No. 15-15174

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATALIA BRUTON,

Plaintiff-Appellant,

v.

GERBER PRODUCTS COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. 5:12-CV-2412-LHK
THE HONORABLE LUCY H. KOH

PETITION FOR PANEL REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Gerber Products Company hereby certifies that it is a wholly-owned indirect subsidiary of Nestlé S.A., a Swiss corporation traded publicly on the SIX Swiss Exchange. No publicly traded company other than Nestlé S.A. owns 10% or more of Gerber's stock.

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INTRODUCTION

Gerber Products Company ("Gerber") respectfully requests panel rehearing of sections 3 and 4 of the memorandum disposition in this case pursuant to Federal Rule of Appellate Procedure 40 and Circuit Rule 40-1. The Panel overlooked or misapprehended two material points, and did not address an apparent conflict with another decision of the Court, in reversing the district court's order granting Gerber summary judgment.

First, in section 3, two members of this Panel held that a reasonable jury could find that Gerber's competitors "complie[d] with a ban on attractive label claims, and [Gerber] d[id] not do so," circumstances under which "consumers will possibly be left deceived" into thinking that Gerber's products are higher-quality than its competitors' products. *Bruton v. Gerber Prods. Co.*, No. 15-15174, slip op. at 5 (9th Cir. Apr. 19, 2017); *see Bruton* (O'Scannlain, J., dissenting), slip op. at 1–5 (dissenting from section 3 of the majority opinion).

Plaintiff submitted *no evidence* that the labels of Gerber's competitors omitted the kinds of claims that Gerber's labels contained and are at issue in this case. In fact, the *only evidence* in the record on this point shows that numerous baby food manufacturers, including Beech-Nut, made the same kinds of claims as Gerber.

At oral argument, Plaintiff's counsel repeatedly misrepresented the evidence before the Court on this issue. In response to Judge Smith's question asking whether there was any difference between Gerber's and its competitors' labels, Plaintiff's counsel stated: "There's a difference between Gerber's labels and Beech-Nut's labels. . . . Gerber's labels are the ones that contained the illegal nutrient-content claims."[1] Plaintiff's counsel cited no evidence. Later, Plaintiff's counsel stated: "There is sufficient evidence of deception in this case, sufficient to overcome summary judgment, because a reasonable consumer would infer that if Beech-Nut could make the same claims as Gerber, it would. And given the fact that Gerber made the claims, and Beech-Nut didn't, it was reasonable for Bruton to infer that Gerber's products met standards that Beech-Nut's products did not."[2] Again, Plaintiff's counsel cited no evidence.

As a result, although counsel for Gerber corrected these misstatements at oral argument,[3] the Court overlooked or misapprehended whether Plaintiff submitted sufficient evidence, or any evidence at all, to support her theory of deception. With no evidence that Gerber's labels included claims that

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[1] Oral Argument at 0:53–1:13, *Bruton*, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010731.
[2] *Id.* at 4:27–4:44.
[3] *See id.* at 22:02–23:23.

Beech-Nut's labels did not—and, in fact, with admissible evidence showing that Beech-Nut's and other competitors' labels made precisely the same kinds of claims—no dispute of material fact exists as to whether Gerber's labels were deceptive in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, False Advertising Law ("FAL"), *id.* § 17500, and Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750.

Moreover, Plaintiff submitted *no evidence* that, absent the FDA regulations at issue, Gerber's competitors generally would have included the types of claims that Gerber did on all of their qualifying baby food products—a crucial assumption on which Plaintiff and the majority's theory of deception depends, but for which there is no evidence. *Bruton*, slip op. at 4–5 ("If the products had been of the same quality," and "everyone [had] play[ed] by the rules," "then competitive pressures would have driven the maker of the second product to use the same attractive label."). As Judge O'Scannlain explained in dissent, "I do not believe that there is any evidence to support the majority's notion." *Bruton* (O'Scannlain, J., dissenting), slip op. at 4.

Second, in section 4, the Court overlooked or misapprehended Ninth Circuit precedent regarding the application of the "reasonable consumer"

test to Plaintiff's claim under the UCL "unlawful" prong, and did not address the tension between its conclusion on this issue and another decision of the Court.

