dole has violated any underlying law. *Id.* at
 15 12-13. Finally, Dole claims that there is no evidence of classwide damages. *Id.* at 13-14. Apart
 16 from its summary judgment motion, Dole also moves to strike the expert reports of Dr. Julie
 17 Caswell and Dr. Edward Scarbrough. *Id.* at 14-15.

18 For the reasons stated below, the Court concludes there is insufficient evidence that the “All
 19 Natural Fruit” label statement on the challenged Dole products was likely to mislead reasonable
 20 consumers and that the label statements were therefore unlawful on that basis. Because Dole has
 21 shown an absence of a genuine dispute of material fact on these points, the Court GRANTS Dole’s
 22 Motion for Summary Judgment. The Court need not address the other bases Dole advances in its
 23 summary judgment motion or Brazil’s counterarguments thereto.³

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 26 ³ The Court GRANTS Brazil’s requests for judicial notice. *See* ECF Nos. 182, 190. These
 27 documents are all either “matters of public record,” *United States v. 14.02 Acres of Land*, 547 F.3d
 28 943, 955 (9th Cir. 2008), exhibits filed publicly in other court proceedings, *see Holder v. Holder*,
 305 F.3d 854, 866 (9th Cir. 2002), or available on publicly accessible government websites, *see*
Daniels-Hall v. Nat’l Educ. Ass’n, 629 F.3d 992, 998-99 (9th Cir. 2010).

1 **A. Statutory Framework**

2 The federal Food, Drug, and Cosmetic Act (“FDCA”), codified at 21 U.S.C. § 301 *et seq.*,
3 gives the Food and Drug Administration (“FDA”) “the responsibility to protect the public health by
4 ensuring that ‘foods are safe, wholesome, sanitary, and properly labeled.’” *Lockwood v. Conagra*
5 *Foods, Inc.*, 597 F. Supp. 2d 1028, 1030 (N.D. Cal. 2009) (quoting 21 C.F.R. § 393(b)(2)(A)). For
6 purposes of federal law, food is “misbranded” if its labeling is “false or misleading in any
7 particular.” 21 U.S.C. § 343(a)(1). California, through the Sherman Food, Drug, and Cosmetic
8 Act (“Sherman Law”), Cal. Health & Safety Code § 109875 *et seq.*, has expressly adopted the
9 federal labeling requirements as its own. Under the Sherman Law, “All food labeling regulations
10 and any amendments to those regulations adopted pursuant to the federal act . . . shall be the food
11 regulations of [California].” *Id.* § 110100. California has also enacted a number of laws and
12 regulations that adopt and incorporate specific federal food laws and regulations. *See, e.g., id.*
13 § 110660 (“Any food is misbranded if its labeling is false or misleading in any particular.”); *id.*
14 § 110665 (“Any food is misbranded if its labeling does not conform with the requirements for
15 nutrition labeling as set forth in” 21 U.S.C. § 343(q)); *id.* § 110670 (“Any food is misbranded if its
16 labeling does not conform with the requirements for nutrient content or health claims as set forth
17 in” 21 U.S.C. § 343(r)).

18 FDA, the parties agree, has yet to promulgate a regulation defining the word “natural” as it
19 pertains to packaged food. *See* Food Labeling: Nutrient Content Claims, General Principles,
20 Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and
21 Cholesterol Content of Food (“FDA Policy Statement”), 58 Fed. Reg. 2303, 2407 (Jan. 6, 1993)
22 (explaining that “FDA is not undertaking rulemaking to establish a definition for ‘natural’ at this
23 time”). Instead, FDA opted to “maintain its current policy . . . not to restrict the use of the term
24 ‘natural’ except for added color, synthetic substances, and flavors as provided in [21 C.F.R.]
25 § 101.22.” *Id.* “Additionally,” FDA continued, “the agency will maintain its policy regarding the
26 use of ‘natural,’ as meaning that nothing artificial or synthetic (including all color additives
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1 regardless of source) has been included in, or has been added to, a food that would not normally be
2 expected to be in the food.” *Id.* (citation omitted).

3 Against that statutory backdrop, Brazil’s lawsuit “has two facets.” TAC ¶ 5. In particular,
4 Brazil argues that Dole has violated the UCL, FAL, and CLRA because the “All Natural Fruit”
5 labels on the challenged Dole products are (1) unlawful and (2) misleading. *Id.* ¶¶ 4-5, 13-14. The
6 challenged Dole products, Brazil alleges, contain “artificial ingredients”—namely, citric acid and
7 ascorbic acid—that Dole uses as chemical preservatives. *Id.* ¶¶ 49, 56-57, 62-63. According to
8 Brazil, the FDA’s informal definition of the term “natural” is one piece of evidence the putative
9 class may rely on to show that Dole’s food products violated the Sherman Law and deceived
10 consumers by including the label “All Natural Fruit.” The Court first addresses the question of
11 deception.

