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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MONICA SUD, et al.,
Plaintiffs,

v.

COSTCO WHOLESALE CORPORATION,
et al.,
Defendants.

Case No. [15-cv-03783-JSW](#)

**ORDER GRANTING MOTIONS TO
DISMISS FIRST AMENDED
COMPLAINT**

Re: Dkt. Nos. 80, 81

Now before the Court for consideration is the motion to dismiss filed by Defendants Charoen Pokphand Foods (“Charoen”), PCL, C.P. Food Products, Inc. (“CP Foods”) (collectively the “CP Defendants”). Also before the Court is the motion to dismiss filed by Costco Wholesale Corporation (“Costco”) (collectively “Defendants”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and it **HEREBY GRANTS** the motions, and it **DISMISSES** this case with prejudice.

BACKGROUND

A. Procedural History.

On August 19, 2015, Plaintiff Monica Sud (“Sud”) filed this putative class action asserting claims under California’s: Unfair Competition Law (“UCL”), Business and Professions Code sections 17200, *et seq.*; False Advertising Law (“FAL”), Business and Professions Code sections 17500, *et seq.*; and Consumer Legal Remedies Act (“CLRA”), Civil Code sections 1750, *et seq.* Each of these claims were based on allegations that Costco sold and the CP Defendants supplied prawns farmed in Thailand, for which the supply chain was tainted by slavery, human trafficking, and other illegal labor practices.

United States District Court
Northern District of California

1 On January 15, 2016, the Court granted the Defendants' motion to dismiss on the basis that
 2 Sud lacked Article III standing, because she had not alleged facts to show that she purchased
 3 prawns that were a product of Thailand. (*See* Dkt. No. 76.) The Court gave Sud leave to amend to
 4 (1) expand the allegations to cover the purchase of prawns farmed in countries other than
 5 Thailand; (2) add her mother, Cecilia Jacobo ("Jacobo") as a class representative to such expanded
 6 claims; or (3) amend to include an additional class representative who could allege facts showing
 7 that he or she purchased prawns that are a product of Thailand. On February 19, 2016, Sud and
 8 Jacobo ("Plaintiffs") filed their First Amended Complaint ("FAC"), in which they assert a claim
 9 under the UCL against the Defendants. Plaintiffs also assert a claim under the FAL and under the
 10 CLRA against Costco.

11 **B. Factual Background.**

12 Plaintiffs allege that Costco sells farmed prawns that "come from Southeast Asia,
 13 including, but not limited to, the countries of Thailand, Indonesia, Vietnam, and Malaysia, and the
 14 international waters off these countries' coasts[.]" (FAC ¶ 5.) Plaintiffs allege the supply chain
 15 for these farmed prawns, specifically the fish used to create fishmeal for the framed prawns
 16 depends on slavery, human trafficking, and other labor abuses. Plaintiffs also allege that Charoen
 17 and CP Foods supply such prawns to Costco. (FAC ¶¶ 12-13, 16; *see also id.*, ¶¶ 80-134
 18 (detailing facts underlying allegations regarding slavery, human trafficking and labor abuses).)

19 Plaintiffs allege that Defendants are aware the feed for the prawns comes from trash fish
 20 caught on boats that use slave labor or other illegal labor practices, including human trafficking.
 21 (*See, e.g., id.* ¶¶ 13, 15, 79, 196.) According to Plaintiffs, Costco publicly states on its website
 22 that it has a "supplier Code of Conduct which prohibits human rights abuses in our supply
 23 chain[.]" (*Id.* ¶ 19.) Plaintiffs allege these statements are misleading, because Costco continues to
 24 sell prawns that it knows are derived from a supply chain tainted by slavery, human trafficking
 25 and other human rights violations. Plaintiffs also allege Costco fails to advise consumers of this
 26 fact and allege that it "market[s] and sell[s] the product in packages which only advise that the
 27 contents are imported as a product from a foreign country...." (*Id.* ¶¶ 13, 15-19.)
 28

1 Plaintiffs also allege the CP Defendants¹ are aware the fishmeal for prawns is tainted by
2 slave labor, have made public statements that they are “‘committed’ to ensuring that [their] supply
3 chain is free from these human rights violations,” continue to sell prawns tainted by these abuses,
4 and fail to disclose that fact to California consumers. (*See id.* ¶¶ 8, 69-79.)

5 Plaintiffs each purchased prawns from Costco, which were sourced from Indonesia and
6 Vietnam. (*Id.* ¶¶ 37-38, 41.) Plaintiffs expanded the allegations of their original complaint, and
7 they now seek to represent a class of “persons and entities residing in California that [*sic*], from at
8 least 2011, through the present purchased frozen (or previously frozen) Southeast Asian farmed
9 prawn products in the United States from Costco[.]” (*Id.* ¶ 187.) Plaintiffs allege they would not
10 have purchased these prawns if they were aware of the facts regarding the supply chain. Plaintiffs
11 also allege that they “would want to purchase farmed prawns from Defendants in the future but
12 only if Defendants address the human rights abuses in their supply chains and couple that effort
13 with full compliance with the California Transparency in Supply Chains Act² so that Plaintiffs can
14 make informed purchasing decisions.” (*Id.* ¶¶ 26, 42.)