The predicates for Plaintiff's claim under the UCL's unlawful prong are (1) alleged FAL and CLRA violations, and (2) alleged violations of the advertising and misbranded food provisions of California's Sherman Law. Of the predicate violations alleged, the Court concluded that the alleged violation of two sections of the Sherman Law that pertain to misbranding, California Health & Safety Code §§ 110760 and 110765, could serve as predicates for Plaintiff's claim even with no proof of consumer deception. *Reid v. Johnson & Johnson*, 780 F.3d 952 (9th Cir. 2015), precludes this conclusion. *Reid* establishes that the reasonable consumer test is appropriately applied to claims under the UCL's unlawful prong predicated on technical "misbranding" in violation of the Sherman Law where, as here, those claims sound in deception. *See id.* at 958.

For these reasons, the Court should grant Gerber's petition for panel rehearing, vacate sections 3 and 4 of its opinion reversing the district court's grant of summary judgment to Gerber on Plaintiff's UCL, FAL, and CLRA claims, and instead affirm the district court's order on those claims.

REASONS FOR GRANTING THE PETITION

Gerber respectfully submits that "the court has overlooked or misapprehended" two "material issues," Fed. R. App. P. 40(a)(2): (1) whether Plaintiff submitted sufficient evidence to create a genuine issue of material fact as to consumer deception based on the theory that the absence of the challenged label claims on competitors' products made Gerber's labels likely to mislead consumers; and (2) whether the "reasonable consumer" test applies to Plaintiff's claim under the UCL's unlawful prong. In addition, with respect to the second issue, the Court did not address in its opinion the apparent conflict between its conclusion and another decision of the Court.

I. Plaintiff Failed to Submit Evidence of Deception Sufficient to Create a Genuine Dispute of Material Fact

A. Plaintiff Submitted No Evidence That Competitors' Labels Did Not Contain the Same Claims That Gerber's Did, and the Only Evidence in the Record Shows Competitors Also Made Those Claims

To prevail on her claims of deception in violation of the UCL, FAL, and CLRA, Plaintiff must ultimately prove that "a significant portion of the general consuming public" is likely to be deceived by Gerber's labels. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (internal quotation marks omitted). The only purported evidence of deception that Plaintiff

identified was: (1) *Gerber's* labels (not its competitors'); (2) Plaintiff's own inconsistent testimony about being misled by Gerber's labels; and (3) two FDA warnings letters. *See Bruton*, slip op. at 6.[4]

All three members of the Panel (rightly) agreed that neither the FDA warning letters nor Plaintiff's testimony provided sufficient evidence of deception. *See Bruton*, slip op. at 6 ("The key evidence is the labels."); *see also Bruton* (O'Scannlain, J., dissenting), slip op. at 2 (noting that the FDA warning letters and Plaintiff's testimony were both insufficient to create a material dispute of fact, and that "[t]he majority challenges neither of these conclusions").[5]

The FDA warning letters are not evidence of deception, as they do not address how the alleged misbranding could have rendered the labels false or

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[4] The majority opinion states that "Bruton submitted . . . Gerber's and its competitors' labels." *Bruton*, slip op. at 6. The Court was misled to believe that Plaintiff had submitted this evidence by Plaintiff's counsel at oral argument. *See supra*, page 2. In fact, Plaintiff submitted *no competitor label evidence*. Gerber submitted the only competitor labels in the record, and those labels show that competitors made the same claims that Gerber did. *See infra*, pages 9–12.

[5] One of the FDA warning letters cited by Plaintiffs was not even sent to Gerber, but rather to another Nestlé company regarding unrelated products. *See* ER 1558–59.

misleading.[6] ER 1555–56, ER 1558–59. And Plaintiff's inconsistent testimony regarding whether she believed the label claims were true or false, and her individual reasons for purchasing Gerber's products, fails to satisfy the reasonable consumer standard. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008).

For example, Plaintiff testified as follows:

> Q As you sit here today under oath, do you know one way or the other whether the comparable Beech-Nut products contained the statement "supports healthy growth and development" at the time you purchased products -- baby food products for your daughter? . . .
>
> THE WITNESS: *I'm not sure.*
>
> Q . . . As you sit here today under oath, do you know one way or the other whether any of the Beech-Nut products used the claim "good source" or "excellent source" at the time you purchased baby

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[6] In any event, FDA warning letters are informal and advisory. *See* 21 C.F.R. § 10.115(d) ("Guidance documents do not establish legally enforceable rights or responsibilities. They do not bind the public or the FDA."); *Summit Tech., Inc. v. High-Line Med. Instruments, Co.*, 933 F. Supp. 918, 934 n.9 (C.D. Cal. 1996) ("FDA regulatory warning letters do not constitute final agency action").

