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NESTLÉ USA, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JADE THOMAS and CAREY HOFFMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

NESTLÉ USA, INC.; FERRARA CANDY COMPANY, and DOES 2 through 10, inclusive,

Defendants.

Case No. BC649863

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION, AND FOR A NO-MERITS DETERMINATION RE CLRA CLAIM; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[*Filed concurrently with Declaration of Dale J. Giali; Declaration of Dr. Duncan Cameron; and Separate Statement of Undisputed Facts*]

Department: 1

Hearing Date: June 9, 2021
Hearing Time: 10:30 a.m.
Judge: Hon. Daniel J. Buckley
Date Action Filed: February 9, 2017

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 9, 2021, at 10:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Daniel J. Buckley, in Department 1 of the above-captioned court, located at 312 N. Spring St., Los Angeles, CA 90012, defendants Ferrara Candy Company and Nestlé USA, Inc. will and hereby do move, pursuant to California Code of Civil Procedure section 437c, for summary judgment in defendants' favor on plaintiffs Jade Thomas and Carey Hoffman's third amended complaint or, in the alternative, summary adjudication in defendants' favor on each claim therein and on the claimed injunctive relief remedy, and for a no-merits determination on plaintiffs' Consumers Legal Remedies Act ("CLRA") claim, on the grounds that there is no material issue of disputed fact and defendants are entitled to judgment as a matter of law. Specifically:

1. Defendants are entitled to a no merits determination in their favor as to plaintiffs' first cause of action for violation of the California Consumers Legal Remedies Act, Cal. Civil Code § 1750, *et seq.* (the "CLRA") because plaintiffs have no evidence to establish deception, reliance, and injury, as required for a claim under the CLRA. Alternatively, the claim is expressly preempted by 21 U.S.C. § 343-1(a)(4) & 21 U.S.C. § 343(d), and defendants therefore have a complete defense to this cause of action.

2. Defendants are entitled to summary adjudication in their favor as to plaintiffs' second cause of action for violation of California's False Advertising Law, Business and Professions Code § 17500, *et seq.* (the "FAL") because plaintiffs have no evidence to establish deception, reliance, and injury, as required for a claim under the FAL. Alternatively, the claim is expressly preempted by 21 U.S.C. § 343-1(a)(4) & 21 U.S.C. § 343(d), and defendants therefore have a complete defense to this cause of action.

3. Plaintiffs' third cause of action for violation of the California's Unfair Competition Law, Business and Professions Code § 17200, *et seq.* (the "UCL") fails because plaintiffs have no evidence to establish deception, reliance, and injury, as required for a claim under the UCL. Alternatively, the claim is expressly preempted by 21 U.S.C. § 343-1(a)(4) & 21 U.S.C. § 343(d), and defendants therefore have a complete defense to this cause of action.

4. Plaintiffs' fourth cause of action for common law fraud fails because plaintiffs have no evidence to establish deception, reliance, and damages as required for their claim of fraud. Alternatively, the claim is expressly preempted by 21 U.S.C. § 343-1(a)(4) & 21 U.S.C. § 343(d), and defendants therefore have a complete defense to this cause of action.

5. Plaintiffs' fifth cause of action for intentional misrepresentation fails because plaintiffs have no evidence to establish deception, reliance, and damages as required for their claim of intentional misrepresentation. Alternatively, the claim is expressly preempted by 21 U.S.C. § 343-1(a)(4) & 21 U.S.C. § 343(d), and defendants therefore have a complete defense to this cause of action.

6. Plaintiffs' sixth cause of action for negligent misrepresentation fails because plaintiffs have no evidence to establish deception, reliance, and damages as required for their claim of negligent misrepresentation. Alternatively, the claim is expressly preempted by 21 U.S.C. § 343-1(a)(4) & 21 U.S.C. § 343(d), and defendants therefore have a complete defense to this cause of action.

7. Defendants are entitled to summary adjudication on plaintiffs' injunctive relief claims because plaintiffs have no evidence that they are entitled to injunctive relief.

