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

)	Case No. 13-3988 SC
)	
ROBERT FIGY and MARY)	ORDER GRANTING IN PART AND
SWEARINGEN, individually and on)	DENYING IN PART DEFENDANT'S
behalf of all others similarly)	MOTION TO DISMISS PLAINTIFFS'
situated,)	<u>FIRST AMENDED COMPLAINT</u>
)	
Plaintiffs,)	
)	
v.)	
)	
FRITO-LAY NORTH AMERICA, INC.,)	
)	
Defendant.)	
)	
)	

I. INTRODUCTION

Now before the Court is Defendant Frito-Lay North America, Inc.'s ("Defendant") motion to dismiss Plaintiffs Robert Figy and Mary Swearingen's ("Plaintiffs") first amended complaint. ECF Nos. 17 ("FAC"), 25 ("MTD"). The motion is fully briefed, ECF Nos. 31 ("Opp'n"),¹ 34 ("Reply"), and suitable for decision without oral argument. Civ. L.R. 7-1(b). For the reasons explained below, the

¹ Plaintiffs' counsel are instructed to review Civil Local Rule 3-4(c)(2), as their font size, typeface, and line spacing do not comply with the Rule. See Wilson v. Frito-Lay N. Am., Inc., No. 12-1586, 2013 WL 1320468, at *1 n.1 (N.D. Cal. Apr. 1, 2013) (raising similar issues to several of the same counsel). The Court may strike portions of future filings that do not adhere to the local rules.

1 Court GRANTS in part and DENIES in part Defendant's motion.

2
3 **II. BACKGROUND**

4 Defendant, a Texas corporation, makes snack food products.
5 Plaintiffs are two California consumers who purchased three of
6 Defendant's pretzel products between August 27, 2009 and the
7 present (the "Class Period"). FAC Intro. ¶ 4.² Specifically,
8 Plaintiffs allege that they purchased "Frito-Lay's Rold Gold Sticks
9 Pretzels," "Frito-Lay's Rold Gold Thins Pretzels," "Frito-Lay's
10 Rold Gold Low Fat Tiny Twists Pretzels," (collectively, the
11 "Purchased Products"), and were misled by portions of their labels.
12 Id. ¶¶ 5-6. Plaintiffs, on behalf of themselves and a putative
13 class, filed this action against Defendant, alleging that the
14 Purchased Products contain deceptive and misleading labeling
15 information, in violation of state and federal law. Id. ¶¶ 1-6;
16 FAC ¶¶ 1-15. Plaintiffs also bring claims on behalf of a putative
17 nationwide class of people who purchased two other products from
18 Defendant that Plaintiffs did not buy.³

19 Plaintiffs allege that Defendant's marketing of the Products
20 is misleading because the Products are labelled "Made with All
21 Natural Ingredients" despite containing "artificial, synthetic and

22 _____
23 ² The Court notes that the FAC contains a numbering error. The
24 "Introduction" section begins with paragraph 1, but the following
25 section, "Parties, Jurisdiction and Venue," also begins with
paragraph 1. To preserve the numbering after the introductory
section, the Court refers to introductory paragraphs herein as "FAC
Intro." followed by the paragraph number as it appears in the FAC.

26 ³ These products are "Frito-Lay's Rold Gold Fat Free Tiny Twists
27 Pretzels," and "Frito-Lay's Rold Gold Rods Pretzels" (collectively
28 the "Non-Purchased Products"). When the Court discusses these
alongside the Purchased Products, the Court refers to them
collectively as the "Products."

1 unnatural ingredients 'niacin, reduced iron, thiamin mononitrate,
2 riboflavin, folic acid and ammonium bicarbonate.'" FAC ¶¶ 6, 27,
3 37, 52, 53, 57. Further, Plaintiffs contend that the labelling of
4 some of the products as "LOW FAT" or "FAT FREE" is false and
5 misleading because, despite containing greater than 480 milligrams
6 of sodium per reference amount, the Products do not bear an
7 additional label directing consumers to see the nutritional
8 information for sodium content as required by 21 C.F.R. Section
9 101.13(h)(1). FAC ¶¶ 22-32. Together, Plaintiffs argue that these
10 representations convey the impression that the Defendant's
11 "products [are] healthier than a product that does not contain
12 [the] unlawful nutrient content claim[s]." FAC ¶ 42. Further,
13 Plaintiffs state that the absence of further labelling on the "LOW
14 FAT" and "FAT FREE" products renders them "misbranded" as a matter
15 of federal and California law, and therefore unsalable and "legally
16 worthless." Id. ¶ 45.

17 Plaintiffs state that they care about buying healthy foods and
18 read the label statements on the Purchased Products prior to buying
19 them. FAC ¶ 80, 82. Because of their interest in purchasing
20 healthy foods, Plaintiffs contend that they relied on the label
21 statements and drew from them "the net impression that the
22 Purchased Products they bought made only positive contributions to
23 a diet, and did not contain any nutrients at levels that raised the
24 risk of diet-related disease or health-related conditions." FAC ¶
25 83. Plaintiffs claim they would not have bought the Products had
26 they been properly labelled. Id.

27 In the FAC, Plaintiffs assert six causes of action against
28 Defendant: (1-3) violations of the "unlawful," "unfair," and

1 "fraudulent" prongs of California's Unfair Competition Law's
2 ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.; (4-5) violations
3 of the "misleading and deceptive" and "untrue" prongs of
4 California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code
5 § 17500, et seq.; and (6) violations of California's Consumers
6 Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.
7 Plaintiffs seek monetary, equitable, and injunctive relief both
8 individually and on behalf of a putative nationwide class of
9 consumers.