15 The Court shall address additional facts as necessary in its analysis.

16 ANALYSIS

17 The facts described in the FAC are tragic and “raise significant ethical concerns.” *McCoy*
18 *v. Nestle USA, Inc.*, 173 F. Supp. 3d 954, 956 (N.D. Cal. 2016) (discussing use of child labor in
19 supply chain for cocoa products). The issue this Court faces, as others have before it, “is whether
20 California law requires corporations to inform customers” of these facts “on their product
21 packaging and point of sale advertising.” *Id.*; *see also Hodson v. Mars, Inc.*, 162 F. Supp. 3d 1016
22 (N.D. Cal. 2016) (addressing allegations of child labor in supply chain for cocoa products); *Dana*
23 *v. The Hershey Company, Inc.*, No. 15-cv-04453-JCS, 2016 WL 1213915 (N.D. Cal. Mar. 29,
24 2016) (same); *Wirth v. Mars Inc.*, No. SA CV 15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal.
25 Feb. 5, 2016) (addressing allegations of slave labor and forced labor in supply chain for seafood

26
27 ¹ Plaintiffs refer collectively throughout the FAC to the CP Defendants as CP Foods and do
not clearly distinguish between these two defendants.

28 ² California Civil Code § 1714.43.

1 used in petfood); *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954, (C.D. Cal. 2015) (same).³ The
2 Court concludes Plaintiffs' claims cannot proceed.

3 **A. The Court Grants the CP Defendants' Motion to Dismiss for Lack of Standing.**

4 The CP Defendants move to dismiss the UCL claim, in part, for lack of Article III
5 standing. Because this is a threshold issue, and because the Court finds it dispositive, it does not
6 reach the CP Defendants' alternative arguments.⁴ The Court evaluates a motion to dismiss for
7 lack of Article III standing under Rule 12(b)(1). *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067
8 (9th Cir. 2011); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A motion to dismiss under
9 Rule 12(b)(1) may be "facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039
10 (9th Cir. 2004). A facial attack on jurisdiction occurs when factual allegations of the complaint
11 are taken as true. *Federation of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207
12 (9th Cir. 1996); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the
13 pleading stage, general factual allegations of injury resulting from the defendant's conduct may
14 suffice, for on a motion dismiss, [courts] presume that general allegations embrace those specific
15 facts that are necessary to support the claim.") (internal citation and quotations omitted). The
16 plaintiff is then entitled to have those facts construed in the light most favorable to him or her.
17 *Federation of African Am. Contractors*, 96 F.3d at 1207.

18 In order for Plaintiffs to establish standing, they must show they: "(1) suffered injury in
19 fact, (2) that is fairly traceable to the challenged conduct of the defendant, (3) that is likely to be
20 redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S.Ct. 1540,
21 1547 (2016) (citing *Lujan*, 504 U.S. at 560-61). Plaintiffs must "clearly allege ... facts
22 demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Plaintiffs
23 allege that Costco sells prawns sourced by the CP Defendants. (FAC ¶ 72.) However, Plaintiffs

24 _____
25 ³ Each of these cases is currently on appeal to the United States Court of Appeals for the
Ninth Circuit.

26 ⁴ The CP Defendants also move to dismiss for lack of personal jurisdiction, which is their
27 primary argument, lack of statutory standing and failure to state a claim. The CP Defendants also
28 argue that the Court should equitably abstain from adjudicating this case, and Costco joined in that
argument.

1 do not allege that the prawns they purchased were sourced by either of the CP Defendants, and
 2 there are no facts in the FAC from which the Court could reasonably infer that is the case. A key
 3 component of Article III standing is “traceability, *i.e.*, a causal connection between the injury and
 4 the actions” about which a plaintiff complains. *Easter v. American West Financial*, 381 F.3d 948,
 5 961-62 (9th Cir. 2004) (finding that plaintiffs who could not trace injury to a particular defendant
 6 did not have standing to sue that defendant). Thus, in cases “where there are multiple defendants
 7 and multiple claims, there must exist at least one named plaintiff with Article III standing as to
 8 each defendant and each claim - but a single named plaintiff who can meet these criteria will
 9 suffice[.]” *Reniger v. Hyundai Motor America*, 122 F. Supp. 3d 888, 895 (N.D. Cal. 2015).

10 In response to the CP Defendants’ argument that, for this same reason, Plaintiffs lack
 11 statutory standing to pursue the UCL claim, Plaintiffs argue they “need not have purchased every
 12 product covered by the class,” and that they have standing to assert this claim “regardless of the
 13 branding.” (Dkt. No. 83, Opp. Br. at 22:6-7, 24:14-15.) Plaintiffs rely on a number of food
 14 labelling cases in which a defendant argued the plaintiff lacked standing to sue based on products
 15 the plaintiff had not purchased. In those cases, the issue was whether the plaintiff had standing to
 16 sue based on products they had not purchased but which had been manufactured or marketed by
 17 the same defendant or defendants. In each case, at least one of the plaintiffs did allege they
 18 purchased at least one product from the defendant or defendants. In sum, there was no dispute the
 19 plaintiffs alleged an injury caused by and traceable to the defendant or defendants. *See Brown v.*
 20 *The Hain Celestial Group, Inc.*, 913 F. Supp. 2d 881, 889-90 (N.D. Cal. 2012); *Cardenas v.*
 21 *NBTY, Inc.*, 870 F. Supp. 2d 984, 992 (E.D. Cal. 2012); *Astiana v. Dreyer’s Grand Ice Cream,*
 22 *Inc.*, No. 11-cv-2190-EMC, 2012 WL 2990766, at *1, *12-23 (N.D. Cal. July 20, 2012); *Koh v.*
 23 *S.C. Johnson & Son, Inc.*, No. 09-CV-927-RMW, 2010 WL 94265, at *2-3 (N.D. Cal. Jan. 6,
 24 2010).⁵

25 The *McCoy* and *Hudson* courts similarly concluded that the plaintiffs had standing under

26 _____
 27 ⁵ Plaintiffs also rely on *Colucci v. Zoneperfect Nutrition Company*, No. 12-CV-2907-SC,
 28 2012 WL 6737800 (N.D. Cal. Dec. 28, 2012). In that case, the court dismissed claims of one of
 the plaintiffs, because he failed to allege he purchased the defendant’s product. *Id.*, 2012 WL
 6737800, at *5.