This motion is based on this notice of motion and motion, the attached memorandum of points and authorities, the declarations of Dale J. Giali and Duncan Cameron, and the separate statement of undisputed material facts filed concurrently, along with all other matters of which the Court may take judicial notice, the oral argument of counsel, pleadings and other documents already on file with the Court, and all other evidence and matters that may be presented as part of this matter.

Dated: October 16, 2020

MAYER BROWN LLP
Dale J. Giali
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BY: _____
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Attorneys for Defendants
FERRARA CANDY COMPANY AND
NESTLÉ USA, INC.

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I. INTRODUCTION

Plaintiffs Jade Thomas and Carey Hoffman purchased "concession box" packages of Raisinets, Buncha Crunch, and Butterfinger Bites candy. As they readily acknowledge, the product labels state exactly how much candy was in the box – in ounces (3.5) and grams (99.2), as well as cups (about ½ cup) or, for Butterfinger Bites, pieces (about 16 pieces). They do not dispute that they received the labeled amount of candy at the posted price. Nevertheless, plaintiffs contend that they thought they would be getting "more" candy because they assumed that the package would be "filled to the very top" and felt deceived when they realized there was empty space between the top of the candy and the top of the box ("slack-fill"). As demonstrated below, plaintiffs' idiosyncratic claims about slack-fill fail for many reasons.

First, plaintiffs' position that they expected the candy boxes to be *entirely full* of candy is unreasonable and unbelievable. It is not plausible that plaintiffs, who routinely expect slack-fill in other food packages, believed that these candy boxes were the exception to this rule or that they would not have realized that the candy boxes weren't entirely full when they picked them up and could feel and hear the candy moving around in the box indicating that there was empty space. Indeed, plaintiffs' own experts contradict plaintiffs' assertion that consumers expect the candy boxes to be completely full because they concluded, based on a survey, that consumers expect the candy boxes to contain about 35% slack-fill. That result comes as no surprise because it is consistent with the long line of cases rejecting the argument that consumers are deceived by the existence of slack-fill in food packages:

> [I]t is not plausible that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled into thinking the container would be filled to the brim with [p]roduct.

Kennard v. Lamb Weston Holdings, Inc., 2019 WL 1586022, at *5 (N.D. Cal. Apr. 12, 2019) (internal quotation marks and citation omitted).

Moreover, plaintiffs testified that they did not even think about, let alone rely on, how full the candy box was when making their purchasing decision. To the contrary, plaintiffs purchased the candy for numerous other reasons, mostly for taste, to enjoy a treat, and the low price.

Consistent with the above, plaintiffs also did not suffer an injury as a result of slack-fill.

Attempting to align themselves with the damage theory in other false advertising class actions, plaintiffs allege that they paid a "price premium" for the candy because of slack-fill. But that damage model requires plaintiffs to prove that the true market price of the same amount of the same candy would be less if there was no slack-fill. Not only is that theory completely illogical, the model plaintiffs employed to do so (even setting aside its poor design and fundamental flaws) is incapable of calculating a market price because it relies solely on a conjoint survey. Instead, the evidence overwhelmingly establishes that, far from premium pricing, concession box pack sizes are a "value" proposition that are the least expensive per ounce package sold by defendants.

Finally, plaintiffs' claims parallel Food & Drug Administration ("FDA") slack-fill regulations, which expressly preempt any non-identical state law requirements. FDA slack-fill regulations do not prohibit all slack-fill; they only prohibit *nonfunctional* slack-fill. Slack-fill that is deemed to be *functional* by FDA, i.e., it is present for one of six reasons enumerated by FDA, is lawful. Because any slack-fill present in the products is *functional* – and plaintiffs have no evidence otherwise – plaintiffs' claims are preempted as challenging lawful functional slack-fill.

For these reasons, and as more fully set forth below, the Court should grant this motion for summary judgment and enter judgment for defendants.

II. FACTUAL BACKGROUND

A. The Challenged Products

At the time plaintiffs purchased the products and filed this lawsuit, Nestlé USA, Inc. manufactured and distributed the challenged candy products: "concession boxes" of Milk and Dark Chocolate Raisinets, Buncha Crunch, Butterfinger Bites, Rainbow Nerds, SweeTarts (Mini Chewy), Spree, Gobstopper, and SnoCaps. TAC, ¶ 1. As of March 31, 2018, Ferrara Candy Company and certain of its affiliates acquired the challenged products from Nestlé and (as of that date) manufactures and sells the challenged products.

