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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CLAUDINE MACASPAC, individually,  
and on behalf of all others similarly  
situated and the general public,  
  
Plaintiff,  
  
v.  
  
HENKEL CORPORATION, a Delaware  
corporation,  
  
Defendant.

Case No.: 3:17-cv-01755-H-BLM

**ORDER:**

**(1) GRANTING DEFENDANT’S  
MOTION FOR JUDGMENT  
ON THE PLEADINGS; and**

[Doc. No. 24]

**(2) DENYING PLAINTIFF’S  
MOTION FOR CLASS  
CERTIFICATION AS MOOT**

[Doc. No. 23]

On July 28, 2017, Plaintiff Claudine Macaspac (“Macaspac”) filed a class action complaint against Defendant Henkel Corporation (“Henkel”) in the San Diego County Superior Court, asserting claims for violations of California’s Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et seq., Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq., and False Advertising Law, Cal. Bus. & Prof. Code § 17500, et seq. (Doc. No. 1-2.) Henkel removed that lawsuit to this District on August 30, 2017, (Doc. No. 1),

1 and filed an answer on September 25, 2017. (Doc. No. 6.)

2 On March 29, 2018, Macaspac filed a motion for class certification. (Doc. No. 23.)  
3 One day later, Henkel responded by moving for judgment on the pleadings. (Doc. No. 24.)  
4 The parties filed their respective opposition papers on May 21, 2018. (Doc. Nos. 30, 33.)  
5 Thereafter, at the parties' request, the Court deferred consideration of the motion for class  
6 certification until after the motion for judgment on the pleadings had been heard. (Doc.  
7 No. 40.) Henkel filed a reply brief in support of its motion on May 29, 2018. (Doc. No.  
8 41.) The Court held a hearing on the motion for judgment on the pleadings on June 4,  
9 2018. Michael Houchin and Ronald A. Marron appeared for Macaspac, while William F.  
10 Tarantino and Ashleigh Landis appeared for Henkel. For the reasons below, the Court  
11 grants Henkel's motion for judgment on the pleadings, and denies Macaspac's motion for  
12 class certification as moot.

### 13 **Background**<sup>1</sup>

14 Macaspac is a San Diego area resident. (Doc. No. 1 at ¶ 11.) Sometime in May  
15 2017, Macaspac purchased several bottles of Henkel's "Purex Crystals" products from a  
16 Walmart store in San Diego. (Id. at ¶ 4.) Purex Crystals is an in-wash fragrance booster  
17 used to give laundry a fresh scent when it comes out of a washing machine. (Id. at ¶ 4.)  
18 Macaspac alleges that she "expected to receive a full container of the Purex Crystals  
19 product, which is packaged in non-transparent containers," but "was surprised and  
20 disappointed when she opened the Purex Crystals product to discover that the container  
21 had more than 30% empty space, or slack-fill." (Id. at ¶ 5.) Macaspac further alleges that  
22 had she "known about the slack-fill at the time of purchase, she would not have bought"  
23 the product. (Id.) She avers that the Purex bottles are deceptive and misleading, and violate  
24 several California consumer protection statutes. (Id. at ¶¶ 45–75.) Macaspac brings this  
25 suit on behalf of a similarly situated California consumers, and seeks various monetary and  
26 equitable remedies. (Id. at 18.)

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28 <sup>1</sup> The Court grants the parties' unopposed requests for judicial notice. (Doc. Nos. 24-3, 30-8.)

1 **Discussion**

2 **I. Legal Standards**

3 Federal Rule of Civil Procedure 12(c) permits a district court to terminate a lawsuit  
4 where the facts alleged in the pleadings demonstrate that the moving party is entitled to  
5 judgment as a matter of law. See Daewoo Elecs. Am. Inc. v. Opta Corp., 875 F.3d 1241,  
6 1246 (9th Cir. 2017). The parties agree that Federal Rule of Civil Procedure 9(b)'s  
7 particularity standard governs each of Macaspac's claims.

8 The Ninth Circuit has explained that:

9 Under Rule 9(b), a plaintiff must state with particularity the circumstances  
10 constituting fraud. This means the plaintiff must allege the who, what, when,  
11 where, and how of the misconduct charged, including what is false or  
misleading about a statement, and why it is false. Knowledge, however, may  
be pled generally.