1 Article III. Again, in those cases, there was no dispute the plaintiffs purchased a product
2 manufactured or marketed by any of the named defendants. *See McCoy*, 173 F. Supp. 3d at 962-
3 64; *Hodson*, 162 F. Supp. 3d at 1021-23. Because Plaintiffs do not allege they purchased any
4 prawns that were produced or marketed by either of the CP Defendants, they fail to allege facts to
5 show that they have Article III standing to pursue the UCL claim against the CP Defendants.⁶

6 Accordingly, the Court GRANTS the CP Defendants' motion to dismiss on this basis.⁷

7 **B. The Court Grants Costco's Motion.**

8 Costco argues: (1) it did not owe Plaintiffs a duty to disclose the information at issue; (2)
9 the FAL does not apply to omissions; (3) the claims are barred by the safe harbor doctrine; and (4)
10 Plaintiffs lack standing to seek injunctive relief. Because the Court finds the first two arguments
11 dispositive, and because those arguments impact Plaintiffs' ability to state a violation of any of the
12 statutes at issue, the Court does not reach Costco's alternative arguments.

13 On a motion to dismiss under Rule 12(b)(6), a court's "inquiry is limited to the allegations
14 in the complaint, which are accepted as true and construed in the light most favorable to the
15 plaintiff." *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the
16 liberal pleadings standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to
17 provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and
18 a formulaic recitation of the elements of a claim for relief will not do." *Bell Atlantic Corp. v.*
19 *Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

20 Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must
21 allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim
22 has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the
23

24 ⁶ To the extent Plaintiffs rely on allegations of agency, conspiracy, aiding and abetting, and
25 concerted actions to show they were injured by the CP Defendants, those allegations are mere
26 legal conclusions couched as fact. (*See* FAC ¶¶ 48-50.) *Cf. Easter*, 381 F.3d at 962 (concluding
plaintiffs failed to establish a juridical link between defendants).

27 ⁷ For that same reason, and assuming the Court could assert personal jurisdiction over either
28 Charoen or CP Foods, Plaintiffs lack statutory standing under the UCL. Because they have not
alleged they purchased prawns produced by either of the CP Defendants, they have not alleged
facts showing they lost money or property as a result of the CP Defendants' conduct.

1 reasonable inference that the Defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
2 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

3 **1. Reliance and Statutory Standing Under the CLRA, UCL and FAL.**

4 The Court begins with Costco’s argument regarding reliance, because Plaintiffs must
5 allege reliance to show they have statutory standing to pursue each of their claims. *See In re*
6 *Tobacco II Cases*, 46 Cal. 4th 289, 326 (2009) (“*Tobacco II*”); *Hodson*, 162 F. Supp. 3d at 1022.
7 Based on the facts of this case, this issue will impact the scope of Plaintiffs’ claims.

8 In order to show actual reliance, whether based on an affirmative misrepresentation or a
9 material omission, Plaintiffs must demonstrate that the misrepresentation or omission was an
10 “immediate cause of the injury-causing conduct.” *Tobacco II*, 46 Cal. 4th at 328; *accord Daniel v.*
11 *Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015). Plaintiffs need not prove the
12 misrepresentation or omission was the “only,” “sole,” “predominant,” or “decisive” cause of the
13 injury-causing conduct. Rather, they may show that the misrepresentation or omission was a
14 substantial factor in their decision making process. *Daniel*, 806 F.3d at 1225; *Tobacco II*, 46 Cal.
15 4th at 328. If an omission is material, the fact that one would have behaved differently “can be
16 presumed, or at least inferred.” *Daniel*, 806 F.3d at 1225. However, a plaintiff cannot use that
17 presumption, “if the evidence establishes an actual lack of reliance.” *Lanovaz v. Twinings North*
18 *America, Inc.*, No. 12-cv-02646-RMW, 2014 WL 46822, at *3 (N.D. Cal. Jan. 6, 2014) (citing,
19 *inter alia*, *In re Tobacco II*, 46 Cal. 4th at 327); *cf. In re iPhone Application Litig.*, 6 F. Supp. 3d
20 1004, 1020 (N.D. Cal. 2013) (presumption cannot be applied to misrepresentations plaintiffs never
21 saw).