B. Plaintiffs' Allegations

Plaintiffs allege they were deceived as to the amount of candy they were purchasing because there was slack-fill in the candy boxes and the box was not filled to the very top with candy. TAC, ¶¶ 2, 4, 9, 62, 64, 173, 181, 189. Plaintiffs contend that the candy boxes were only

52% full of candy and allege they contained 48% slack-fill, *all* of which was nonfunctional, and in violation of FDA regulations. TAC, ¶¶ 2-3, 7, 9, 19, 21-14, 93, 114, 134-137, 151, 154, 170, 181. Plaintiffs do not dispute that the packaging clearly disclosed the amount of candy in the box in measurements they understand – ounces and grams, as well as cups, tablespoons or pieces – *or* that the box contained the net weight stated. SSUF 1-2, 70-71, 139-140.

1. Plaintiff Jade Thomas

Jade Thomas ("Thomas") alleges that she made her one and only purchase of a single box of Butterfinger Bites and a single box of Buncha Crunch at a movie theater in 2016. SSUF 3, 72, 141. Thomas purchased the candy for very specific reasons: at the request of her son (who went with her to the movie), to have something they could share, because they liked chocolate snacks, because she enjoyed the taste of Butterfinger and Crunch bars, and to have something sweet to enjoy during the movie. SSUF 4, 73, 142. Thomas confirmed that she could not recall any other reasons for her candy purchase and these were her major reasons for buying the candy. *Id.*, 5, 74, 143. *After* taking a break during the deposition and conferring with her counsel, Thomas tried to amend her answer to add that the size of the box was also a factor. *Id.,* 6, 75, 144. She decided to buy the candy before she was aware of how much it would cost. *Id.,* 7, 76, 145.

Though the amount of candy in the box *was not even a question in her mind* at the time of purchase – and admitting that she knows that slack-fill in food packages is routine and does not deceive her – Thomas was disappointed in the amount she received. *Id.,* 8-10, 77-79, 146-148. Thomas admits that defendants never represented that the box would be full; she just assumed that *these* boxes of candy (as opposed to other food products) *would be full* to the top. *Id.,* 11-12, 80-81, 149-150. Thomas claims the boxes she received were half empty. TAC, ¶ 2. At the time of her purchase, Thomas was not aware of FDA's slack-fill regulations or the difference between functional and nonfunctional slack-fill. SSUF 13, 82, 151. She also admits that she cannot tell the difference between functional and nonfunctional slack-fill; she just thought there was too much space in the box. *Id.,* 14, 83, 152.

2. Plaintiff Carey Hoffman

Shortly before filing this lawsuit, and despite never having purchased Raisinets before,

plaintiff Hoffman made three separate purchases of Milk Chocolate Raisinets and Dark Chocolate Raisinets at Ralphs and CVS, paying approximately $1 per box. *Id.,* 15, 84, 153. When she saw that Raisinets were on sale she "grabbed it and threw it in the basket." *Id.,* 16, 85, 154. Her decision to purchase was spontaneous and by the time she picked up the box, she had already decided to purchase it. *Id.*, 17, 86, 155. "I know Raisinets, and it was a dollar, so I bought em." *Id.*, 18, 87, 156. Hoffman's principal reason for purchasing Raisinets was price. *Id.*, 19, 88, 157. The additional reasons she bought it were that it contained raisins, she wanted chocolate, she liked the fact that the Dark Chocolate Raisinets contained dark chocolate, and she thought Raisinets were a healthier candy option. *Id.*, 20, 89, 158 . Like Thomas, Hoffman confirmed that these were all the material reasons she bought the product and she did not remember any other reasons for her purchase. *Id.*, 21, 90, 159. And, also like Thomas, *after* conferring with her attorney, Hoffman attempted to change her testimony to say that another factor in her purchasing decision was the size of the box. *Id.*, 22, 91, 160.