12 Under [Ninth Circuit] case law, Rule 9(b) serves two principal purposes.  
13 First, allegations of fraud must be specific enough to give defendants notice  
14 of the particular misconduct which is alleged to constitute the fraud charged  
15 so that they can defend against the charge and not just deny that they have  
16 done anything wrong. Thus, perhaps the most basic consideration for a federal  
court in making a judgment as to the sufficiency of a pleading for purposes  
of Rule 9(b) is the determination of how much detail is necessary to give  
adequate notice to an adverse party and enable that party to prepare a  
responsive pleading.

17 Second, the rule serves to deter the filing of complaints as a pretext for the  
18 discovery of unknown wrongs, to protect defendants from the harm that  
19 comes from being subject to fraud charges, and to prohibit plaintiffs from  
20 unilaterally imposing upon the court, the parties and society enormous social  
and economic costs absent some factual basis. By requiring some factual  
basis for the claims, the rule protects against false or unsubstantiated charges.

21 Consistent with these requirements, mere conclusory allegations of fraud are  
22 insufficient. Broad allegations that include no particularized supporting detail  
23 do not suffice, but statements of the time, place and nature of the alleged  
24 fraudulent activities are sufficient. Because this standard does not require  
absolute particularity or a recital of the evidence, a complaint need not allege  
a precise time frame, describe in detail a single specific transaction or identify  
the precise method used to carry out the fraud.

25 United States v. United Healthcare Ins. Co., 848 F.3d 1161, 1180 (9th Cir. 2016) (citations,  
26 quotation marks, alterations and footnote omitted).

27 In reviewing a Rule 12(c) motion, a district court must accept as true all facts alleged  
28 in the pleadings, and draw all reasonable inferences in favor of the non-moving party. See

1 Gregg v. Hawaii Dep't of Pub. Safety, 870 F.3d 883, 887 (9th Cir. 2017). But because  
2 “Rule 12(c) is ‘functionally identical’ to Rule 12(b)(6),” U.S. ex rel. Cafasso v. Gen.  
3 Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (citation omitted), a court  
4 need not accept “legal conclusions” as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).  
5 Further, it is improper for a court to assume the plaintiff “can prove facts which it has not  
6 alleged or that the defendants have violated the . . . laws in ways that have not been  
7 alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,  
8 459 U.S. 519, 526 (1983). In addition, a court may consider documents incorporated into  
9 the complaint by reference and items that are proper subjects of judicial notice. See Coto  
10 Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010).

11 If a court grants judgment on the pleadings, it must then determine whether to grant  
12 leave to amend. See Gregg, 870 F.3d at 887. “‘A district court may deny a plaintiff leave  
13 to amend if it determines that ‘allegation of other facts consistent with the challenged  
14 pleading could not possibly cure the deficiency,’ or if the plaintiff had several opportunities  
15 to amend its complaint and repeatedly failed to cure deficiencies.” Telesaurus VPC, LLC  
16 v. Power, 623 F.3d 998, 1003 (9th Cir. 2010) (internal quotation marks and citations  
17 omitted).

## 18 **II. Analysis**

19 Henkel argues that it is entitled to judgment on the pleadings because no reasonable  
20 consumer could have been deceived by the Purex packaging, and Macaspac lacks standing  
21 to either bring claims predicated on products that she did not purchase, or to sue for  
22 injunctive relief. (Doc. No. 24-1.) Macaspac rejoins that a reasonable consumer could  
23 have been deceived by the size of the Purex bottles into believing that they contained more  
24 product than they did, and also disputes Henkel’s arguments about her legal standing to  
25 bring claims related to all of Henkel’s allegedly deceptive products. (Doc. No. 30.) As  
26 explained below, the Court agrees that no reasonable consumer could have been misled by  
27 the Purex bottles, which both allowed consumers to see that the bottles contained slack fill,  
28 and accurately reported the aggregate weight of the product inside. The Court declines to

1 address Macaspac’s standing to bring claims related to products that she did not purchase,  
2 which, as the Court has recently noted, is an open question under California law. See  
3 Covell v. Nine W. Holdings, Inc., No. 3:17-cv-01371-H-JLB, 2018 WL 558976, at \*5 (S.D.  
4 Cal. Jan. 25, 2018) (Huff, J.) (“The district courts in this Circuit are divided as to whether  
5 plaintiffs have statutory standing under the UCL, FAL, and CLRA to assert claims for  
6 deceptive advertising related to items that they did not purchase.”).