10 Defendant now moves to dismiss the FAC.

11 **III. LEGAL STANDARD**

12 **A. Motions to Dismiss**

13 **1. Rule 12(b)(1)**

14 A motion to dismiss under Federal Rule of Civil Procedure
15 12(b)(1) challenges the Court's subject-matter jurisdiction.
16 Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1121-22
17 (9th Cir. 2010). The party asserting jurisdiction "bears the
18 burden of proving its existence." Id. at 1122. "Rule 12(b)(1)
19 attacks on jurisdiction can be either facial, confining the inquiry
20 to allegations in the complaint, or factual, permitting the court
21 to look beyond the complaint." Savage v. Glendale Union High Sch.,
22 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing White v. Lee, 227
23 F.3d 1214, 1242 (9th Cir. 2000). On a factual attack under Rule
24 12(b)(1),

25
26 the moving party may submit "affidavits or any other
27 evidence properly before the court It then
28 becomes necessary for the party opposing the motion to
present affidavits or any other evidence necessary to
satisfy its burden of establishing that the court, in
fact, possesses subject matter jurisdiction."

1
2 Colwell v. Dep't of Health & Human Servs., 558 F.3d 1112, 1121 (9th
3 Cir. 2009) (quoting St. Clair v. City of Chico, 880 F.2d 199, 201
4 (9th Cir. 1989)).

5 2. **Rule 12(b)(6)**

6 A motion to dismiss under Federal Rule of Civil Procedure
7 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
8 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
9 on the lack of a cognizable legal theory or the absence of
10 sufficient facts alleged under a cognizable legal theory."
11 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
12 1988). "When there are well-pleaded factual allegations, a court
13 should assume their veracity and then determine whether they
14 plausibly give rise to an entitlement to relief." Ashcroft v.
15 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
16 must accept as true all of the allegations contained in a complaint
17 is inapplicable to legal conclusions. Threadbare recitals of the
18 elements of a cause of action, supported by mere conclusory
19 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
20 Twombly, 550 U.S. 544, 555 (2007)). The court's review is
21 generally "limited to the complaint, materials incorporated into
22 the complaint by reference, and matters of which the court may take
23 judicial notice." Metzler Inv. GMBH v. Corinthian Colls., Inc.,
24 540 F.3d 1049, 1061 (9th Cir. 2008) (citing Tellabs, Inc. v. Makor
25 Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

26 3. **Leave to Amend**

27 When a motion to dismiss is granted, a district court must
28 decide whether to grant leave to amend. Generally, the Ninth

1 Circuit has a liberal policy favoring amendments and, thus, leave
2 to amend should be freely granted. See, e.g., DeSoto v. Yellow
3 Freight System, Inc., 957 F.2d 655, 658 (9th Cir. 1992). However,
4 a court does not need to grant leave to amend in cases where the
5 court determines that permitting a plaintiff to amend would be an
6 exercise in futility. See, e.g., Rutman Wine Co. v. E. & J. Gallo
7 Winery, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to
8 amend is not an abuse of discretion where the pleadings before the
9 court demonstrate that further amendment would be futile.").

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

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

22 **IV. DISCUSSION**

23 Defendant argues that Plaintiffs' FAC should be dismissed for
24 five reasons: (1) Plaintiffs lack standing as to products they do
25 not claim to have purchased, (2) Plaintiffs lack standing to seek
26 injunctive relief as to statements that are no longer present on
27 Defendant's labeling and were discontinued prior to this suit being
28 filed, (3) Plaintiffs improperly seek to apply California consumer

1 law to purchases made outside California against a non-California
2 company, (4) Plaintiffs have not sufficiently pleaded reliance and
3 injury with respect to their 'misbranding' claims, and (5), more
4 generally, Plaintiffs have not adequately pleaded deception and
5 reasonable reliance on Frito-Lay's labels.

6 **A. The Statutory Framework**

7 The Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. Section
8 301 et seq., as amended by the Nutrition Labeling and Education Act
9 of 1990 ("NLEA"), 21 U.S.C. § 343(r), et seq., is the operative
10 statute in this matter.

11 The many subsections of 21 U.S.C. § 343 establish the
12 conditions under which food is considered "misbranded." Generally,
13 food is misbranded under 21 U.S.C. § 343(a)(1) if "its labeling is
14 false or misleading in any particular." Section 343(r) discusses
15 "nutrition levels and health-related claims" about food products
16 made anywhere on their labels. It governs all voluntary statements
17 about nutrition content or health information that a manufacturer
18 includes on the food label or packaging. The Food and Drug
19 Administration ("FDA") has classified these nutrient claims as
20 "express" (e.g., "100 calories"), "implied" (e.g., "high in oat
21 bran"), and "health claims," which "characteriz[e] the relationship
22 of any substance to a disease or health-related condition." 21
23 C.F.R. §§ 101.13, 101.14; see also Chacanaca v. Quaker Oats Co.,
24 752 F. Supp. 2d 1111, 1116-17 (N.D. Cal. 2010) (describing the
25 statutory scheme). If a food item contains a requisite level of
26 certain ingredients, including greater than 480 milligrams of
27 sodium per reference amount, and bears an express, implied, or
28 health claim, then that food item must also bear a label stating:

1 "See nutrition information for [sodium] content." 21 C.F.R. §
2 101.13(h)(1).

3 Plaintiffs' state law claims are based on California's Sherman
4 Food, Drug, and Cosmetic Act ("Sherman Act"), Cal. Health & Safety
5 Code § 109875 et seq., which adopts and incorporates the FDCA. See
6 Sherman Act § 110100 ("All food labeling regulations and any
7 amendments to those regulations adopted pursuant to the federal
8 acts in effect on January 1, 1993, or adopted on or after that date
9 shall be the food regulations of this state."). This specifically
10 includes provisions of the FDCA and NLEA that set forth food
11 labeling and packing requirements.