Moreover, the evidence shows that on March 9, 2010, Gerber sent FDA a response to the warning letter ("March 9 Letter"), setting forth, with lengthy analysis, Gerber's interpretation of FDA regulations relevant to the misbranding allegations. SER 83–90. After receiving Gerber's March 9 Letter, FDA took no enforcement action. SER 72. To date, FDA has not disputed Gerber's analysis and interpretation of relevant FDA regulations set forth in Gerber's March 9 Letter, nor has FDA taken any steps to prohibit Gerber from making the claims. *Id.* As is standard in the food industry, FDA's silence in response to the March 9 Letter reflects FDA's agreement with Gerber's positions. *Id.*

food products for your daughter? . . .

THE WITNESS: And *I'm not sure* on that one either.

SER 683:11–684:4 (emphasis added).[7]

All that remains, then, are Gerber's labels as compared to competitors' labels. Setting forth the relevance of the labels given Plaintiff's theory of deception, the majority stated that although Gerber's label claims "may be literally true," consumers "will possibly be left deceived" if Gerber's labels included claims that its competitors' labels did not. *Bruton*, slip op. at 3–5. With respect to the labels in evidence, the majority then concluded that "[a] reasonable jury observing Gerber's labels and comparing them to those of its competitors could rationally conclude that Gerber's labels were likely to deceive members of the public." *Id.* at 6.

There is no evidence in the record to support this conclusion. Rather,

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[7] Plaintiff's generalized and conclusory claims at other points in her deposition that "Beech-Nut doesn't have them [the claims] and Gerber does have them," ER 163:9–10, are flatly contradicted by the specific testimony quoted above and are inadmissible to prove the contents of competitors' specific labels in light of the existence in evidence of the labels themselves. *See, e.g.*, *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 935 (9th Cir. 2002) ("We think that Fox's report of what he saw on the label . . . was inadmissible under the best evidence rule."), *amended by* 313 F.3d 1093 (9th Cir. 2002); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (finding deposition testimony that was uncorroborated, self-serving, and flatly contradicted by the deponent's prior sworn statements and medical evidence "d[id] not present a sufficient disagreement to require submission to a jury") (quotation marks omitted).

the evidence flatly contradicts Plaintiff's bare allegation that Gerber's labels included allegedly unauthorized nutrient-content claims, while Beech-Nut's labels did not. Both Gerber's labels and Beech-Nut's labels included the same kinds of claims at issue in this case. For instance:

- Excellent source of Vitamin A—ER 1524 (Gerber); SER 239, 260, 261, 265, 277 (Beech-Nut);
- Excellent source of Vitamin C—ER 1522 (Gerber); SER 246, 253 (Beech-Nut);
- Good/excellent source of Vitamin B—ER 1553 (Gerber: "good source" of 6 B Vitamins); SER 265 (Beech-Nut: "excellent source" of Vitamin B6);
- Good/excellent source of Zinc—ER 1532, 1541, 1553 (Gerber: "good source" of Zinc); SER 270 (Beech-Nut: "excellent source" of Zinc); and
- No added sugar—ER 1520, 1522 (Gerber); SER 241, 260, 272, 279 (Beech-Nut).

Beech-Nut even received an almost identical FDA warning letter concerning purportedly unauthorized nutrient-content claims on its baby food product labels the same day Gerber received such a letter. *See* SER 596–98 (Beech-Nut letter); ER 1555–56 (Gerber letter).

Indeed, the *only* evidence in the record concerning label claims made by competing products shows that numerous baby food manufacturers, including Beech-Nut, made the *same claims* over which Plaintiff sues:

Claim Category	**Gerber Label Examples**	**Competitor Label Examples**
"Excellent Source" and "Good Source" Claims	• "Excellent Source" or "Good Source" of various vitamins and minerals. *E.g.*, ER 1522, 1524, 1528, 1532–33, 1541, 1553.	Beech-Nut • "Excellent source" of various vitamins and minerals. *E.g.*, SER 239, 246, 253, 260–61, 265, 270. Happy Baby • "Excellent Source" of various vitamins and minerals. *E.g.*, SER 284, 286, 313, 315, 325, 327–29, 331, 333, 335. Earth's Best • "Excellent Source" of various vitamins and minerals. *E.g.*, SER 297, 300, 306–11.