## 7 **A. Sufficiency of Macaspac’s Claims**

### 8 **1. Reasonable Consumer Test**

9 Macaspac’s complaint asserts violations of California’s Unfair Competition Law  
10 (“UCL”), Bus. & Prof. Code § 17200 et seq., False Advertising Law (“FAL”), Bus. & Prof.  
11 Code § 17500 et seq., and Consumer Legal Remedies Act (“CLRA”), Civil Code § 1750  
12 et seq. (Doc. No. 10.) These claims are governed by California law. The Ninth Circuit  
13 has explained:

14 California's Unfair Competition Law (“UCL”) prohibits any “unlawful, unfair  
15 or fraudulent business act or practice.” Cal. Bus. and Prof. Code § 17200.  
16 The false advertising law prohibits any “unfair, deceptive, untrue, or  
17 misleading advertising.” Cal. Bus. and Prof. Code § 17500. “[A]ny violation  
18 of the false advertising law . . . necessarily violates’ the DUCL.” [Kasky v.  
19 Nike, Inc., 27 Cal.4th 939, 950 (2002) (quoting Comm. on Children's  
20 Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 210 (1983))].  
California's Consumer Legal Remedies Act (“CLRA”) prohibits “unfair  
methods of competition and unfair or deceptive acts or practices.” Cal. Civ.  
Code § 1770.

21 [A plaintiff’s] claims under these California statutes are governed by the  
22 “reasonable consumer” test. Freeman v. Time, Inc., 68 F.3d 285, 289 (9th  
23 Cir. 1995) (“[T]he false or misleading advertising and unfair business  
24 practices claim must be evaluated from the vantage of a reasonable  
25 consumer.” (citation omitted)); [Lavie v. Procter & Gamble Co., 105 Cal.  
26 App. 4th 496, 506–07 (2003)] (“[U]nless the advertisement targets a particular  
disadvantaged or vulnerable group, it is judged by the effect it would have on  
a reasonable consumer.”).

27 Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008).

1 Under the reasonable consumer standard, a plaintiff must “show that ‘members of  
2 the public are likely to be deceived.’” Freeman, 68 F.3d at 289 (quoting Bank of the W. v.  
3 Superior Court, 2 Cal. 4th 1254, 1267 (1992)). “‘Likely to deceive’ implies more than a  
4 mere possibility that the advertisement might conceivably be misunderstood by some few  
5 consumers viewing it in an unreasonable manner.” Lavie, 105 Cal. App. 4th at 508.  
6 Rather, the reasonable consumer standard adopts the perspective of the “ordinary consumer  
7 acting reasonably under the circumstances.” Id. at 512. The reasonable consumer need  
8 not be “exceptionally acute and sophisticated.” Id. at 509 (citation omitted). To the  
9 contrary, questions of judgment calling for the perspective of a reasonable consumer are  
10 “determined in the light of the effect [such a question] would most probably produce on  
11 ordinary minds.” Id. (citation omitted).

12 The “primary evidence in a false advertising case is the advertising itself.” Brockley  
13 v. Moore, 107 Cal. App. 4th 86, 100 (2003). The Ninth Circuit has recognized that the  
14 question of whether advertising materials are deceptive to a reasonable consumer “will  
15 usually be a question of fact not appropriate for decision” at the pleading stage. Williams,  
16 552 F.3d at 938. However, actions may be dismissed under the reasonable consumer test  
17 when “the advertisement itself [makes] it impossible for the plaintiff to prove that a  
18 reasonable consumer was likely to be deceived.” Id. at 939; see also Ebner v. Fresh, Inc.,  
19 838 F.3d 958, 965 (9th Cir. 2016) (affirming dismissal of deceptive advertising claims  
20 where the plaintiff’s “claim that the reasonable consumer would be deceived” was “not  
21 plausible”); Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1162 (9th Cir. 2012)  
22 (affirming dismissal of false advertising suit where advertising contained no literally false  
23 statements, and plaintiff’s theory for how advertising was misleading “defie[d] common  
24 sense”); Martinez-Leander v. Wellnx Life Scis., Inc., No. CV 16-08220 SJO (Ex), 2017  
25 WL 2616918, at \*7 (C.D. Cal. Mar. 6, 2017) (dismissing deceptive advertising claims  
26 based on nonfunctional slack fill where plaintiff “no reasonable consumer could have been  
27 misled” by product packaging).