22 In *Daniel*, the court identified two “sub-elements” a plaintiff must prove to show an
23 omission was a substantial factor in a purchasing decision: awareness; and a change in behavior.
24 806 F.3d at 1225-26. The latter sub-element may be presumed if the omitted information is
25 material, but a plaintiff must still be able to show she would have been aware of the information if
26 it had been disclosed. *Id.* at 1225-26. In *Daniel*, the court found that the plaintiffs created a
27 genuine issue of material fact about whether they would have been aware of the omitted
28 information. There, the plaintiffs presented evidence that the defendant disclosed the allegedly

1 omitted information to its dealerships, and plaintiffs testified that they engaged with and obtained
2 information from sales staff at the dealerships before they purchased their cars. *Id.* “Since
3 Plaintiffs have sufficient evidence to establish a plausible method of disclosure and to establish
4 that they would have been aware of information disclosed using that method, there is a genuine
5 issue of material fact as to whether they in fact relied on” defendant’s omissions. *Id.* at 1227
6 (emphasis added).

7 Plaintiffs allege Costco fails to include information about the labor abuses in the supply
8 chain for farmed prawns on the packaging and, instead, states only that the prawns are a product of
9 a given country. (FAC ¶ 15.) There are sufficient allegations in the FAC from which the Court
10 could infer Plaintiffs relied on the statements on the packaging before they purchased the prawns
11 at issue and, thus, that they have statutory standing to pursue their claims based on that omission.

12 However, Plaintiffs’ allegations regarding Costco’s conduct are based, in part, on the fact
13 that Costco publishes a “Disclosure Regarding Human Trafficking and Anti-Slavery” (the
14 “Disclosure”) on its website. They also are based on the fact that Costco advertises a supplier
15 Code of Conduct, which purports to prohibit the type of labor abuses described in the FAC. (FAC
16 ¶¶ 18-20, 59-61.) According to Plaintiffs, through the Disclosure, Costco “affirmatively
17 represents to consumers that it makes efforts to monitor its suppliers to eradicate human rights
18 abuses in the supply chain.” (*Id.* ¶ 19.) Plaintiffs also allege that Costco’s “practices are
19 fraudulent in that ... Costco affirmatively represents that it enforces standards to prohibit the use of
20 slave labor.” (*Id.* ¶ 196.)

21 While the Disclosure might have been a “plausible method” of disclosing the fact that
22 Costco sells prawns “tainted” by labor abuses in the supply chain, neither Plaintiff alleges that she
23 read or relied on the Disclosure before she purchased prawns from Costco. Therefore, to the
24 extent their claims are based allegations that the Disclosure is misleading, either because it
25 contains affirmative misrepresentations or because it omits information, Plaintiffs fail to allege
26 facts to show reliance. Similarly, Plaintiffs have not alleged they read or relied on Costco’s Code
27 of Conduct and, thus, fail to allege facts to show they relied on any affirmative statements in that
28 Code. They also fail to allege facts to show they were aware of the Code, such that they could

1 premise an omissions claim on it. *See, e.g., Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212,
2 1218 (S.D. Cal. 2012) (dismissing claims relating to website and other documents where plaintiff
3 did not allege “that she viewed any of those sources, and therefore cannot link her injuries to those
4 misrepresentations”).

5 Further, although in paragraph 207 Plaintiffs refer to generally “false statements in
6 [Costco’s] television, radio, and print advertising, website, brochures, and ... other written and
7 oral materials,” they do not allege with particularity any advertisements on which they relied.
8 Plaintiffs also do not attempt to allege that Costco engaged in a long term advertising campaign
9 about the practices at issue in the FAC, which might otherwise enable them to avoid pleading
10 reliance on a particular advertisement with specificity. *See Tobacco II*, 46 Cal. 4th at 328 (holding
11 a plaintiff “is not required to necessarily plead and prove individualized reliance on specific
12 misrepresentations or false statements where ... those misrepresentations and false statements
13 were part of an extensive and long-term advertising campaign”).

14 In sum, notwithstanding Plaintiffs’ arguments that Costco has made affirmative
15 misrepresentations or has made partial representations, their claims must be limited to alleged
16 omissions from product packaging.

17 **1. The Duty to Disclose.**

18 Plaintiffs allege that, “[g]iven its representations about excluding slave labor from its chain
19 of supply, ... Costco has a duty to accurately disclose to consumers that slavery, forced labor and
20 human trafficking have been tainting and continue to taint Costco’s supply chain for farmed
21 prawns.” (FAC ¶ 25.) Costco moves to dismiss Plaintiffs claims under the UCL and the CLRA,
22 in part, on the basis that it did not have a duty to disclose this information.

23 The UCL prohibits any “unlawful, unfair, or fraudulent business act or practice.” Cal. Bus.
24 & Prof. Code § 17200. “Since section 17200 is [written] in the disjunctive, it establishes three
25 separate types of unfair competition. The statute prohibits practices that are either ‘unfair’ or
26 ‘unlawful,’ or ‘fraudulent.’” *Pastoria v. Nationwide Ins.*, 112 Cal. App. 4th 1490, 1496 (2003).
27 To state a claim under the UCL, a “plaintiff must establish that the practice is either unlawful (i.e.,
28 is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or fraudulent (i.e., is likely

1 to deceive members of the public).” *Albillo v. Intermodal Container Servs., Inc.*, 114 Cal. App.
2 4th 190, 206 (2003). The CLRA prohibits “unfair methods of competition and unfair or deceptive
3 acts or practices undertaken by any person in a transaction intended to result or which results in
4 the sale or lease of goods or services to any consumer.” Cal. Civ. Code § 1770(a).