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

13 To show Article III standing, plaintiffs must allege: (1) a
14 concrete, particularized, actual or imminent injury-in-fact; (2)
15 that the injury is traceable to the defendant's action; and (3)
16 that a favorable ruling could redress the injury. See Friends of
17 the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167,
18 180-81 (2000). Plaintiffs in a case like this one can show Article
19 III standing by alleging that they purchased a product they
20 otherwise would not have purchased, or that they spent too much on
21 such a product, in reliance on a defendant's representations in ads
22 or on labels. See, e.g., Brazil v. Dole Food Co., Inc., 935 F.
23 Supp. 2d 947, 961-62 (N.D. Cal. 2013). It is Plaintiffs' burden to
24 show standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561
25 (1992). The parties agree that Plaintiffs have pleaded standing as
26 to the Purchased Products. However, Defendant argues that
27 Plaintiffs lack standing as to the Non-Purchased Products.

28 Courts in this district have adopted three diverging

1 approaches for analyzing standing to pursue claims for non-
2 purchased products. See Clancy v. The Bromley Tea Co., No. 12-cv-
3 03003-JST, 2013 WL 4081632, at *4 (N.D. Cal. Aug. 9, 2013). The
4 first approach holds that "[w]hen a plaintiff asserts claims based
5 both on products that she purchased and products that she did not
6 purchase, claims relating to products not purchased must be
7 dismissed for lack of standing." Id. (citing Granfield v. NVIDIA
8 Corp., C 11-05403 JW, 2012 WL 2847575, at *6 (N.D. Cal. July 11,
9 2012) and collecting other cases); see also MTD at 21 (collecting
10 cases). Other courts have adopted a "middle-ground" position,
11 holding that sufficient or substantial similarity between the
12 purchased and non-purchased products satisfies the standing
13 requirement for the non-purchased products. See Astiana v.
14 Dreyer's Grand Ice Cream, Inc., No. 11-cv-2910 EMC, 2012 WL
15 2990766, at *11 (N.D. Cal. July 20, 2012); see also Anderson v.
16 Jamba Juice Co., 888 F. Supp. 2d 1000, 1006 (N.D. Cal. 2012); cf.
17 Stephenson v. Neutrogena, No. 12-cv-00426 PJH, 2012 WL 8527784, at
18 *1 (N.D. Cal. July 27, 2012) (assessing whether "an individualized
19 factual inquiry [would be] needed for each product" that the named
20 plaintiff did not purchase). Finally, some courts have concluded
21 that so long as a named plaintiff has individual standing to sue
22 for the products they did purchase, any inquiry into products they
23 did not purchase is best left for the class certification stage.
24 See, e.g., Kosta v. Del Monte Corp., No. 12-CV-01722-YGR, 2013 WL
25 2147413, at *15 (N.D. Cal. May 15, 2013); Koh v. S.C. Johnson &
26 Son, Inc., C-09-00927 RMW, 2010 WL 94265, at *3 (N.D. Cal Jan. 6,
27 2010).

28 Defendant urges the Court to adopt the first position, and to

1 hold that because Plaintiffs concede they never bought the Non-
2 Purchased Products, they therefore lack standing to pursue claims
3 for the alleged mislabeling of those products. MTD at 20-21.
4 Plaintiffs, on the other hand, argue the Court should adopt the
5 third position and leave these questions for class certification.
6 Opp'n at 19-20. The Court disagrees with both parties' views and
7 instead, as in the related case Wilson v. Frito-Lay North America,
8 Inc., 961 F. Supp. 2d 1134, 1141-42 (N.D. Cal. 2013) and several
9 other analogous cases, adopts the "substantial similarity" test.
10 See also Parker v. J.M. Smucker Co., No. C 13-0690 SC, 2013 WL
11 4516156, at *3 (N.D. Cal. Aug. 23, 2013) (applying the "substantial
12 similarity" approach); Colucci v. ZonePerfect Nutrition Co., No.
13 12-2907 SC, 2012 WL 6737800, at *4 (N.D. Cal. Dec. 28, 2012)
14 (same). In applying the "substantial similarity" test, Courts look
15 to a series of factors including whether the challenged products
16 are of the same kind, comprised of largely the same ingredients,
17 and whether each of the challenged products bears the same alleged
18 mislabeling. See Astiana, at *13.

19 Anticipating the Court's application of the substantial
20 similarity test, Defendant argues, relying on Wilson, that
21 Plaintiffs have failed to show sufficient similarity between the
22 Purchased and Non-Purchase Products. MTD at 20-23. Defendant
23 contends that Plaintiffs have only conclusively pleaded similarity,
24 and argue that any similarities sufficiently pleaded are, as in a
25 series of other cases in this District, merely superficial. See
26 Kane v. Chobani, Inc., 12-CV-02425-LHK, 2013 WL 5289253, at *11
27 (N.D. Cal. Sept. 19, 2013) (dismissing for failure to allege that
28 the purchased and non-purchased products were substantially

1 similar); Khasin v. R.C. Bigelow, Inc., No. C 12-02204 JSW, 2013 WL
2 2403579, at *4 (N.D. Cal. May 31, 2013) (finding insufficient
3 similarity where font, label size, and presentation of alleged
4 misrepresentations differed); Miller v. Ghirardelli Chocolate Co.,
5 912 F. Supp. 2d 861, 870-71 (N.D. Cal. 2012) (concluding that
6 products' appearance, labeling, and marketing were too dissimilar).

7 Plaintiffs oppose these arguments, contending that unlike in
8 Wilson, where Plaintiffs sought to include 85 allegedly similar
9 snack foods, many with subtle but significant differences in
10 packaging, labelling, and marketing, here Plaintiffs only seek to
11 include two additional pretzel products which are "misbranded in
12 the identical fashion as the Purchased Products." Opp'n at 20.
13 Furthermore, they point to the allegations in their complaint
14 articulating the similarities between the Products in labelling,
15 ingredients, and level of sodium. Id. (citing FAC ¶¶ 10-11, 36-45,
16 50-68). In short, Plaintiffs argue that "the only difference among
17 the five products at issue is the shape of the pretzels." Id.