Claim Category	**Gerber Label Examples**	**Competitor Label Examples**
"Healthy" Claims	• "As Healthy As Fresh." *E.g.*, ER 1520. • "Nutrition for Healthy Growth & Natural Immune Support." *E.g.*, ER 1526. • "Supports Healthy Growth & Development." *E.g.*, ER 1520.	Earth's Best • "help maintain healthy cells and are essential for normal growth and development." *E.g.*, SER 552. • "helps support healthy digestion." *E.g.*, SER 552. • "supports healthy digestion." *E.g.*, SER 553.
"No Added Sugar" Claims	• "No Added Sugar." *E.g.*, ER 1522. • "No Added Refined Sugar." *E.g.*, ER 1520.	Beech-Nut • "CONTAINS NO ADDED SWEETENERS." *E.g.*, SER 241, 279. • "CONTAINS NATURAL SUGARS ONLY." *E.g.*, SER 260, 272.

Given the complete absence of support in the record for Plaintiff's allegation that competitors' labels did not contain the claims that Gerber's did,[8] the Court should grant Gerber's petition for panel rehearing and consider the evidence it appears to have overlooked in reversing the district court's grant of summary judgment.

B. Plaintiff Submitted No Evidence to Support Her Novel Theory of Deception, and the Only Evidence in the Record Disproves It

Moreover, there is no evidence in the record to support the novel theory of deception embraced by the majority—that absent the FDA regulations allegedly violated, there would have been no claim discrepancies between Gerber's labels and those of other brands' comparable products from which consumers might have erroneously inferred quality differences. *See Bruton*, slip op. at 5–6 n.1 ("If Gerber's product says 'No Added Sugar,' and a competitor's product does not, . . . the reasonable assumption would be that some of the sugar in that competitor's product must have been added, or

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[8] Gerber also presented expert testimony regarding the presence of the claims on competitors' labels. *E.g.*, SER 491 ("[S]ome Beech-Nut labels as well as some Happy Baby and Earth's Best labels, did use one or more of the Statements during the proposed class period. Specifically, I have seen Beech-Nut labels that used the 'Excellent source of' and 'Contains natural sugars only' statements, Happy Baby labels that use the 'Excellent source of' statement, and Earth's Best labels that use the statements 'Supports healthy digestion,' 'Maintain healthy cells,' and 'Excellent source of.'").

else the competitor would have used the attractive label 'No Added Sugar.'"); *id.* at 4–5 ("If the products had been of the same quality, then competitive pressures would have driven the maker of the second product to use the same attractive label.").

In fact, the only evidence in the record contradicts the majority's theory of deception. Other manufacturers—including Beech-Nut, Happy Baby, and Earth's Best—also evidently believe, like Gerber, that the challenged claims do not violate FDA regulations, as all three companies used some combination of these claims on at least some of their baby food products. *See supra*, Section I.A. But, for example, Happy Baby chose not to use the "No Added Sugar" claim on certain products for which that claim would have been accurate. *See, e.g.*, SER 552, 553. In other words, the uncontroverted evidence shows that at least some of the discrepancies between Gerber's and its competitors' label claims would have persisted absent the FDA regulations, and so Gerber's alleged "disregard for industry regulation" cannot—as a matter of law—"make[] Gerber's packaging misleading." *Bruton*, slip op. at 6 n.1 ("[W]hat makes Gerber's packaging misleading" is "that the reason for Gerber's claims is not superior products, but a disregard for industry regulation."). As Judge O'Scannlain explained in dissent, there is no *evidence* that a consumer comparing a Gerber product

labeled with the challenged claims with a comparable competitor product without those claims would conclude, based on supposedly "common sense" laws of "competiti[on]," *id.* at 4, that the Gerber product is of a higher quality. *Bruton* (O'Scannlain, J., dissenting), slip op. at 4–5.