Hoffman expected the box to be filled to the top with candy, but found that it was only half full. *Id.*, 23-24, 92-93, 161-162. She saw the slack-fill as soon as she opened the box. *Id.*, 25, 94, 163. Hoffman acknowledges that she paid the right price for the amount of candy received (3.5 oz.) and that if the box had had more Raisinets, it would have cost more. *Id.*, 26, 95, 164.

C. Slack-Fill Regulatory Background

Food and its packaging are among the most pervasively regulated consumer products. Slack-fill in food packages is regulated by FDA through the federal Food Drug & Cosmetic Act ("FDCA"). *See* 21 U.S.C. § 343(d); 21 C.F.R. § 100.100. California has adopted its own Fair Packaging and Labeling Act that is identical to federal law. Cal. Bus. & Prof. Code § 12606.2(c)(1)-(6). Slack-fill in food packages is permitted and *not* considered to be misleading if it fits within any of FDA's six enumerated reasons for slack-fill to be *functional*: (1) protection of the contents of the package; (2) requirements of the machines used for enclosing the contents in such package; (3) unavoidable product settling during shipping and handling; (4) the need for the package to perform a specific function; (5) the fact that product is packaged in a reusable or gift container; and (6) inability to increase level of fill or to further reduce the size of the package. *See*

21 C.F.R. 100.100(a)(1)-(6); Cal. Bus. & Prof. Code § 12606.2(c)(1)-(6). Only slack-fill that does not fit within one of these permissible reasons is considered nonfunctional and, therefore, misleading or in violation of FDA regulations. *Id.* The FDCA expressly preempts state requirements on slack-fill that are not identical to FDA's slack-fill regulations, which means that consumer protection claims like those asserted here can only be based on allegedly deceptive *nonfunctional* slack-fill. 21 U.S.C. § 343-1(a)(4) & 21 U.S.C. § 343(d).

D. The Slack-Fill In The Candy Boxes Is Functional

Concession boxes of candy are considered a "value" pack and represent the least expensive way, in terms of price per ounce, for consumers to buy the candy products. SSUF 27, 96, 165. Concession boxes are predominantly sold by discount retailers like Walmart, Target, and Dollar Stores and grocery stores, which price the concession boxes at or about $1.00. *Id.*, 28, 97, 166. Nestlé was a distant fourth in the confectionery product category; it was a market follower on price, not a market leader. *Id.*, 29, 98, 167. That means that Nestlé was constrained to manufacture its concession boxes so that it could be priced to retailers such that retailers could sell it to consumers for $1.00. *Id.*, 30, 99, 168. Because of the value pricing, there is a very low profit margin on these products and Nestlé relied on volume to make them financially viable. *Id.*, 31, 100, 169. Everything Nestlé did in connection with the packaging of the products was designed to ensure that this pack size could continue to be sold by its customers (retailers) at a value price. *Id.*, 32, 101, 170.

Nestlé manufactured and separately filled the concession boxes on high-speed lines (filling at a rate of 60 boxes per minute) in factories in Burlington, Wisconsin, and Franklin Park, Bloomington, and Itasca, Illinois. *Id.*, 33, 102, 171. The filling/packaging machinery in these factories is more than fifty-five years old. *Id.*, 34, 103, 172. Filling/packaging is a highly mechanized, quick and precise operation. The boxes for Raisinets and Buncha Crunch are positioned on their vertical end and a pre-measured amount of candy is dropped into the top of the open box as it travels underneath at high speed. *Id.*, 35, 104, 173. The height of the box – which doubles as a sort of funnel – is required to ensure that the product does not spill out during filling because the machine cannot be lowered further and product is actually still falling in the box as it

passes down the line. *Id.*, 36, 105, 174. The height of the box is required to accommodate the filling process; not the height of the product after it has completely settled into the box. *Id.*, 37, 106, 175. The boxes cannot be made more narrow as the opening would be too small for the candy to fall into the box at high speed. *Id.*, 38, 107, 176. Because of the nature of the product and machinery, Butterfinger Bites is packaged in a clamshell box that lays horizontally with the top hinging open completely. *Id.*, 44, 113, 182. The pre-weighted amount of candy is dropped into the bottom half of the box, the product is adjusted in the box by hand as it travels down the line, and then the top of the box is folded down and the box is sealed. *Id.*