12 **B. Whether Dole’s Labels Are Deceptive**

13 Brazil’s UCL, FAL, and CLRA claims are governed by the “reasonable consumer
14 standard,” which requires evidence that “members of the public are likely to be deceived.”
15 *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (internal quotation marks
16 omitted). To survive summary judgment, Brazil “must produce evidence showing ‘a likelihood of
17 confounding an appreciable number of reasonably prudent purchasers exercising ordinary care.’”
18 *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008) (quoting *Brockey v.*
19 *Moore*, 107 Cal. App. 4th 86, 99 (2003)). Put differently, Brazil must show “it is probable that a
20 significant portion of the general consuming public or of targeted consumers, acting reasonably in
21 the circumstances, could be misled.” *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 507
22 (2003). Although surveys and expert testimony regarding consumer expectations are not required,
23 “a few isolated examples of actual deception are insufficient” in the Ninth Circuit. *Clemens*, 534
24 F.3d at 1026 (internal quotation marks omitted). Whether a business practice is deceptive is
25 typically, but not always, a question of fact for the jury to decide. *See Williams*, 552 F.3d at 938.

26 Brazil’s evidence is insufficient to create a genuine dispute of material fact. It is true that
27 Brazil himself testified that he was misled by Dole’s “All Natural Fruit” label. *See Deposition of*
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1 Chad Brazil, ECF No. 180-1, at 10-11, 44-50. According to Brazil, when he read the label “All
2 Natural Fruit,” he understood it to mean that all “the contents of the package,” not just the fruit,
3 were “all natural.” *Id.* at 10. While the Court accepts that Brazil’s non-literal interpretation of the
4 label statement is not necessarily unreasonable, *see Williams*, 552 F.3d at 939, binding Ninth
5 Circuit precedent requires the Court to conclude that Brazil’s own testimony, without more, is not
6 enough to survive summary judgment. As the Ninth Circuit explained in *Clemens*, “a few isolated
7 examples of actual deception are insufficient” to survive summary judgment. 534 F.3d at 1026
8 (internal quotation marks omitted); *see also Ries v. Ariz. Beverages USA LLC*, No. 10-01139 RS,
9 2013 WL 1287416, at *6-7 (N.D. Cal. Mar. 28, 2013) (granting summary judgment where
10 defendants’ owner testified that some consumers of AriZona Iced Tea “were confused by the term
11 a hundred percent natural” because such testimony, without more, “does not demonstrate that it is
12 probable that a significant portion of the consuming public could be confused by the ‘all natural’
13 labeling of defendants’ products”).

14 The additional “evidence” offered by Brazil falls short. Brazil cites the FDA’s informal
15 definition of the term “natural” as “evidence of how reasonable consumers would view” the “All
16 Natural Fruit” label. *Opp.* at 9. As Dole points out, however, Brazil has offered no evidence that
17 citric acid and ascorbic acid, the two allegedly synthetic ingredients found in the challenged Dole
18 products, “would not normally be expected to be in” those products, as the FDA definition
19 requires. FDA Policy Statement, 58 Fed. Reg. at 2407; *see Mot.* at 5-6. Confronted with this
20 language, Brazil says only: “It goes without saying that man-made ingredients added to products
21 would not normally be expected to be in food.” *Opp.* at 4. Brazil does not provide any basis for
22 this conclusory statement.

23 Brazil’s failure to offer any evidence on this score is not for want of opportunity. Indeed,
24 Dole served contention interrogatories on Brazil asking him to “[s]tate all facts that support
25 [Brazil’s] contention . . . that a reasonable consumer would understand that such ‘All Natural’
26 products do not contain synthetic, artificial, or excessively processed ingredients.” ECF No. 169-1,
27 at 3 (alteration and internal quotation marks omitted). Brazil objected to the question as
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1 “premature,” promising that “many of the facts supporting [his] claims will be submitted via merit
2 expert reports.” *Id.* Tellingly, those expert reports are silent on the matter. *See, e.g.*, Expert
3 Report of Dr. Kurt M. Hong, ECF No. 180-6 (failing to opine on whether citric acid and ascorbic
4 acid “would not normally be expected to be in” the challenged Dole products); Expert Report of
5 Dr. F. Edward Scarbrough (“Scarbrough Report”), ECF No. 180-8 (same). Without any evidence
6 that the FDA’s informal definition has actually been violated, Brazil cannot rely on that definition
7 as “evidence” that reasonable consumers would likely be deceived by Dole’s “All Natural Fruit”
8 label claim. *See Clemens*, 534 F.3d at 1026 (affirming a grant of summary judgment on fraud-
9 based UCL claim where “[a]side from his bare allegations, Clemens has produced no evidence to
10 suggest that a reasonable consumer would have expected or assumed any particular head gasket
11 lifespan in excess of the warranty period”).