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1                   **2. Section 12606**

2           Macaspac’s UCL claim is partially predicated on Henkel’s alleged violation of  
3 Business and Professions Code § 12606(b). That provision provides:

4           No container shall be made, formed, or filled as to be misleading. A container  
5 that does not allow the consumer to fully view its contents shall be considered  
6 to be filled as to be misleading if it contains nonfunctional slack fill. Slack  
7 fill is the difference between the actual capacity of a container and the volume  
8 of product contained therein. Nonfunctional slack fill is the empty space in a  
package that is filled to substantially less than its capacity for reasons other  
than any one or more of [fifteen specified safe harbor exceptions].

9 Id.

10           Section 12606 furthers the legislative “goal of providing the consumer with accurate  
11 information in the form of the packaging about the quantity of contents and facilitates value  
12 comparisons.” Hobby Indus. Ass’n of Am., Inc. v. Younger, 101 Cal. App. 3d 358, 366  
13 (1980). The statute “prohibits all . . . nonfunctional slack fill packaging whether or not  
14 there is other proof of deception or fraud.” Id. at 364. Accordingly, when a plaintiff brings  
15 a claim under the “unlawful” prong of the UCL predicated on a violation of § 12606(b),  
16 the “only defense available is that the conduct is not unlawful within Section 12606,” id.  
17 at 372, either because the container allows “the consumer to fully view its contents,” Cal.  
18 Bus. & Prof. Code § 12606(b), or because the slack fill is permissible under one of the  
19 statute’s safe harbor exceptions. Younger, 101 Cal. App. 3d at 372.

20                   **3. Application to Macaspac’s Claims**

21           Henkel argues that Macaspac cannot maintain a UCL claim predicated on a  
22 § 12606(b) violation because the Purex bottles permit consumers to fully view the bottles’  
23 contents. (Doc. No. 24-1 at 9.) Relatedly, Henkel argues that the balance of Macaspac’s  
24 claims must fail because no reasonable consumer could be deceived by the Purex  
25 packaging, which accurately reports the weight of the product contained in each bottle. (Id.  
26 at 13.) Macaspac argues that: (i) she has stated a § 12606(b) claim because the Purex  
27 bottles are not fully transparent; and (ii) a reasonable consumer could be misled by the  
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1 bottles' size into thinking that the weight reported on the label is equivalent to an amount  
2 approximately the size of the bottle, and thus a reasonable consumer could be misled into  
3 thinking that the Purex bottles contained more product than they actually did. (Doc. No.  
4 30 at 5, 7–9.)

5 After reviewing the parties' submissions, the Court agrees with Henkel that no  
6 reasonable consumer could be deceived as to the amount of product contained in the Purex  
7 bottles. The parties attached several photographs of the Purex bottles Macaspac purchased  
8 to their respective requests for judicial notice.<sup>2</sup> (See Doc. Nos. 24-2 Ex. A, 30-4.)  
9 Although the bottles depicted in the photographs differ somewhat,<sup>3</sup> each bottle is a cylinder  
10 that contains a roughly 1-2 inch transparent band along the lower part of the bottle's  
11 exterior, and each bottle's bottom is fully transparent. (Id.) Using the transparent band  
12 and bottom, a consumer can fully see the bottle's contents—including the slack fill  
13 inside—by turning the bottle on its side and looking in through the bottom. (Doc. No. 24-  
14 2 PageID 499.) Moreover, a consumer can also view the bottles' contents by opening the  
15 lid without altering the packaging or damaging the product. (Id. PageID 500; Doc. No. 30-  
16 4 PageID 603.)