Nestlé also used the same size box for candy products that were filled on the same line because doing so meant that the cartridges holding the boxes do not need to be changed between filling runs, which increased efficiency and decreased down-time. *Id.*, 40-42, 109-111, 178-180. In addition, the individual pieces of Raisinets and Buncha Crunch are irregularly sized and shaped. *Id.*, 45, 114, 183. Moreover, because Raisinets use fresh raisins, the size and shape of the individual pieces can vary significantly depending on the harvest or season. *Id.*, 46, 115, 184. Accordingly, the boxes for these products must be tall enough to accommodate a varying geometry and size of products during filling. *Id.*, 47, 116, 185. Furthermore, these products have a re-sealable side dispenser tab, which won't operate property if candy is filled over the tab. *Id.*, 48-49, 117-118, 186-187.

Although Nestlé looked into the issue a number of times, it was not possible for Nestlé to reduce the size of the candy boxes and continue to fill the products using Nestlé's existing filling machinery without significantly slowing down the filling line. *Id.*, 39, 108, 177. Otherwise, significant capital expenditures would be required to update the machinery. *Id.* Slowing down the line would dramatically decrease efficiency, thereby increasing production costs such that Nestlé could no longer sell the concession boxes at a value price. *Id.*, 43, 112, 181.

All of the above establishes that the slack-fill in the challenged candy boxes is functional.

III. LEGAL ARGUMENT

A. Standard For Summary Judgment

On summary judgment, the defendant may "point to the absence of evidence to support

the plaintiff's case," or present affirmative evidence negating an essential element of plaintiff's claim. *Leslie G. v. Perry & Assoc.*, 43 Cal. App. 4th 472, 482 (1996); *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 334-35 (2000). A defendant need only "show that the plaintiff does not possess needed evidence . . . [and] that the plaintiff cannot reasonably obtain needed evidence." *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 854 (2001).

Once defendant has done so, the "plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact on the merits of defendant's showing." *Sangster v. Paetkau*, 68 Cal. App. 4th 151, 162-63 (1998). "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial." *Id.* at 163; *Rochlis v. Walt Disney Co.*, 19 Cal. App. 4th 201, 219 (1993) (courts should summarily dispose of meritless litigation based on nothing more than a "smoke and mirrors" presentation), *disapproved of on other grounds by Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238 (1994). If the plaintiff cannot carry the burden of producing substantial admissible evidence, then the defendant is entitled to judgment as a matter of law. *Saelzler v. Advanced Grp. 400*, 25 Cal. 4th 763, 780-81 (2001). The same standards apply to no merit determinations for CLRA claims. *Princess Cruise Lines, Ltd. v. Super. Ct*, 179 Cal. App. 4th 36, 42 (2009).

B. <u>All Of Plaintiffs' Claims Fail Because They Suffered No Cognizable Injury</u>

Plaintiffs' claims fail because they cannot show with substantial evidence that they were injured by slack-fill. Without such proof, they lack standing to pursue their claims under the UCL, FAL, and CLRA. Cal. Bus. & Prof. Code § 17204; *Bower v. AT&T Mobility, LLC*, 196 Cal. App. 4th 1545, 1555-56 (2011); *Gutierrez v. Carmax Auto Superstores Cal.*, 19 Cal. App. 4th 1234, 1263 (2018) (plaintiff must suffer damage to have standing under the CLRA); *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 700 (2006), *as modified on denial of reh'g* (Jan. 31, 2006) (a failure to provide substantial evidence supporting restitution is fatal to a plaintiff's claims because the Court cannot fashion an award unsupported by evidence).