The only evidence in the record disproves Plaintiff's theory of deception. The Panel should grant rehearing; vacate the portion of its opinion reversing summary judgment for Gerber on Plaintiff's UCL "unfair" prong, FAL, and CLRA claims; and affirm the district court's grant of summary judgment to Gerber on those claims.

II. The "Reasonable Consumer" Test Applies to Plaintiff's Claim Under the UCL's Unlawful Prong

In general, violations of the UCL are "evaluated from the vantage point of a 'reasonable consumer.'" *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)); *see, e.g.*, *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) ("Plaintiff's claims under the California consumer protection statutes are governed by the 'reasonable consumer' test."). Under this test, "a plaintiff must 'show that members of the public are likely to be deceived.'" *Reid*, 780 F.3d at 958 (quoting *Williams*, 552 F.3d at 938).

Gerber does not dispute that, outside of the context of claims sounding in deception, UCL "unlawful" claims need not satisfy the "reasonable

consumer" test. But the Ninth Circuit's decision in *Reid* demonstrates that the test is appropriately applied where the predicate violation is a Sherman Law misbranding claim. The Panel's holding to the contrary thus conflicts with *Reid* and should be vacated.

Mr. Reid, like Ms. Bruton, predicated his UCL unlawful-prong claim (in part) on several violations of the Sherman Law. Compl. ¶¶ 156–58, *Reid v. Johnson & Johnson*, No. CV-11-1310-L-BLM (S.D. Cal. June 14, 2011), Dkt. No. 1. Among those alleged violations, Mr. Reid specifically listed the same two Sherman Law misbranding provisions highlighted by the Court here: California Health & Safety Code §§ 110760 and 110765. *Id.* ¶ 157; *see Bruton*, slip op. at 7 ("The predicate violation here is of California's Sherman Law, *see* Cal. Health & Safety Code §§ 110760, 110765.").[9]

The district court dismissed Mr. Reid's claims because he failed to allege facts showing that the contested label statements were likely to deceive a reasonable consumer. *Reid*, 780 F.3d at 958. On appeal, the Ninth Circuit did not take issue with the application of the reasonable consumer test to Mr. Reid's UCL unlawful-prong claim. *Id.* Instead, the court

[9] Pursuant to § 110760, "[i]t is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded." Cal. Health & Safety Code § 110760. Pursuant to § 110765, "[i]t is unlawful for any person to misbrand any food." *Id.* § 110765.

acknowledged the district court's proper application of the test to Mr. Reid's claims, including his claim under the unlawful prong of the UCL, and noted that the dismissal was improper for other reasons. *See id.* ("It is true that violations of the UCL, FAL, and CLRA are evaluated from the vantage point of a 'reasonable consumer.'").

That UCL "unlawful" claims predicated on a Sherman Law violation are—as *Reid* acknowledged—subject to the "reasonable consumer" test makes good sense: a plaintiff's misbranding claims are inextricably related to claims that the challenged labels are false or misleading, given that a plaintiff who was not misled by a label could not conceivably establish that he or she sustained any harm. Thus, the Ninth Circuit appropriately disregards the artificial distinction between a consumer protection claim alleging that labeling claims violate the UCL "unlawful" prong predicated on misbranding under the Sherman Law, and a claim alleging the same labeling claims violate the UCL's other prongs. The Panel's holding to the contrary creates tension with *Reid* and, Gerber submits, would open the floodgates to litigation against food manufacturers for alleged misbranding conduct that could not have deceived—and therefore injured—consumers.

CONCLUSION

For the foregoing reasons, the Court should grant Gerber's petition for panel rehearing; vacate its opinion as to the district court's grant of summary judgment to Gerber on Plaintiff's UCL, FAL, and CLRA claims; and affirm the district court's grant of summary judgment on those claims.

Dated: May 3, 2017

Respectfully submitted,
WHITE & CASE LLP

By: *s/ Bryan A. Merryman*
Bryan A. Merryman

Attorneys for Defendant-Appellee
GERBER PRODUCTS COMPANY

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 15-15174

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 3,425 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: s/ Bryan A. Merryman   Date: May 3, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 19 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NATALIA BRUTON, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

GERBER PRODUCTS COMPANY,

Defendant-Appellee.