5 Plaintiffs allege Costco violated all three prongs of the UCL. The Court will address
6 Plaintiffs’ claims under the unlawful and unfair prongs in more detail in Section B., infra. In this
7 portion of the Order, the Court focuses on the claims under the fraudulent prong. Under both the
8 UCL and the CLRA, in order to determine whether a representation is misleading, a court
9 evaluates whether members of the public are likely to be deceived. *Tobacco II*, 46 Cal. 4th at 312
10 (allegations that the fraudulent deception was “actually false, known to be false by the perpetrator
11 and reasonably relied upon by a victim who incurs damages” are not necessary) *Colgan v.*
12 *Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 680 (2006).⁸

13 A plaintiff may base a UCL claim or a CLRA claim “in terms constituting fraudulent
14 omissions, [but] to be actionable the omission must be contrary to a representation actually made
15 by the defendant, or an omission of a fact that the defendant was obliged to disclose.” *Daugherty*
16 *v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006); *see also id.* at 838 (finding that
17 plaintiff failed to state a UCL claim, because “the failure to disclose a fact one has no affirmative
18 duty to disclose” is not likely to deceive a reasonable consumer). In general, “California courts
19 have ... rejected a broad obligation to disclose[.]” *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136,
20 1141 (9th Cir. 2012); *cf. Gray v. Toyota Motor Sales, U.S.A., Inc.*, 554 Fed. Appx. 608, 609 (9th
21 Cir. 2014).⁹

22 In *Wilson*, the plaintiffs alleged the defendant was aware of, but concealed, a design defect
23

24 ⁸ The standard is the same under the FAL. *See Colgan*, 135 Cal. App. 4th at 680.

25 ⁹ Although *Gray* is unpublished, the Court finds it instructive. The Ninth Circuit concluded
26 the plaintiffs could not state a claim under the UCL or the CLRA, on a pure omissions theory,
27 where they alleged the defendant failed to disclose internal fuel economy data, which plaintiffs
28 alleged was contrary to EPA estimates. *Gray*, 554 Fed. Appx. at 609. The *Gray* court reasoned
“California law instructs that a manufacturer’s duty to its consumers is limited to its warranty,
unless a safety issue is present or there has been some affirmative misrepresentation.” *Id.*

1 that rendered certain of its laptop computers unusable and that posed a safety risk. *Wilson*, 668
 2 F.3d at 1138. The plaintiffs argued a “concealed fact need only be ‘material,’” to state a claim
 3 under the CLRA and relied on *Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088 (N.D. 2007).
 4 The *Wilson* court rejected that argument. It distinguished cases on which the plaintiffs had relied
 5 on the basis that, in those cases, the defendant either made affirmative misrepresentations or the
 6 cases involved services rather than products. *Id.* at 1143. It also stated that even if it applied “the
 7 factors from *Falk* regarding materiality[,] ... for the omission to be material, the failure must still
 8 pose safety concerns.” *Id.*, 668 F.3d at 1142 (internal quotations and citation omitted).¹⁰

9 In *Hodson*, the plaintiff alleged the defendant, which marketed and distributed chocolate
 10 products, failed to disclose that some of the cocoa beans used to make its products “come from
 11 Cote d’Ivoire, where children,” some of whom had been sold or kidnapped, “and forced laborers”
 12 were forced to work under dangerous conditions. *Hodson*, 163 F. Supp. 3d at 1020. The court,
 13 relying on *Wilson* and “overwhelming authority to the contrary,” found the defendant did not have
 14 a duty to disclose these “horrific labor practices,” because the plaintiffs neither alleged those
 15 practices posed a safety risk to consumer nor alleged they were a product defect. *Id.* at 1025-26.
 16 Therefore, the court held the “duty to disclose does not extend to situations, as here, where
 17 information may persuade a customer to make different purchasing decisions.” *Id.* at 1026; *see*
 18 *also Wirth*, 2016 WL 4711234, at *5-6 (finding, in pure omissions case, defendant had no duty to
 19 disclose alleged labor violations in fishing industry on packaging for pet food that contained
 20 seafood caught in Thailand and that was manufactured in Thailand).

21 In *McCoy*, the plaintiff’s claims were essentially identical to the claims alleged in *Hodson*,
 22 although they named a different chocolate manufacturer as a defendant. *McCoy*, 173 F. Supp. 3d
 23 at 956 (plaintiff alleged defendant failed “to disclose on [its] packaging of ... chocolate products
 24 that some of the cocoa used therein originated at farms in [the Ivory Coast] that use slave labor

25
 26 ¹⁰ In *Falk*, the court held a failure to disclose can constitute actionable fraud under the CLRA
 27 in four circumstances: “(1) when the defendant is in a fiduciary relationship with the plaintiff; (2)
 28 when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when
 the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant
 makes partial representations but also suppresses some material fact.” *Id.*, 496 F. Supp. 2d at 1095
 (quoting *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336-37 (1997)).