Plaintiffs contend that a varying array of "price premiums" of about 20% of the purchase price are imbedded into the purchase price of the candy as a result of slack-fill (empty space in the box) and they are entitled to restitution of that price premium. SSUF 55, 124, 193. But, a price

premium damage model requires plaintiffs to demonstrate with "substantial evidence" that *the actual market value* of the challenged product as received is less than the price he or she paid for it. *See In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *8 (N.D. Cal. Dec. 15, 2014) (restitution in false advertising cases is properly calculated by "taking the difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices"); *Lanovaz v. Twinings N. Am., Inc.*, 2014 WL 1652338, at *6 (N.D. Cal. Apr. 24, 2014) (same). As set forth below, plaintiffs cannot demonstrate that the true market price of the candy products is 20% less because not only is Drs. Lenzo and Bechtel's ("L-B") "Box Size" conjoint survey incapable of measuring the market value of the products, their damage analysis is based on illogical and unproven factual assumptions, and it fails to take into account the market realities of the sale and pricing of the products. *See* Cameron Rpt.

1. Plaintiffs' Damage Model Is Incapable Of Calculating The Market Price Of The Challenged Products

Plaintiffs' price premium model is incapable of measuring the market price of the candy products because it is based solely on a conjoint survey (the "box size" conjoint). SSUF 53-54, 122-123, 191-192. Market price is the intersection of a consumer's willingness-to-pay *and* a seller's willingness-to-sell (i.e., price equilibrium). In order to capture the true market price, a plaintiffs' price premium methodology must account for a seller's ability to, and willingness to, sell, as well as other "marketplace realities that would affect product pricing," i.e., it must "reflect supply-side considerations." *Zakaria v. Gerber Prod. Co.*, 755 F. App'x 623, 624–25 (9th Cir. 2018). A conjoint survey, however, only measures consumer willingness-to-pay, i.e., it only considers half of the equation and therefore cannot calculate the market price. *See In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1119-20 (C.D. Cal. 2015) (a conjoint survey is incapable of determining market price because it "ignores the price for which NJOY is willing to sell its products, what other e-cigarette manufacturers say about their products, and the prices at which those entities are willing to sell their products.").

In *Zakaria*, plaintiff used a conjoint survey to measure the alleged decreased consumer

willingness-to-pay associated with the challenged label statement. The Ninth Circuit affirmed the district court's grant of summary judgment for failure to show damage or injury because it found that that plaintiff's damage model – a conjoint survey – was incapable of measuring *market price*:

> Dr. Howlett's conjoint analysis did not reflect market realities and prices for infant formula products. Dr. Howlett's conjoint analysis showed only how much consumers subjectively valued the 1st and Only Seal, not what had occurred to the actual market price of Good Start Gentle with or without the label. Thus, regardless of whether consumers were willing to pay a higher price for the labelled product, the expert's opinion did not contain any evidence that such higher price was actually paid; hence, no evidence of restitution or actual damages was proffered.

755 F. App'x at 624-45. Put another way:

> By focusing only on the consumers' perceived value of one attribute, the conjoint model ignored the market value of the entire product without the misrepresented attribute. This does not measure restitution, which is based on market value paid minus the value of the product received discounted for any misrepresented health benefit. To be entitled to restitution, however, plaintiffs must present evidence of the market value of the product without the allegedly fraudulent representation.

Brown v. The Am. Tobacco Co., Inc., 2013 WL 7154428, at *6 (Cal. Super. Ct. Sep. 23, 2013), *affirmed* 240 Cal. App. 4th 779, 787 (2015); *see also Apple, Inc. v. Samsung Elecs. Co.*, 2014 WL 976898, at *11-12 (N.D. Cal. Mar. 6, 2014). ("[T]he [conjoint] survey leaves the Court with no way to compare Dr. Hauser's willingness to pay metrics – which relate only to demand for the patented feature – to the market price of the infringing devices, which reflects the real-world interaction of supply and demand for infringing and non-infringing devices"); *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *4-7 (C.D. Cal. Dec. 18, 2014) ("The Court has found no case holding that a consumer may recover based on consumers' willingness to pay irrespective of what would happen in a functioning market (i.e. what could be called sellers' willingness to sell)."); *Mohamed v. Kellogg Co.*, 2019 WL 1330920, at *3 (S.D. Cal. Mar. 23, 2019) (conjoint survey cannot properly calculate a price premium because it does not account for the supply and market factors that influence price).