18 Plaintiffs are right. Here, each of the factors courts
19 generally consider in deciding whether products are substantially
20 similar are satisfied. See Colucci, 2012 WL 6737800, at *4
21 (finding sufficient similarity because the challenged products were
22 "of a single kind, . . . nutrition bars," contained at least six of
23 the nine challenged ingredients, and bore the same challenged
24 label). First, unlike the 85 snack products at issue in Wilson,
25 which were substantially similar only in that they were all "potato
26 chips, corn chips, and puffed corn products . . . ," 961 F. Supp.
27 2d at 1141, the Purchased and Non-Purchased Products are all
28 pretzels, distinct in their shape but not in any other relevant

1 characteristic. Second, they contain the same list of allegedly
2 "artificial, synthetic and unnatural ingredients" present in the
3 Purchased Products, and allegedly have the same impermissibly high
4 levels of sodium. FAC ¶¶ 9, 57. Third, Plaintiffs plead that the
5 mislabeling of the Non-Purchased Products is not just similar, but
6 identical to the Purchased Products. Id. ¶¶ 52-53. Both the Non-
7 Purchased Products and the Purchased Products state they are "Made
8 with All Natural Ingredients," and the non-purchased "Fat Free Tiny
9 Twists" share the "Fat Free" labelling with the purchased "Rold
10 Gold Sticks Pretzels." See id. ¶¶ 9-10.

11 As a result, Plaintiffs have adequately pleaded substantial
12 similarity. Accordingly, Defendant's motion to dismiss for lack of
13 standing to challenge the Non-Purchased Products is DENIED.

14 **C. Standing to Seek Injunctive Relief**

15 Defendant also raises a second challenge to Plaintiffs'
16 standing, arguing that Plaintiffs' claims for injunctive relief are
17 not justiciable because Defendant discontinued use of all
18 challenged labelling practices prior to the time Plaintiffs filed
19 this lawsuit. MTD at 23-25; ECF No. 26 ("Brennan Decl.") ¶¶ 4-5.
20 Defendant has furnished two declarations showing the current
21 labelling for the Products and specifically stating that the
22 allegedly offending labels were no longer being printed when
23 Plaintiffs filed their complaint. Brennan Decl. ¶¶ 4-5, Exs. 1-10
24 (depicting the current packaging for each of the challenged
25 Products); see also ECF No. 27 ("Maleck Decl."), Exs. A-B (showing
26 the current packaging for two of the Products). The Court may
27 consider these declarations on Defendant's motion because Defendant
28 appears to be bringing a factual attack on the Court's jurisdiction

1 under Rule 12(b)(1). MTD at 24 n.13; see Savage, 343 F.3d at 1039
2 n.2. Plaintiffs rest on the allegations in their complaint. Opp'n
3 at 22-23.

4 To demonstrate Article III standing to seek injunctive relief,
5 Plaintiffs must demonstrate a "real and immediate threat of
6 repeated injury." City of Los Angeles v. Lyons, 461 U.S. 95, 103
7 (1983) (quoting O'Shea v. Littleton, 414 U.S. 488, 496 (1974)).
8 "Past exposure to illegal conduct does not in itself show a present
9 case or controversy regarding injunctive relief if unaccompanied by
10 any continuing present adverse effects." Id. (internal alterations
11 omitted). Defendant argues that because none of the Products were
12 being printed with the challenged labeling at the time the case was
13 filed, Plaintiffs cannot show "a sufficient likelihood that he will
14 again be wronged in a similar way" by the alleged mislabeling. MTD
15 at 24 (citing Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985
16 (9th Cir. 2007) (internal quotation marks omitted)).

17 Unfortunately the parties failed to appreciate the
18 significance of Plaintiffs' failure to respond to Defendant's
19 factual attack with affirmative evidence in favor of jurisdiction.
20 Because Plaintiffs bear the burden of demonstrating the existence
21 of jurisdiction, at first blush this would seem to resolve the
22 issue in Defendant's favor. However the Court still needs to
23 confront two seemingly contradictory Ninth Circuit precedents
24 addressing the allocations of the burdens on jurisdiction in a
25 facial challenge under Rule 12(b)(1). Generally speaking, in a
26 factual attack under Rule 12(b)(1), "the moving party may submit
27 affidavits or any other evidence properly before the court"
28 Colwell, 558 F.3d at 1121 (internal quotation marks omitted). Once

1 extrinsic evidence is introduced, "it then becomes necessary for
2 the party opposing the motion to present affidavits or any other
3 evidence necessary to satisfy its burden of establishing that the
4 court, in fact, possesses subject matter jurisdiction." Id.
5 (quoting St. Clair, 880 F.2d at 201). However, another Ninth
6 Circuit opinion suggests that (without analyzing the issue), where
7 the Court does not hold an evidentiary hearing on jurisdiction (as
8 here), the Court "accept[s] as true the factual allegations in the
9 complaint," including those regarding jurisdiction. McLachlan v.
10 Bell, 261 F.3d 908, 909 (9th Cir. 2001) (citation omitted).⁴ These
11 two statements seem, at least to the Court, irreconcilably at odds.
12 After all, a literal reading of McLachlan would require the Court
13 to hold an evidentiary hearing in order to grant any factual motion
14 to dismiss for lack of subject-matter jurisdiction. Other courts
15 have rejected this interpretation, although not in precisely the
16 same posture. See Robertson v. Qadri, No. C 06-04624 JF, 2008 WL
17 818529, at *4 n.4 (N.D. Cal. Mar. 25, 2008).