No. 15-15174

D.C. No. 5:12-cv-02412-LHK

MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Lucy H. Koh, District Judge, Presiding

Argued December 13, 2016 Submitted April 19, 2017
San Francisco, California

Before: O'SCANNLAIN, GOULD, and M. SMITH, Circuit Judges.

Plaintiff-Appellant Natalia Bruton filed a putative class action against baby food manufacturer Gerber Products Company (Gerber). Bruton alleged that labels on certain Gerber baby food products included claims about nutrient and sugar content that were impermissible under Food and Drug Administration (FDA)

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

regulations incorporated into California law. The district court dismissed several of Bruton's claims, denied class certification, denied partial summary judgment for Bruton, and granted summary judgment to Gerber. Bruton appeals, challenging the district court's orders. We have jurisdiction under 28 U.S.C. §§ 1291 and 1332(d). We reverse and remand.

1. The district court erred in dismissing Bruton's claim for unjust enrichment/quasi-contract. At the time when the district court dismissed this claim, California's case law on whether unjust enrichment could be sustained as a standalone cause of action was uncertain and inconsistent. But since then, the California Supreme Court has clarified California law, allowing an independent claim for unjust enrichment to proceed in an insurance dispute. *See Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 61 Cal. 4th 988, 1000 (2015); *see also Ghirardo v. Antonioli*, 14 Cal. 4th 39, 54 (1996) (recognizing independent cause of action for unjust enrichment relating to real estate transaction). In light of this clarification, we reverse the district court's dismissal and remand for consideration of whether there are other grounds on which Bruton has failed to state a claim for unjust enrichment, or if that claim must proceed to resolution.

2. The district court erred when it held that the class could not be certified because it was not "ascertainable." Again, the district court's reasoning runs

headlong into an inconsistent case that was decided after the district court's ruling. In *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), our court—using different terminology for what the district court called "ascertainability"—held that there was no separate "administrative feasibility" requirement for class certification. *Id*. at 1123. We reverse the district court's denial of class certification and remand for further consideration of whether class certification is appropriate.

3. The district court erred in holding that there was no genuine dispute of material fact on Bruton's claims that the labels were deceptive in violation of California's Unfair Competition Law (UCL), *see* Cal. Bus. and Prof. Code § 17200, False Advertising Law (FAL), *see id.* § 17500, and Consumer Legal Remedies Act (CLRA), *see* Cal. Civ. Code § 1770.

Bruton's theory of deception does not rely on proving that any of Gerber's labels were false. Rather, Bruton contends that the combination of (a) the presence of the claims on Gerber's products (in violation of FDA regulations), and (b) the lack of claims on competitors' products (in compliance with FDA regulations), made Gerber's labeling likely to mislead the public into believing that Gerber's products were of a higher quality than its competitors' products.

Doubtless, Bruton's theory of deception is unusual. But even technically correct labels can be misleading. *See Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 510 (2003) ("The advertisement, although literally true, was nevertheless deceptive and misleading in its implications." (quoting *People v. Wahl*, 39 Cal. App. 2d Supp. 771, 773 (Cal. App. Dep't Super. Ct. 1940) (literally true advertisement was misleading because price of offered product was 50% off regular price of more expensive product, not regular price of the offered product)); *see also Leoni v. State Bar*, 39 Cal. 3d 609, 627 (1985) (holding that attorney advertising, though not false, was misleading because "[a] necessary fact ha[d] been omitted."). Here, it may be literally true that Gerber's products are "As Healthy As Fresh," but due to external facts—that Gerber does not comply with the FDA regulations that otherwise prevent its competitors from making the same claim—Gerber's labels mislead in their implications.

Bruton's theory of deception comports with common sense. Shoppers in a supermarket aisle look for cues about quality in the products they buy. If a shopper sees two products on a shelf and one says "Supports Healthy Growth & Development," while the other makes no similar claim and is cheaper, a likely inference is that the first product will be viewed as healthier, explaining why it costs more. If the products had been of the same quality, then competitive

pressures would have driven the maker of the second product to use the same attractive label. In the baby food market in particular—where measuring the effect of a particular food on one's own baby's growth and development is not practical—consumers have to make quality judgments before the baby is fed, based on what they see in front of them at the store. When everyone plays by the rules, this process works reasonably well. But when the maker of one product complies with a ban on attractive label claims, and its competitor does not do so, the normal assumptions no longer hold, and consumers will possibly be left deceived. We hold that Bruton has alleged a viable claim for consumer deception.[1]