1 and the worst forms of child labor”).¹¹ Following *Wilson* and *Hodson*, the court determined that
 2 the “the weight of authority limits a duty to disclose under the CLRA to issues of product safety,
 3 unless disclosure is necessary to counter an affirmative misrepresentation.” *Id.* at 966. Because
 4 the plaintiff did not allege an omission of “known dangers to the safety of consumers, there is no
 5 duty to disclose that is applicable to this case.” *Id.*

6 Plaintiffs argue that *Wilson*’s holding is not as broad as Costco argues, and they urge the
 7 Court not to follow the reasoning set forth in *McCoy*, *Hodson* and *Wirth*. In support of this
 8 argument, Plaintiffs rely on the *Stanwood* case, *supra*. The Court does not find Plaintiffs’ reliance
 9 on *Stanwood* persuasive. First, it “is not free to deviate from the Ninth Circuit’s construction of
 10 California law in *Wilson* absent subsequent interpretation from California’s courts that the
 11 interpretation was incorrect.” *Rasmussen v. Apple Inc.*, 27 F. Supp. 3d 1027, 1036 (N.D. Cal.
 12 2014). Second, it appears that the *Stanwood* case represents a minority view on this issue. *See*,
 13 *e.g.*, *Hodson*, 162 F. Supp. 3d at 1025 (“*Stanwood* stands alone in” the conclusion that *Wilson* is
 14 limited to product liability cases where warranties protected consumers.). Third, the Court finds
 15 the reasoning set forth in *McCoy* and *Hodson* on this issue persuasive. For the reasons set forth in
 16 those cases, it concludes that the Ninth Circuit’s holding in *Wilson* is not as narrow as the
 17 *Stanwood* court construed it to be. *See Hodson*, 162 F. Supp. 3d at 1025-26; *McCoy*, 173 F. Supp.
 18 3d at 995-66.

19 Finally, the Court concurs with the *McCoy* court that “some bright-line limitation on a
 20 manufacturer’s duty to disclose is sound policy, given the difficulty of anticipating exactly what
 21 information some customers might find material to their purchasing decisions and wish to see on
 22 product labels.” *McCoy*, 173 F. Supp. 3d at 966; *see also Hall v. SeaWorld Entertainment, Inc.*,
 23 No. 15-CV-660-CAB-RBB, 2015 WL 9659911, at *7 (S.D. Cal. Dec. 23, 2015) (“Under the
 24 standard argued by Plaintiffs, any consumer would have standing to sue any company that fails to
 25 disclose product ingredients or components, or business practices that could cause that consumer
 26

27 _____
 28 ¹¹ The *McCoy* court also decided the *Dana* case, cited above. Because the Court’s reasoning
 in *Dana* is substantially similar to, if not identical to the reasoning in *McCoy*, which is published,
 this Court has relied on *McCoy*.

1 to regret patronizing that business.”).

2 Plaintiffs do not allege that the labor practices described in the FAC, while horrific,
3 constitute a safety risk to consumers or constitute a product defect. On the facts of this case,
4 Plaintiffs fail to show Costco had a duty to disclose the allegedly omitted information. Therefore,
5 they fail to state a claim under the CLRA and fail to state a claim under the fraudulent prong of the
6 UCL. *McCoy*, 173 F. Supp. 3d at 966-67; *Hodson*, 162 F. Supp. 3d at 1026; *see also Wirth*, 2016
7 WL 471234, at *3-*5. Even if *Wilson’s* holding should be limited to cases involving products
8 covered by a warranty, the Court still is not persuaded Plaintiffs have alleged facts to establish a
9 duty to disclose.

10 As set forth in *Falk*, there are four circumstances that may give rise to a duty to disclose,
11 only three of which are at issue in this case. 496 S. Supp. 2d at 1095. First, Plaintiffs argue
12 Costco had exclusive knowledge of the facts, which were not known to Plaintiffs. In *McCoy*, the
13 plaintiff also argued the defendant had a duty to disclose the facts about labor practices in its
14 supply chain for cocoa based on its purportedly superior knowledge of the allegedly omitted facts.
15 173 F. Supp. 3d at 967. The court noted the plaintiff alleged that the defendant “acknowledge[d]
16 on a public website its suppliers use of slave labor,” and also included other public disclosures
17 about the use of such labor in the supply chain for cocoa. *Id.* Based on those allegations, the court
18 found she had not alleged the defendant had exclusive or superior knowledge of the facts. *Id.*
19 Plaintiffs, like the plaintiff in *McCoy*, include numerous paragraphs in the FAC that describe
20 public disclosures of the labor conditions in the fishing industry in Thailand and Southeast Asia
21 and the manner in which those conditions affect the supply chain for farmed prawns. (*See, e.g.*
22 FAC ¶¶ 64-65, 77-78, 86-89.) The Court concludes that Plaintiffs have not alleged facts to show
23 that Costco would have superior, let alone exclusive, knowledge of those facts.

24 Plaintiffs also assert that Costco actively concealed the facts about the supply chain for its
25 farmed prawns, but their argument on this point is focused on their assertion that Costco made
26 partial representations. (*See Opp. Br.* at 6:25-10:21.) In addition, the FAC does not contain any
27 facts that would support an inference that Costco actively concealed information about abuses in
28 the supply chain for farmed prawns.

1 Third, Plaintiffs argue Costco made partial representations but suppressed other material
 2 facts. In the FAC, the Plaintiffs do allege Costco made partial representations, but those
 3 allegations pertain to the Disclosure and the Code of Conduct. Plaintiffs do not allege that they
 4 relied on those statements. In addition, Plaintiffs do not allege Costco made partial
 5 representations on the product packaging that are misleading absent a disclosure. The Court
 6 concludes they cannot rely on a partial representation theory to allege a duty to disclose.

7 Accordingly, the Court GRANTS Costco's motion to dismiss on the basis that Plaintiffs
 8 fail to allege it had duty to disclose the information about labor abuses in the supply chain for
 9 farmed prawns from Southeast Asia on its product packaging.

10 **2. The Court Dismisses the Remainder of the UCL Claim.**

11 Plaintiffs also pursue claims against Costco under the unlawful and unfair prongs of the
 12 UCL. Costco argues that Plaintiffs fail to allege facts to support a claim under either prong.