L-B's damage model because it is based on a conjoint survey admittedly only measures a consumer's willingness-to-pay and does not account for the supply side/seller's willingness-to-sell. SSUF 56, 125, 194; Cameron Rpt., ¶¶ 6, 28-37, 42-56. As a matter of law, it cannot demonstrate an actual market price and, in turn, cannot demonstrate that plaintiffs suffered injury.

2. Logic And Supply Side Considerations Demonstrate Why L-B's Conjoint Based Damage Model Cannot Establish A Price Premium

Plaintiffs must prove with "substantial evidence" that they were injured in the amount of the price premium percentages calculated by L-B. Applying those percentages to plaintiffs' actual purchases means: (i) Hoffman must prove that the true market price of Raisinets is $.80 instead of $1.00, and (ii) Thomas must prove that the true market price of Buncha Crunch and Butterfinger Bites is $3.49 and $3.46, respectively, and not $4.00. Plaintiffs cannot do so because the "substantial evidence" demonstrates the opposite, namely, that there is no price premium, much less a significant price premium, caused by slack-fill in the candy boxes.

First, plaintiffs received exactly what they bargained for: 3.5 oz. of Butterfinger Bites and Raisinets or 3.2 oz. of Buncha Crunch. The price premium model is commonly used in false advertising cases to measure the harm suffered by a consumer who received a product that did not have the advertised attributes (e.g., "all natural" "organic," or "no preservatives"). For example, if orange juice is falsely advertised as being "organic" when it is not, the price premium would be the difference between the market price of the product as advertised (organic orange juice) and what was received (non-organic orange juice). Here, this concept is meaningless because there is absolutely no difference in quality or quantity between the candy product "as advertised" and "as received." Indeed, plaintiffs admit that if the box contained "more" than the labeled amount of candy, they would have had to pay more for the extra candy. SSUF 26, 96, 164.

Second, it is not feasible for defendants to manufacture and sell the same amount of candy for 20% less than its current sales price. For starters, because the candy itself would be identical – the *same* amount of the *same* candy – the costs associated with making the candy would remain constant. Moreover, Nestlé's manufacturing process – using fifty-five year old equipment on a high-speed filing line that relies on using the same or similar packaging for all candy products – unavoidably requires slack-fill. Packaging the candy with no slack-fill is not feasible and a reduction in slack-fill would result in increased manufacturing costs (which would necessarily be borne by the consumer) because of the lack of efficiency, and the requirement that new packaging, equipment, and manufacturing lines would need to be developed. *See* Section II.D.,

supra. Plaintiffs neither grapple with these increased manufacturing costs nor demonstrate how it is economically feasible that the *true* market price of the identical product is approximately 20% less than the current price based solely on box size – especially where manufacturing costs remain the same or increase. Significantly, plaintiffs also have no response to the fact that concession boxes are "value" packs that are sold in most retail sales channels for approximately $1.00 per box (the *least expensive* price-per-ounce pack-size). SSUF 27-28, 96-97, 165-166.

Third, L-B's conclusion, based on the "Box Size" conjoint, that there is a decreased willingness-to-pay for a smaller box of candy with no slack-fill is contradicted by their own evidence. The "Box Size" conjoint only measured a decreased willingness-to-pay for a smaller box because consumers in that survey thought they were getting less candy than the larger box. Specifically, in that survey consumers were shown a larger and smaller box (at varying price points) of candy and asked which product they preferred. They were not told what the fill level was of the candy boxes. SSUF 54, 123, 192. L-B concluded from that exercise that consumers had a reduced willingness-to-pay for smaller boxes, which then translated to their opinion that consumers would be willing to pay less for the same amount of candy in a smaller box. But that conclusion is illogical because L-B concluded that consumers expect candy boxes, *including the smaller box shown in their survey*, to contain 35% slack-fill. SSUF 51, 120, 189. Accordingly, the consumers in their survey would have expected both the smaller box *and* the larger box to be only two-thirds full of candy. They would not have expected the smaller box to be completely full of candy and the larger box to be only two-thirds full. That means, respondents thought they were getting significantly less candy in the smaller box than they were in the larger box. Accordingly, the results of this survey do not support the conclusion that box size, as opposed to the amount of candy, drove consumer willingness-to-pay. *See* Cameron Rpt. at ¶ 8, 24-27.