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[1] That Bruton reviewed the nutritional information of both Gerber's and its competitors' products does not undermine the deceptive nature of Gerber's labels. Consumers cannot easily check claims like "Supports Healthy Growth & Development," or "As Healthy As Fresh," against nutritional charts to determine their veracity. Consumers might believe, for instance, that the claims refer to the quality of the produce used or the particular canning process. The same holds for the absence of such claims. Does the lack of the claim "Supports Healthy Growth & Development" on a competitor's product mean that the product does not support healthy growth and development? A nutritional chart does not answer that question. This problem applies even for seemingly black and white claims like "No Added Sugar." If Gerber's product says "No Added Sugar," and a competitor's product does not, the competitor's nutritional chart will not under current FDA requirements tell the consumer whether any of the sugar in its product was added—it will simply list the amount of "Sugars." *See* Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 81 Fed. Reg. 33742-01, 33742 (May 27, 2016) (codified at 21 C.F.R. pt. 101) (compliance date for new "Added Sugar" rule delayed until 2018 or 2019). Nevertheless, the reasonable assumption would be that some of the sugar in that competitor's product must have

(continued...)

The next questions is whether Bruton submitted enough evidence of likely consumer deception to create a genuine dispute of material fact for trial. Bruton submitted the following evidence to support consumer deception: (1) Gerber's and its competitors' labels; (2) Bruton's own testimony about being misled by Gerber's labels; and (3) two warnings letters from the FDA.

The key evidence is the labels. A reasonable jury observing Gerber's labels and comparing them to those of its competitors could rationally conclude that Gerber's labels were likely to deceive members of the public. *See Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 679 (2006) ("In determining whether a statement is misleading under the [FAL], the primary evidence . . . is the advertising itself." (internal quotation marks omitted)); *see also id.* ("The misleading character of a given representation appears on applying its words to the facts." (internal quotation marks omitted)).[2] We hold that Bruton has submitted sufficient evidence to create a genuine dispute of material fact over the reasonable

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[1](...continued)
been added, or else the competitor would have used the attractive label "No Added Sugar." The upshot is that nutritional charts on Gerber's and its competitors' products do not cure what makes Gerber's packaging misleading—that the reason for Gerber's claims is not superior products, but a disregard for industry regulation.

[2] The advertisement in *Colgan*, unlike Gerber's labels, was actually false. *Id.* at 682–83. However, we cite *Colgan* not as support for Bruton's theory of deception, but as support for the high evidentiary value of the labels in this case.

consumer test. We reverse the district court's grant of summary judgment to Gerber on Bruton's claims that the labels were deceptive in violation of the UCL, FAL, and CLRA.

4. The district court erred in granting summary judgment to Gerber on Bruton's claims that the labels were unlawful under the UCL. The UCL's unlawful prong "borrows" predicate legal violations and treats them as independently actionable under the UCL. *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 871 (2002). The best reading of California precedent is that the reasonable consumer test is a requirement under the UCL's unlawful prong only when it is an element of the predicate violation. *Compare, e.g.*, *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1354, 1360 (2003) (holding that UCL claims were subject to the reasonable consumer test where the predicate violations were of the FAL and CLRA, both of which require meeting the reasonable consumer test); *with Los Angeles Mem'l Coliseum Comm'n v. Insomniac, Inc.*, 233 Cal. App. 4th 803, 835 (2015) (holding that a UCL claim was properly stated—without mention of the reasonable consumer test—where the predicate violation was of federal tax law). The predicate violation here is of California's Sherman Law, *see* Cal. Health & Safety Code §§ 110760, 110765, which itself incorporates standards set by FDA regulations, *see id.* §§ 110100,

110670. These FDA regulations include no requirement that the public be likely to experience deception. *See* 21 C.F.R. §§ 101.13(b)(3), 101.60(c)(2)(v). We reverse the district court's grant of summary judgment to Gerber on Bruton's claims that the labels were unlawful in violation of the UCL.

REVERSED and **REMANDED**

FILED

APR 19 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Bruton v. Gerber Products Co., No. 15-15174

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

While I join in Parts 1, 2, and 4 of the court's disposition in this case, I must respectfully dissent from Part 3, and from the majority's conclusion that there is a genuine issue of material fact regarding consumer deception in this case. I agree with the district court that the record does not contain sufficient evidence upon which a rational juror could conclude that a reasonable consumer would be deceived as to the quality of Gerber's products based on the challenged statements. I thus would affirm the court's grant of summary judgment on Bruton's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act claims.