12 For the same reason, Brazil’s reliance on FDA letters to other companies is misplaced. In
13 each of those letters, FDA concluded that the offending company had violated FDA’s informal
14 policy because “natural” means “nothing artificial or synthetic has been included in, or has been
15 added to, a food *that would not normally be expected to be in the food.*” ECF No. 180-11, at 2
16 (emphasis added) (FDA letter to Oak Tree Farm Dairy); *see also* ECF No. 180-12, at 2 (FDA letter
17 to Hirzel Canning Company); ECF No. 180-28, at 2 (FDA letter to Shemshad Food Products); ECF
18 No. 180-29, at 1 (FDA letter to Alexia Foods). One of Brazil’s experts, Dr. Scarbrough, also relies
19 on these FDA letters to conclude that “[v]iolations of FDA’s ‘natural’ policy can lead to labels that
20 are misleading to consumers.” Scarbrough Report ¶ 10. Again, absent any evidence that
21 reasonable consumers would not normally expect citric acid and ascorbic acid to be found in the
22 challenged Dole products, Brazil cannot rely on FDA’s informal policy to show that those
23 consumers were likely to have been misled. Notably, neither Brazil nor Dr. Scarbrough points to a
24 single FDA letter warning Dole about its “All Natural Fruit” labels.

25 Brazil’s citation to *Rubio v. Capital One Bank*, 613 F.3d 1195 (9th Cir. 2010), fares no
26 better. *See* Opp. at 9. In *Rubio*, the Ninth Circuit found that “evidence on how a reasonable
27 consumer will understand the term ‘fixed rate’ is available from the Federal Reserve Board of
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1 Governors,” and such evidence was sufficient to survive a motion to dismiss. 613 F.3d at 1200.
2 Unlike here, the evidence in *Rubio* was based on “consumer testing” conducted by an independent
3 “research firm.” *Id.* That testing included “several rounds of interviews” with credit cardholding
4 consumers. *Id.* at 1200-01; *see also* Truth in Lending, 74 Fed. Reg. 5244, 5246-48 (Jan. 29, 2009)
5 (describing the consumer testing that was conducted, including “a survey to conduct quantitative
6 testing”).

7 In the instant case, by contrast, the best Brazil can muster is that “consumer surveys are not
8 required” under California law. *Opp.* at 9 (capitalization altered). True enough. *See Brockey*, 107
9 Cal. App. 4th at 99. The Court today does not require consumer surveys or, as Dole would have it,
10 a showing that more than fifty percent of the public would be deceived. *See Mot.* at 7. Brazil,
11 however, still must provide evidence “that a significant portion of the general consuming public or
12 of targeted consumers, acting reasonably in the circumstances, could be misled” by Dole’s “All
13 Natural Fruit” label. *Lavie*, 105 Cal. App. 4th at 507. Brazil has not done so. When given the
14 opportunity to offer evidence in response to Dole’s contention interrogatories, Brazil declined the
15 invitation, vowing to do so later in his “expert reports.” ECF No. 169-1, at 3. Those expert reports
16 have come and gone, and they contain no evidence of a likelihood of deception. Furthermore, the
17 only survey evidence Brazil cites is in Brazil’s Opposition to the instant summary judgment motion
18 and relates to the issue of materiality of food labels. *See Opp.* at 12-15. These surveys, which do
19 not involve the “All Natural Fruit” label or the challenged Dole products, say nothing about
20 consumer deception.

21 As binding Ninth Circuit precedent makes clear, “a few isolated examples of actual
22 deception are insufficient” to survive summary judgment. *Clemens*, 534 F.3d at 1026. Where, as
23 here, a plaintiff offers one isolated example of deception—i.e., Brazil’s—summary judgment must
24 be granted. *See Ries*, 2013 WL 1287416, at *6-7 (granting summary judgment where plaintiffs
25 failed to offer “extrinsic evidence that a significant portion of the consuming public would be
26 confused by” AriZona Iced Tea’s “all natural” label statements); *Martinez v. Welk Grp., Inc.*, 907
27 F. Supp. 2d 1123, 1141 (S.D. Cal. 2012) (granting summary judgment where, “aside from
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1 Plaintiff's bare allegations," there was "no evidence to suggest that a reasonable consumer would
 2 have expected or assumed that the entire [San Diego] Resort was, and has always been, free of any
 3 mold, mildew, or water intrusion"); *cf. Brockey*, 107 Cal. App. 4th at 99-100 (finding that "the trier
 4 of fact could conclude [defendant's] activities were likely to mislead consumers" where the
 5 evidence included expert testimony and showed that "a number of consumers were actually
 6 deceived").