18 The Court is persuaded that the Ninth Circuit did not intend
19 to adopt such a rule. Instead the Court believes Colwell correctly
20 states the burdens on a factual challenge to jurisdiction under
21 Rule 12(b)(1). By submitting declarations and extrinsic evidence

22 ⁴ The case the McLachlan court cited in support of this
23 proposition, GATX/Airlog Co. v. United States, 234 F.3d 1089, 1093
24 (9th Cir. 2000), superseded, 286 F.3d 1168, is puzzling. In that
25 case, the Ninth Circuit affirmed a dismissal for lack of subject-
26 matter jurisdiction under the Federal Tort Claims Act's
27 discretionary function exception. The dismissal below revolved
28 around the Federal Aviation Administration's issuance of a
directive modifying the terms of two design certificates for
converting passenger airplanes into cargo planes. Id. at 1091. In
affirming the dismissal, the Ninth Circuit did not discuss the
allocation of burdens under Rule 12(b)(1), nor is it even clear
from the face of the opinion that the challenge to jurisdiction
went beyond the scope of the pleadings.

1 of Plaintiffs' lack of standing to seek injunctive relief,
2 Defendant triggered Plaintiff's obligation to "present affidavits
3 or any other evidence necessary to satisfy its burden of
4 establishing that the court, in fact, possesses subject matter
5 jurisdiction." 558 F.3d at 1121 (quotation omitted). Because
6 Plaintiffs have failed to offer any affirmative evidence to satisfy
7 the Court that it has subject-matter jurisdiction over Plaintiffs'
8 claims for injunctive relief, Plaintiffs allegations are DISMISSED.
9 Nevertheless, the Court is not persuaded that amendment would be
10 futile and accordingly grants Plaintiffs leave to amend. If
11 Plaintiffs can make factual allegations showing some continued
12 threat of harm or that Defendant ceased their offending labeling in
13 response to this litigation or the threat of this litigation, they
14 may be able to satisfy the requirements of Article III. See, e.g.,
15 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109 (1998)
16 (discussing the "presumption of future injury when the defendant
17 has voluntarily ceased its illegal activity in response to
18 litigation . . . ") (quoting source) (alterations omitted).⁵

19
20 ⁵ The Court notes that while the Defendant has, in the most general
21 sense, "voluntarily ceased" the conduct at issue in the litigation,
22 the presumption does not apply at least to the allegations as they
23 stand now. Although the doctrines are related, this presumption
24 only applies in the context of a challenge for mootness. See Steel
25 Co., 523 U.S. at 109; see also Laidlaw, 528 U.S. at 170 ("For
26 example, a defendant claiming that its voluntary compliance moots a
27 case bears a formidable burden. By contrast, it is the plaintiff's
28 burden, in a lawsuit brought to force compliance, to establish
standing by demonstrating that, if unchecked by the litigation, the
defendant's allegedly wrongful behavior will likely occur or
continue and that the threatened injury is certainly impending.")
It would therefore be "an immense and unacceptable stretch to call
the presumption into service as a substitute for the allegation of
present or threatened injury upon which initial standing must be
based." Steel Co., 523 U.S. at 109 (citing Lyons, 461 U.S. at 108-
09). Because there is no indication in Plaintiffs' complaint or
elsewhere in the factual record that Defendant's cessation was in

1 Nonetheless, while Plaintiffs' Complaint is not a model of
2 clarity on this point, the Court finds that their injunctive claims
3 are left undisturbed to the extent they are based on the allegation
4 that Defendant continues to sell an existing stock of the allegedly
5 mislabeled products. While Defendant's motion is presented as a
6 challenge to Plaintiffs' standing to seek any injunctive relief,
7 their supporting declarations only state that they are no longer
8 "printing the phrase[s]," Brennan Decl. ¶¶ 4-5, on their labels.
9 While this may ultimately prove to be a distinction without a
10 difference if all remaining inventory of the Products have already
11 been sold, Plaintiffs have pleaded that sales of the mislabeled
12 Products continue to the present. Without some affirmative
13 evidence showing Plaintiffs cannot demonstrate a likelihood of
14 future injury from continued sales of an existing stock of
15 allegedly mislabeled pretzels, the Court must presume the truth of
16 Plaintiffs' allegations. Accordingly, to the extent Defendant
17 seeks dismissal of Plaintiffs' claims for an injunction barring the
18 continued sale of the Products, the motion is DENIED.

19 **D. Claims for Non-California Purchases**

20 Defendant challenges Plaintiffs' claims on behalf of non-
21 California residents. Defendant argues that, as in this Court's
22 previous orders in Wilson, Plaintiffs' class claims should be
23 dismissed because "non-California residents' claims are not
24 supported where none of the alleged misconduct or injuries occurred
25 in California." MTD at 23 (quoting Wilson, 961 F. Supp. 2d at
26 1147). Plaintiffs respond that this inquiry is best saved for the
27
28 any way a response to the litigation, the Court cannot apply the
presumption now.

1 class certification stage. Opp'n at 21.

2 Defendant is right. As this Court held in Wilson, the
3 ordinary presumption against extraterritorial application of
4 California law applies to UCL, CLRA, and FAL claims, and such
5 claims "are not supported where none of the alleged misconduct or
6 injuries occurred in California." 961 F. Supp. 2d at 1147 (quoting
7 Churchill Village, LLC v. Gen. Elec. Co., 169 F. Supp. 2d 1119,
8 1126 (N.D. Cal. 2000)) (citing Sullivan v. Oracle Corp., 51 Cal.
9 4th 1191, 1207, 127 Cal. Rptr. 3d 185, 254 P.3d 237 (Cal. 2011)).
10 In this case, just as in Wilson, "Plaintiffs are located in
11 California, Defendant is located in Texas, and Plaintiffs have not
12 alleged any activity within California except their own purchase of
13 the Purchased Products." Id. Because Plaintiffs mistakenly
14 conflate Defendant's argument with the choice of law inquiry often
15 required at the class certification stage, and simply retread the
16 argument this Court directly rejected in Wilson, the Court will not
17 repeat its prior order. 961 F. Supp. 2d at 1147-48.