I

To prevail on any of these claims, Bruton must be able to prove (among other things) that "a significant portion of the general consuming public" is likely to be deceived by the contested label claims. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (internal quotation marks omitted). Bruton specifically argues that the challenged nutritional statements on Gerber's labels would cause reasonable consumers to be misled about the *quality* of Gerber's products (as compared to nutritionally similar products that do not include such label claims).

In support, she submitted as evidence: (1) the products' labels themselves, (2) her own testimony that *she* was misled about the quality of Gerber's products, and (3) two FDA warning letters regarding the products' labeling.

First, the FDA warning letters do not help Bruton, as they do not address the potential for consumers to be misled about the quality of Gerbers' products. Second, as the district court recognized, Bruton's testimony about her own confusion cannot satisfy the reasonable consumer standard, because "a few isolated examples of actual deception are insufficient" to create a material dispute over the likelihood of general consumer deception. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008) (internal quotation marks omitted). The majority challenges neither of these conclusions.

II

The majority holds, however, that the very label statements that Bruton challenges themselves supply sufficient evidence to satisfy California's "reasonable consumer" test. To do so, the majority mistakenly relies on *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663 (2006), a case that has little to say about the circumstances before us.

In *Colgan*, the plaintiff alleged that Leatherman deceptively labeled its tools as "Made in U.S.A.," even though "significant parts of the tools"—including parts

that were the main reason people bought the tools—were made *outside* the U.S.A. *Id.* at 680 (internal quotation marks omitted). Thus, the court quite understandably reasoned that the label "Made in U.S.A." itself may evidence deception when, in fact, the product was *not* made in the U.S.A. in a meaningful sense. *See id.* at 682–83. This seems straightforward. There is virtually no other way a consumer could read "Made in the U.S.A." but to mean that meant the product was indeed manufactured in the U.S.A, and thus there seems little reason to require additional evidence to confirm that reasonable consumers might have been deceived by such a false assertion.

But this case involves no similar allegation of a false (or even mostly false) factual assertion. To repeat, the question in this case is whether the challenged nutritional statements on Gerber's labels would cause a reasonable consumer to be misled about the *quality* of Gerber's products. Yet the challenged statements themselves say nothing at all about the quality of Gerber's products; they simply report—accurately—certain nutritional features of the products. Bruton does not claim that these statements are false or even misleading about the actual nutritional content of the products (for example that a product labeled "no sugar added" in fact included added sugar). Thus, to carry her burden at this stage, Bruton must provide some evidence that reasonable consumers would see these truthful

nutritional statements about Gerber's products and be deceived into thinking such products are somehow better than other products that are the same nutritionally but which did not have the label statements.

There is nothing inherent in Gerber's labels that would support an inferential leap from factually correct nutritional statements to deceptive claims about product quality. This is especially so because both Gerber's and its competitors' labels included detailed information about their ingredients and nutritional contents. Indeed, Bruton admitted that she actually reviewed the nutritional facts of both Gerber's products and its competitors, and thus she would presumably have seen that they were nutritionally similar despite whatever additional nutritional labeling Gerber's products had. How those additional, accurate label statements are inherently deceptive is far from self-evident, as it was in *Colgan*. And I do not believe that there is any evidence to support the majority's notion, Maj. at 4–5, that the challenged statements make Gerber's labels objectively more "attractive" to a "a significant portion of the general consuming public," *Ebner*, 838 F.3d at 965, or that such a portion of consumers would conclude that any price or quality difference between Gerber and its competitors is due specifically to the challenged label statements (as opposed to any number of other reasons that may have led Gerber's nationally recognized brand to carry more market power).

Accordingly, I agree with the district court that this body of evidence—Bruton's testimony, the FDA's warning letters, and the product labels themselves—is not enough to create a genuine dispute of material fact as to the likelihood of general consumer deception about the quality of Gerber's products. I would affirm the grant of summary judgment on these claims, and I respectfully dissent from the majority's judgment to the contrary.

9th Circuit Case Number(s) 15-15174

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