7 For these reasons, the Court GRANTS Dole's Motion for Summary Judgment to the extent
 8 Brazil's claims are based on Dole's "All Natural Fruit" label misleading reasonable consumers.

9 C. Whether Dole's Labels Are Unlawful

10 Brazil also alleges that Dole's "All Natural Fruit" label statement is "unlawful" for
 11 purposes of the UCL. TAC ¶ 5. "By proscribing any unlawful business practice, the UCL borrows
 12 violations of other laws and treats them as unlawful practices that the unfair competition law makes
 13 independently actionable." *Alvarez v. Chevron Corp.*, 656 F.3d 925, 933 n.8 (9th Cir. 2011)
 14 (alteration and internal quotation marks omitted). "Virtually any law federal, state or local can
 15 serve as a predicate for an action under [the UCL]." *Smith v. State Farm Mut. Auto. Ins. Co.*, 93
 16 Cal. App. 4th 700, 718 (2001). "If a plaintiff cannot state a claim under the predicate law,
 17 however, [the UCL] claim also fails." *Stokes v. CitiMortgage, Inc.*, No. CV 14-00278 BRO SHX,
 18 2014 WL 4359193, at *11 (C.D. Cal. Sept. 3, 2014) (internal quotation marks omitted).

19 In his Opposition, Brazil explains that his UCL unlawful claim is based on a violation of
 20 the Sherman Law, which "expressly prohibits false and misleading food labeling and advertising."
 21 Opp. at 18 (citing Cal. Health & Safety Code §§ 10660, 110398, 110400). Brazil's UCL unlawful
 22 claim, he insists, is grounded in Dole's "misleading" use of the "All Natural Fruit" label statement.
 23 *Id.* at 17. As Brazil emphasizes repeatedly, "The fundamental question for the trier of fact is
 24 whether Dole's labels stating 'All Natural Fruit' are misleading and deceptive to consumers." *Id.*
 25 at 1; *see also id.* ("Stated plainly, Plaintiff has alleged that Dole's labels are misleading to
 26 consumers because they claim the products are one thing, 'All Natural Fruit,' but actually are
 27 another, i.e., products containing ascorbic acid and citric acid which are synthetic and artificial
 28

1 ingredients.”); *id.* at 7 n.31 (“Again, the issue is whether the labels are misleading.”); *id.* at 18 n.82
 2 (“[T]his is a ‘misleading’ case and not a ‘you violated FDA policy’ case.”). Brazil, thus, has
 3 confirmed that his UCL unlawful claim requires a finding that Dole’s “All Natural Fruit” label
 4 violated the Sherman Law by misleading reasonable consumers. Because the Court has found no
 5 genuine dispute as to whether Dole’s “All Natural Fruit” label statement was misleading to
 6 reasonable consumers, *see supra* Part III.B, the Court necessarily must find no genuine dispute as
 7 to whether the Sherman Law was violated on that very basis. With no predicate violation on which
 8 to rely, Brazil’s UCL unlawful claim must fail. *See Stokes*, 2014 WL 4359193, at *11.⁴

9 Accordingly, the Court GRANTS Dole’s Motion for Summary Judgment to the extent
 10 Brazil’s claims are based on Dole’s “All Natural Fruit” label being unlawful under the UCL.⁵


11 **IV. CONCLUSION**

12 For the foregoing reasons, the Court hereby GRANTS Dole’s Motion for Summary
 13 Judgment. The Court also DENIES as moot Dole’s Motion to Strike.

14 The Clerk shall close the case file.

15 **IT IS SO ORDERED.**

16
 17 Dated: December 8, 2014

18 
 19 LUCY H. KOH
 20 United States District Judge

21
 22
 23 ⁴ In a footnote to his Opposition, Brazil attempts to resurrect his abandoned claim that Dole
 24 has violated 21 C.F.R. § 101.22(j) by failing to disclose on Dole’s product labels that citric acid
 25 and ascorbic acid function as chemical preservatives. *See Opp.* at 18 n.85. While this theory was
 26 once part of the instant case, Brazil has long since narrowed his challenge to only the propriety of
 27 Dole’s “All Natural Fruit” label statement. *See TAC* ¶ 86 (seeking to certify two classes of persons
 28 who “purchased a Dole fruit product bearing the front panel label statement ‘All Natural Fruit’ but
 which contained citric acid and ascorbic acid”); Decert Order at 25.

⁵ The Court DENIES as moot Dole’s Motion to Strike the expert reports of Dr. Caswell and
 Dr. Scarbrough. Even if these reports were admissible under Rule 702 of the Federal Rules of
 Evidence, the Court would still grant summary judgment in Dole’s favor.