18 Nevertheless, unlike the Plaintiffs in Wilson, Plaintiffs here
19 have not pleaded an alternative California-specific subclass. MTD
20 at 23 n.12. As a result, all of Plaintiffs' class claims must be
21 DISMISSED. Furthermore, because the Court finds that amendment
22 would be futile with respect to claims under the UCL, CLRA, and FAL
23 by non-California residents for purchases made outside California,
24 these claims are DISMISSED WITH PREJUDICE. Plaintiffs' remaining
25 class claims are DISMISSED WITHOUT PREJUDICE. To the extent
26 Plaintiffs seek to assert claims on behalf of a class limited to

27
28

1 California, the Court grants Plaintiffs leave to amend.⁶

2 **E. Plaintiffs' Substantive Claims**

3 Turning now to the substance of Plaintiffs' claims, Defendant
4 claims the FAC is deficient in two additional respects. First,
5 Defendant argues that each of Plaintiffs' six causes of action are
6 based on a repackaging of the "misbranding" theory that this Court
7 previously rejected in Wilson. Second, Defendant contends that
8 Plaintiffs have not sufficiently pleaded deception and injury as a
9 result of Frito-Lay's labels. The Court will address each in turn.

10 **1. Plaintiffs' Reprised Mislabeled Theory**

11 First, Defendant contends that each of Plaintiffs' six causes
12 of action are insufficient insofar as they are they are based on a
13 revised version of the "misbranding" theory the Court rejected in
14 Wilson. MTD at 7 (citing FAC ¶¶ 107, 115-17, 123, 125, 133, 141,
15 152). Plaintiffs' view is that because the Products' "All
16 Natural," "FAT FREE," and "LOW FAT" labelling violates state and
17 federal law, California law deems the Products 'misbranded,' and
18 therefore they "cannot be legally sold or possessed, have no
19 economic value and are legally worthless." FAC ¶¶ 2; see also id.
20 ¶¶ 45, 68. Defendant argues that "in asserting this theory,
21 Plaintiffs do not allege that they relied on any of the challenged
22 labeling statements in buying the products, just that they relied

23 _____
24 ⁶ The Court agrees with Defendant that Plaintiffs' "Alternative,
25 Motion to Amend" on the final page of their Opposition is
26 procedurally improper and is accordingly DENIED. See Phleger v.
27 Countrywide Home Loans, Inc., No. C 07-1686 SBA, 2008 WL 65677, at
28 *5 (N.D. Cal. Jan 4, 2008); Civ. L.R. 7-1, 7-2. Nonetheless the
court is mindful of the Ninth Circuit's directive that "leave to
amend should be granted unless the court determines that the
allegation of other facts consistent with the challenged pleading
could not possibly cure the deficiency." DeSoto, 957 F.2d at 658
(quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806
F.2d 1393, 1401 (9th Cir. 1986)).

1 on the supposed 'misrepresentation that the products were salable,
2 capable of possession and not misbranded.'" MTD at 7 (citing FAC ¶
3 107).

4 Plaintiffs' counterargument is twofold. First, Plaintiffs
5 contend, reprising the argument in Wilson, that reliance is not an
6 element of their cause of action under the UCL's unlawful prong.
7 Opp'n at 7-8. Second, Plaintiffs argue that even if reliance is
8 required, California law supplies a presumption of reliance which
9 they have adequately pleaded. Opp'n at 8-9. This presumption of
10 reliance, they argue, stems from the California Supreme Court's
11 pronouncement in In re Tobacco II Cases, 46 Cal. 4th 298, 327 (Cal.
12 2010) that a "presumption, or at least an inference, of reliance
13 arises whenever there is a showing that a misrepresentation was
14 material." Because the form of the "FAT FREE," "LOW FAT," and
15 "Made with All Natural Ingredients" statements during the Class
16 Period were allegedly proscribed by statute or regulation, they are
17 material as a matter of law. See Opp'n at 8 (citing 21 C.F.R. §§
18 101.13(h)(1), 101.22; Fed. Reg. 2301, 2407 (Jan. 6, 1993); Cal.
19 Health & Safety Code § 110740; Kwikset Corp. v. Super. Ct., 51 Cal.
20 4th 310, 333 (Cal. 2011)). Accordingly Plaintiffs argue the Court
21 should presume reliance.

22 As to the first argument, the Court reiterates its prior
23 holding in Wilson. A UCL plaintiff must plead reliance even for a
24 claim under the UCL's unlawfulness prong. See Wilson, 961 F. Supp.
25 2d at 1144; see also Figy v. Amy's Kitchen, No. CV 13-03816 SI,
26 2013 WL 6169503, at *3 (N.D. Cal. Nov. 25, 2013). While Plaintiffs
27 disagree with the Court's prior ruling, absent binding authority
28 from the Ninth Circuit or some other reason for reconsideration,

1 the Court will not revisit the issue. Opp'n at 8 n.1.