13 **a. Unlawful prong.**

14 The UCL's unlawful prong proscribes "anything that can be properly called a business
 15 practice and that at the same time is forbidden by law." *Smith v. State Farm Mut. Auto. Ins. Co.*,
 16 93 Cal. App. 4th 700, 717-18 (2001) (internal quotations omitted). "[A] violation of another law
 17 is a predicate for stating a cause of action" under the unlawful prong. *Berryman v. Merit Property*
 18 *Mgmt., Inc.*, 152 Cal. App 4th 1544, 1554 (2007). Plaintiffs allege that Costco's conduct violates
 19 the FAL and the CLRA. (FAC ¶ 195.) However, for the reasons set forth in Section B.1 and
 20 Section B.3, Plaintiffs fail to state a claim under either statute. Therefore, they fail to state a UCL
 21 claim based on alleged violations of those statutes. *See, e.g., McCoy*, 173 F. Supp. 3d at 967;
 22 *Berryman*, 152 Cal. App. 4th at 1554.

23 Plaintiffs also allege that Costco's conduct "in sourcing and selling farmed prawns actively
 24 contributes to the use of slave labor in violation of bans on such human trafficking enacted by the
 25 U.S., California and by international conventions, including but not limited to the Tariff Act of
 26 1930[,] ... [t]he Anti-Trafficking in Persons Act, the UN Declaration on Human Rights, and
 27 California Penal Code § 236, § 237, *et seq.*," and the Supply Chains Act. (FAC ¶ 195.) The
 28 Supply Chains Act does not clearly speak to product labels, and, to the extent Plaintiffs are

1 attempting to suggest the Disclosure does not comply with the requirements of the Supply Chains
2 Act, the Court also has concluded that Plaintiffs lack statutory standing to pursue claims based on
3 the Disclosure. With respect to the remaining statutes and the Declaration of Human Rights cited
4 in paragraph 195, Plaintiffs do not attempt to show how the allegations in the FAC support alleged
5 violations of these laws in their opposition brief. Rather, they simply repeat the allegations set
6 forth in the FAC. (*Compare* FAC ¶ 195 with Opp. Br. at 12:4-12.)

7 The Court concludes Plaintiffs fail to plead a violation of the UCL’s unlawful prong.

8 **b. Unfair Prong.**

9 The UCL also proscribes business practices that are “unfair,” but it does not define that
10 term. In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, the California Supreme
11 Court considered a number of definitions relied upon by the courts of appeal and found they were
12 “too amorphous and provide too little guidance to courts and businesses.” 20 Cal. 4th 163, 185
13 (1999). The *Cel-Tech* court determined that, in claims between direct competitors, “the word
14 ‘unfair’ ... means conduct that threatens an incipient violation of an antitrust law, or violates the
15 policy or spirit of one of those laws because its effects are comparable to or the same as a violation
16 of the law, or otherwise significantly threatens or harms competition.” *Id.* at 187. The *Cel-Tech*
17 court “limited” the test to claims between competitors and to allegations of anticompetitive
18 practices. *Id.* at 187 n.12. Thus, “the proper definition of ‘unfair’ conduct against consumers ‘is
19 currently in flux’ among California courts.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152,
20 1169 (9th Cir. 2012) (quoting *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 735 (9th Cir.
21 2007)); *see also* *McVicar v. Goodman Global, Inc.*, 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014)
22 (citing *Boschma v. Home Loan Center, Inc.*, 198 Cal. App. 4th 230, 252 (2011)).

23 To the extent California courts examine whether the alleged practice “is immoral,
24 unethical, oppressive, unscrupulous or substantially injurious to consumers” and weigh “the utility
25 of the defendant’s conduct against the gravity of the harm to the alleged victim,” the Court
26 concludes Plaintiffs do not allege facts to satisfy this test. *See Boschma*, 198 Cal. App. 4th at 252
27 (internal quotations and citations omitted). As in the *McCoy* and *Hodson* cases, the harm
28 Plaintiffs have alleged is that they would not have purchased the farmed prawns had they been

1 aware of the potential of slave and forced labor in the supply chain. In *Hodson*, the court held
 2 that, given the harm at issue, the defendant's conduct was not "unfair" within the meaning of the
 3 UCL.

4 Such information [about the prospect for child labor in the
 5 defendant's supply chain] is, in fact, readily available to consumers
 6 on Mars's website. Given that *Hodson*, like any other consumer,
 7 has access to information about the source of Mars's cocoa beans,
 8 the absence of such information on the packaging is not
 9 "substantially injurious to consumers" or necessarily immoral.
 10 Granting that the labor practices at issue are immoral, there remains
 11 an important distinction between them and the actual harm for
 12 which *Hodson* seeks to recover, namely his purchase of Mars's
 13 chocolate products absent any disclosure. Mars's failure to disclose
 14 information it had no duty to disclose in the first place is not
 15 substantially injuries, immoral, or unethical[.]

16 162 F. Supp. 3d at 1027; accord *McCoy*, 173 F. Supp. 3d at 969. The Court agrees with this
 17 reasoning.