17 After viewing the Purex bottles, two conclusions are readily evident. First, the  
18 bottles do not violate § 12606(b) because they “allow the consumer to fully view [their]  
19 contents.” Although Macaspac stresses that the bottles are mostly non-transparent, (Doc.  
20 No. 30 at 5), § 12606(b) does not require packaging to be fully transparent as long as it  
21 allows consumers “to fully view its contents.” The Purex bottles are entirely consistent  
22 with the statute's core purpose “of providing the consumer with accurate information in  
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25 <sup>2</sup> The Court encloses representative examples of these photographs with this Order. The Court also  
26 notes that the parties provided examples of the Purex bottles for the Court to review at the June 4, 2018  
27 hearing.

28 <sup>3</sup> Specifically, the bottles photographed by Henkel show a transparent band across the middle and  
sides, while this band does not appear on the bottles photographed by Macaspac (although it is apparently  
present in the bottles pictured in the complaint). The Court assumes that Macaspac's photographs  
accurately represent the bottles in dispute.



1 the form of the packaging about the quantity of contents and facilitat[ing] value  
2 comparisons.” Younger, 101 Cal. App. 3d at 366. Accordingly, Macaspac cannot maintain  
3 a claim under the UCL’s unlawful prong predicated on a violation of § 12606(b).

4 Second, no reasonable consumer could find the Purex bottles deceptive. “No  
5 reasonable consumer expects the overall size of the packaging to reflect precisely the  
6 quantity of product contained therein.” Bush v. Mondelez Int’l, Inc., No. 16-cv-02460-RS,  
7 2016 WL 5886886, at \*3 (N.D. Cal. Oct. 7, 2016); accord Ebner, 838 F.3d at 967. While  
8 excessive slack fill may sometimes prove deceptive in products with non-transparent  
9 packaging despite accurate labeling indicating the product’s weight, see, e.g., Escobar v.  
10 Just Born Inc., CV 17-01826 BRO (PJWx), 2017 WL 5125740, \*9 (C.D. Cal. June 12,  
11 2017), no person could reasonably expect a bottle to be full or nearly full when they can  
12 look inside and see that it is not. Here, the Purex bottles allowed consumers to see their  
13 contents either by looking through the transparent bottom or unscrewing the lid, and also  
14 accurately reported the weight of the crystals inside. Reasonable consumers would know  
15 roughly how much product they were receiving when purchasing these bottles.

16 Because the bottles themselves make “it impossible for [Macaspac] to prove that a  
17 reasonable consumer was likely to be deceived,” Henkel is entitled to judgment as a matter  
18 of law on Macaspac’s UCL, FAL, and CLRA claims. Williams, 552 F.3d at 939.

### 19 **B. Leave to Amend**

20 Macaspac requests leave to amend her complaint. (Doc. No. 30 at 17.) However,  
21 leave to amend should be denied when it would be futile—i.e., “the complaint could not  
22 be saved by any amendment.” See, e.g., Curry v. Yelp Inc., 875 F.3d 1219, 1228 (9th Cir.  
23 2017) (citation and quotation marks omitted). No amount of additionally pleaded facts  
24 could change the features of the Purex bottles that render them non-deceptive. The Court  
25 accordingly denies leave to amend and dismisses the complaint with prejudice.


### 26 **Conclusion**

27 For the foregoing reasons, the Court concludes that: (i) the Purex bottles do not  
28 violate § 12606(b); and (ii) no reasonable consumer could be deceived or misled by the

1 bottles into thinking that they were purchasing more product than the bottles actually  
2 contained. Because these conclusions entitle Henkel to judgment as a matter of law, the  
3 Court grants Henkel's motion for judgment on the pleadings, denies Macaspac's motion  
4 for class certification as moot, and directs the Clerk of the Court to enter judgment in favor  
5 of Henkel.

6 **IT IS SO ORDERED.**

7 DATED: June 4, 2018

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9 MARILYN L. HUFF, District Judge  
10 UNITED STATES DISTRICT COURT  
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