2 Plaintiffs' second argument fares no better. First, as
3 Defendant points out, the cases cited by Plaintiffs, Kwikset,
4 Hinojos v. Kohl's Corp., 718 F.3d 1098 (9th Cir. 2008), and Tobacco
5 II, do not support the existence of such a presumption. Rather,
6 these cases required named plaintiffs to plead actual reliance on
7 the misrepresentations at issue. See Hinojos, 718 F.3d at 1109
8 (restating the elements laid out in Kwikset, including the
9 requirement that a customer plead they "purchased the product in
10 reliance on the misrepresentation . . .") (emphasis added);
11 Kwikset, 51 Cal. 4th at 327 ("[P]laintiffs need only allege
12 economic injury arising from reliance on Kwikset's
13 misrepresentations.") (emphasis added); Tobacco II, 46 Cal. 4th at
14 328 ("[A] plaintiff must plead and prove actual reliance to satisfy
15 the standing requirement of section 17204") (emphasis
16 added). Second, Plaintiffs' mislabeling theory cannot satisfy this
17 requirement. Instead, rather than allege reliance on an alleged
18 misrepresentation as required by the UCL, at best Plaintiffs
19 misbranding theory only alleges reliance on the "salability" of the
20 products. This is insufficient, as the statute requires reliance
21 on the allegedly injury-causing practice. See Kwikset, 51 Cal. 4th
22 at 327 ("[P]laintiffs need only allege economic injury arising from
23 reliance on Kwikset's misrepresentations.") (emphasis added).
24 Here, the practices that allegedly injured Plaintiffs are the "All
25 Natural," "FAT FREE," and "LOW FAT" labels -- not some implicit
26 representation of salability. Finally, extending the UCL to
27 encompass this type of theory would expand liability to reach any
28 violation of the underlying regulations -- even if no consumer

1 relied on the statements that violate those regulations. This is
2 because, in Plaintiffs' view, consumers always rely on the
3 salability of the products they purchase. This is precisely the
4 type of reasoning the Court rejected in Wilson when it stated that
5 a "mere alleged violation of the underlying regulations" is
6 insufficient to state a claim under the UCL. 961 F. Supp. 2d at
7 1144.

8 Accordingly, Plaintiffs' misbranding theory is DISMISSED.
9 Furthermore, given the Court's previous rejection of a virtually
10 identical theory in Wilson, the Court finds amending the
11 misbranding theory would be futile. Therefore, the dismissal is
12 WITH PREJUDICE. Nonetheless, Plaintiffs may amend to include
13 alternate theories of reliance.

14 **2. Plaintiffs' Allegations of Deception and Injury**

15 The balance of Defendant's motion argues that Plaintiffs have
16 failed to adequately allege deception as to each of the two alleged
17 types of misrepresentations. Specifically, Plaintiffs claim that
18 they were injured by the alleged mislabeling because they care
19 about buying healthy foods and read the label statements on the
20 Purchased Products prior to buying them. FAC ¶ 80, 82. Because of
21 their interest in purchasing healthy foods, Plaintiffs contend that
22 they relied on the label statements and drew from them "the net
23 impression that the Products made only positive contributions to a
24 diet, and did not contain any nutrients at levels that raised the
25 risk of diet-related disease or health-related conditions." FAC ¶
26 83. Plaintiffs claim they would not have bought Defendant's
27 products absent these statements on the labels of the Purchased
28 Products. Id.

1 In order to show deception, Plaintiffs must plausibly plead
2 that (1) they relied on the packaging and were deceived, and (2) a
3 reasonable consumer would "likely . . . be deceived." Williams v.
4 Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008); Trazo v.
5 Nestle USA, Inc., 5:12-CV-2272 PSG, 2013 WL 4083218, at *10 (N.D.
6 Cal. Aug. 9, 2013). As the Ninth Circuit noted in Williams,
7 deception is usually a question of fact, 552 F.3d at 938-39,
8 however in certain cases deception can be resolved on a motion to
9 dismiss. See, e.g., Ang v. Whitewave Foods Co., No. 13-CV-1953 SC,
10 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013) (dismissing UCL,
11 FAL, and CLRA claims for lack of plausibility where plaintiffs
12 pleaded deception on the theory that consumers might confuse soy
13 milk or almond milk for dairy milk).

14 The Court will address the adequacy of Plaintiffs' "All
15 Natural" and fat-related allegations in turn.

16 a. Plaintiffs' 'All Natural' Claims

17 As explained, supra, Plaintiffs allege that the "Made with All
18 Natural Ingredients" labeling on the Products is false and
19 misleading because the Products contain "artificial, synthetic and
20 unnatural ingredients 'niacin, reduced iron, thiamin mononitrate,
21 riboflavin, folic acid and ammonium bicarbonate.'" FAC ¶¶ 6, 27,
22 37, 52, 53, 57. Defendant argues that Plaintiffs have failed to
23 plead "'a plausible objective definition of the term 'All Natural'
24 or that [their] subjective definition of the term 'All Natural' is
25 one that is shared by the reasonable consumer.'" MTD at 16
26 (quoting Pelayo v. Nestle USA, Inc., No. CV 13-5213-JFW AJWX, 2013
27 WL 5764644, at *4-5 (C.D. Cal. Oct. 25, 2013) (alterations
28 omitted)). Relying on cases such as Kane v. Chobani, Inc., 973 F.

1 Supp. 2d 1120, 1138 (N.D. Cal. Feb. 20, 2014), which require
2 Plaintiffs to plead what they believe "All Natural" to mean, what
3 the offending ingredients are, and what is unnatural about them,
4 Defendant contends the FAC is insufficient. See also Chin v.
5 General Mills, No. 12-2150 (MJD/TNL), 2013 WL 2420455, at *9 (D.
6 Minn. June 3, 2013) (dismissing "100% Natural" and "Natural" claims
7 where plaintiffs pleaded only that they contain "highly processed
8 and non-natural sugar substitutes" and other ingredients, without
9 specifying how they were deceived or what they believed the labels
10 to mean).