18 Similarly, to the extent California courts require a UCL claim to be "tethered to specific
 19 constitutional, statutory, or regulatory provisions," the Court concludes Plaintiffs' allegations are
 20 not sufficient. See *Boschma*, 198 Cal. App. 4th at 252 (citations omitted). Again, as in the *McCoy*
 21 and *Hodson* cases, "the crux of" Plaintiffs' claim "is not that [Costco] used slave labor ..., but
 22 rather that [Costco] does not disclose the existence of those labor abuses in its supply chain on the
 23 packaging of its products." *McCoy*, 173 F. Supp. 3d at 968; see also *Hodson*, 162 F. Supp. 3d at
 24 1027. As in those cases, the Plaintiffs have not identified a particular policy or other statutory or
 25 regulatory provision that demonstrate "it is 'unfair' within the meaning of the UCL for [a]
 26 manufacturer to fail to disclose" such violations on its product packaging. *McCoy*, 173 F. Supp.
 27 3d at 968. The Court concludes Plaintiffs have failed to allege a violation of the unfair prong of
 28 the UCL.

Accordingly, the Court GRANTS Costco's motion to dismiss for these reasons as well.

3. The Court Dismisses the FAL Claim.

Costco moves to dismiss the FAL claim on the basis that the FAL does not apply to
 omissions. The FAL states, in part, that "[i]t is unlawful for any ... corporation ... with intent
 directly or indirectly to dispose of real or personal property... to make or disseminate ... any

1 statement ... which is known, or by the exercise of reasonable care should be known, to be untrue
2 or misleading[.]” Cal. Bus. & Prof. Code § 17500. “[M]any courts have held a plaintiff who
3 asserts that a business omitted a material fact in its advertisements, labels, or literature has not
4 stated a claim under the FAL.” *Hodson*, 162 F. Supp. 3d 1023. However, some courts have
5 concluded otherwise. *Id.* (citing cases).

6 The *Hodson* court found these two lines of cases were “not necessarily discordant.” *Id.* It
7 concluded that if “the crux of a plaintiff’s FAL claim is that the defendant did not make any
8 statement at all about a subject, then a claim under the FAL may not advance.” *Id.* However, if a
9 plaintiff alleges “the defendant actually made a statement, but omitted information that undercuts
10 the veracity of the statement,” a claim under the FAL could proceed. *Id.* Because the plaintiff
11 *Hodson* alleged the defendant failed “to issue any statement at all” about the alleged labor abuses
12 in its supply chain. Therefore, the court concluded he failed to state a claim for relief and
13 dismissed the FAL claim without leave to amend. *Id.*

14 In *McCoy*, the court also found that the plaintiff failed to state a claim under the FAL.
15 *McCoy*, 173 F. Supp. 3d at 969-70. The court reasoned that the “plain language of the statute --
16 which prohibits *making, disseminating, or causing* the dissemination of false or misleading
17 statements -- does not encompass omissions.” *Id.* at 969 (emphasis in original). It then
18 distinguished a number of cases on which the plaintiff relied and concluded those cases either
19 failed to address the issue or involved at least some form of affirmative misrepresentation. *Id.* at
20 969-70. It concluded, following *Hodson*, that because the plaintiff’s claims were based solely on
21 omissions, she failed to allege the defendant “‘made or disseminated or caused to be made or
22 disseminated’ any false or misleading statement,” and failed to state a claim under the FAL. *Id.* at
23 970 (brackets in *McCoy* omitted).

24 Plaintiffs here have not expressly limited their claims to pure omissions, and although the
25 FAC includes allegations about partial or affirmative representations. However, as the Court has
26 concluded, Plaintiffs do not allege they relied on those statements, and it is clear from the FAC
27 that the crux of their claims is that Costco omitted information about labor abuses in its supply
28 chain from the product packaging. That is, the “focus” of their “claim is on the message that does

1 not appear on” Costco’s prawn product packaging. *Id.* at 1024 n.3 (emphasis in original). The
2 Court finds the reasoning in *McCoy* and *Hodson* persuasive, and it concludes that when an FAL
3 claim is based on pure omissions, it cannot proceed. Because Plaintiffs’ claims are limited to
4 alleged omissions, they fail to state a claim under the FAL.

5 Accordingly, the Court GRANTS Costco’s motion to dismiss on this basis as well.

6 **C. The Court Denies Plaintiffs Leave to Amend.**

7 In general, if the allegations are insufficient to state a claim, a court should grant leave to
8 amend, unless amendment would be futile. *See, e.g. Reddy v. Litton Indus., Inc.*, 912 F.2d 291,
9 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242,
10 246-47 (9th Cir. 1990). However, where a plaintiff has previously amended a complaint, “a
11 district court’s discretion to deny leave to amend is particularly broad[.]” *Salameh v. Tarsadia*
12 *Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013). In its previous Order, the dismissed solely on the
13 basis of standing. However, the Defendants each raised many of the same arguments in their
14 original motions to dismiss that they have raised in their renewed motions to dismiss. In light of
15 the Court’s ruling on the issue of duty, and given Plaintiffs’ consistent representations in the
16 original Complaint and the FAC that their reliance was based on product packaging, rather than on
17 any of Costco’s statements in other contexts, the Court concludes it would be futile to grant
18 Plaintiffs further leave to amend.

19 **CONCLUSION**

20 For the foregoing reasons, the Court GRANTS the motions to dismiss, and it dismisses the
21 claims with prejudice. The Court shall enter a separate judgment, and the Clerk shall close the
22 file.

23 **IT IS SO ORDERED.**

24 Dated: January 24, 2017

25 
26 _____
27 JEFFREY S. WHITE
28 United States District Judge