11 Defendant is right. Unlike in Wilson, where claims based on
12 the same "Made with All Natural Ingredients" label survived a
13 motion to dismiss, here Plaintiffs' FAC provides no detail
14 whatsoever about how or why the offending ingredients are
15 unnatural. Compare Wilson, No. 3:12-cv-01586-SC, ECF No. 18
16 ("Wilson FAC") at ¶ 45 (naming allegedly unnatural ingredients and
17 explaining why they are unnatural), with FAC ¶¶ 50-68 (repeatedly
18 asserting, without any specificity or explanation, that the
19 allegedly unnatural ingredients are "artificial, synthetic and
20 unnatural . . ."). While Plaintiffs dedicate much of their
21 briefing to arguing that they interpreted the word "natural" to
22 mean that the product is composed of "only natural ingredients,"
23 Opp'n at 15 (internal quotation marks omitted), they still have
24 offered nothing more than conclusory assertions that the
25 ingredients they complain of are unnatural. It is insufficient
26 under Rule 9(b) to simply assert, no matter how foreign or
27 synthetic-sounding an ingredient's name might be, that an
28 ingredient is unnatural. Rather, Plaintiffs must plead why these

1 allegedly offending ingredients are unnatural. Kane, 973 F. Supp.
2 2d at 1138. Because Plaintiffs have not pleaded any facts
3 explaining what these ingredients are and how they are unnatural,
4 Plaintiffs' "All Natural" claims do not meet the standard set forth
5 in Federal Rule of Civil Procedure 9(b). Accordingly, these claims
6 are DISMISSED. Plaintiffs may amend their claims to include
7 allegations about how and why the offending ingredients are
8 unnatural.

9 b. Plaintiffs' 'LOW FAT' and 'FAT FREE'

10 Allegations

11 Second, Defendant argues that Plaintiffs' allegations of
12 deception and injury by the fat-related statements are implausible
13 and therefore merit dismissal. Specifically, Defendant offers four
14 reasons why Plaintiffs' allegations of deception and injury as to
15 the fat-related statements are insufficient and implausible.
16 First, Defendant notes that in light of Plaintiffs' professed
17 interest in the nutritional content of food, it is implausible that
18 "they would have relied on a labeling statement about fat to form
19 an expectation about the pretzels' level of sodium - particularly
20 since the exact sodium levels were fully and accurately disclosed
21 on the pretzels' nutrition facts panel." MTD at 11. Second,
22 Defendant notes Plaintiffs' allegations in other cases that they
23 scrutinized the back panels of other food products and argues that
24 this renders implausible the suggestion they did not read the back
25 panel here (where the true level of sodium was displayed).⁷ Third,

26 _____
27 ⁷ In support of this argument Defendant asks the Court to take
28 judicial notice of complaints filed by the same named plaintiffs in
other cases in this district alleging that they scrutinized the
back labels of a veritable grocery cart full of other food
products. ECF No. 28 ("Def. RJN"). Nonetheless, the request is

1 Defendant argues that Plaintiffs and reasonable consumers could not
2 be deceived about the Products' sodium levels because the see-
3 through windows or depictions of pretzels on the Products'
4 packaging show visible salt crystals. Finally, Defendant argues
5 that, contrary to the FDA's guidance, Plaintiffs erroneously
6 conclude that because the pretzels lack the sodium disclosure they
7 are "inherently unhealthy" and contain "unhealthy sodium levels."
8 See FAC ¶¶ 6, 38, 43.

9 Defendant is right. As with the misbranding claims discussed
10 earlier, deception claims must be predicated on more than simple
11 regulatory violations. Trazo, 2013 WL 4083218, at *10. Yet all
12 Plaintiffs can show here is the existence of a regulatory
13 violation. It is utterly implausible that Plaintiffs or reasonable
14 consumers would see an undisputedly true statement about fat and
15 then draw conclusions about other totally unrelated nutritional
16 characteristics like sodium content or conclude the Products "made
17 only positive contributions to a diet" FAC ¶ 82. In this
18 way, this claim resembles one the undersigned rejected in Lam v.
19 General Mills, Inc., 859 F. Supp. 2d 1097, 1103-04 (N.D. Cal.
20 2012). In Lam, the Court found that an objectively true statement
21 like "gluten free" on a pack of fruit snacks was unlikely to
22 deceive a reasonable consumer into believing the product also
23 "contains no partially hydrogenated oils, low amounts of sugar or
24

25 DENIED as irrelevant. At the pleading stage, where credibility is
26 not in issue, the fact that Plaintiffs scrutinized labels in other
27 cases (without pleading they had any habit or practice of doing so
28 generally) is irrelevant to the issues before the Court. Fed. R.
Evid. 401(a). Plaintiffs make a request for judicial notice of
their own providing images of several of the allegedly offending
labels as well as FDA warning letters. ECF No. 32 ("Pls.' RJN").
The request is GRANTED. Fed. R. Evid. 201(b).

1 corn-syrup, or that the [products] are otherwise healthful." Id.
2 at 1104. Similarly here, it is implausible that a reasonable
3 consumer would interpret an objectively true statement like "FAT
4 FREE" as also communicating that the product contains low amounts
5 of sodium or is otherwise healthful.

6 Accordingly these claims are DISMISSED with leave to amend.

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V. CONCLUSION

For the reasons explained above, Defendant Frito-Lay North America, Inc.'s motion to dismiss Plaintiffs Robert Figy and Mary Swearingen's first amended complaint is GRANTED in part and DENIED in part. The Court orders as follows:

- Defendant's motion to dismiss claims based on the Non-Purchased Products is DENIED.
- Plaintiffs' claims for injunctive relief are DISMISSED with leave to amend except as to claims seeking to enjoin sales of allegedly mislabeled Products, which survive.
- Plaintiffs' claims based on purchases that occurred outside California are DISMISSED WITH PREJUDICE.
- Plaintiffs' misbranding theory is DISMISSED WITH PREJUDICE.
- Plaintiffs' claims based on the "LOW FAT" and "FAT FREE" representations are DISMISSED with leave to amend.
- Plaintiffs' claims based on the "Made with All Natural Ingredients" representation is DISMISSED with leave to amend.

IT IS SO ORDERED.

Dated: August 12, 2014

UNITED STATES DISTRICT JUDGE