Finally, L-B's matrix of price premiums is inconsistent with how food products (like the candy at issue) are priced at retail stores. The retail sales price paid by consumers is set by retailers, not by defendants.[1] There is no evidence that retailers or movie theaters would be

[1] Generally, California law prohibits manufacturers like defendants from dictating the prices at which retailers resell their products.

willing to sell Nestlé's candy boxes for a substantially lower price (20% less) than other candy products or that there would be no competitive response by Nestlé's competitors to this price difference. To the contrary, retailers generally sell all brands of similarly-sized concession boxed candy for the same price. SSUF 50, 119, 188. In addition, plaintiffs have no evidence that retailers would be willing to sell various types of Nestlé candy for different prices (i.e., Buncha Crunch for $3.74 and Butterfinger Bites for $3.47) because of the relative space in the box.

Ultimately, plaintiffs' damage model requires the impossible task of proving that even where the underlying manufacturing cost remains identical (or increases), the market price for the same amount of candy with the same attributes would be substantially less (almost 20%) across all retail sales channels, based solely on size of the exterior packaging and amount of interior space. There is simply no evidence to support the conclusion that there is a price premium.

C. Plaintiffs Cannot Establish Causation And Actual Reliance

Plaintiffs' claims (both statutory and common law) also fail because they cannot demonstrate causation and actual reliance.[2] *Kwikset v. Super. Ct.*, 51 Cal. 4th 310, 326 & n. 9 (2011); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1366-67 (2010). Plaintiffs' own testimony establishes that the fill level of the candy in the box did *not* play a "substantial part" in their purchasing decision. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009); *Durell*, 183 Cal. App. 4th at 1362-63; *Pfizer Inc. v. Super. Ct.*, 182 Cal. App. 4th 622, 632–33 (2010); *In re iPhone Application Litig.*, 6 F. Supp. 3d 1004, 1014 (N.D. Cal. 2013). Instead, as plaintiffs admit, a range of other factors were material to their purchasing decision, including their past experience, their taste preference, price, and ingredients. SSUF 4, 19-20, 73, 88-89, 142, 157-158.

Significantly, neither Thomas nor Hoffman stated package size or expectation of fill-level was a reason why they purchased the candy. SSUF 4-5, 19-21, 73-74, 88-90, 142-143, 157-159.

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[2] Plaintiffs are not entitled to a presumption of reliance based on the assertion that the alleged deception was material to consumers. First, a representation cannot be material if the plaintiff personally did not rely on it in making her purchasing decision. *Wilson v. Frito-Lay N. Am., Inc.*, 260 F. Supp. 3d 1202, 1209 (N.D. Cal. 2017). Moreover, plaintiffs have no evidence that the absence of slack-fill was material to reasonable consumers. The only evidence in this case regarding materiality is the survey conducted by defense expert Dr. Ran Kivetz that shows that the existence of slack-fill is *not* material to consumers. SSUF 57, 126, 195.

Hoffman is also a repeat purchaser, which means that she knew before her second and third purchases of Raisinets that the box was not filled to the top with candy. SSUF 15, 84, 153. So she could not have relied on her misconception that the box would be full to the top with respect to her subsequent purchases of Raisinets. And, if fill level was material to her, she would not have purchased Raisinets again. *See Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951, 976 (1997).

Moreover, it is unreasonable for plaintiffs to rely on package size alone to determine how much candy is in the box. Plaintiffs know that packaged food routinely contains slack-fill, they know where on a product label to find the net quantity information, and understand the measurement nomenclature. SSUF 1, 9, 70, 78, 139, 147. Plaintiffs also do not know what makes slack-fill functional under FDA regulations nor can they tell the difference between functional and nonfunctional slack-fill. *Id.* 13-14, 82-83, 151-152. Accordingly, they could not have relied on the absence of nonfunctional slack-fill as opposed to functional slack-fill in purchasing the candy. For these reasons, plaintiffs cannot show reliance and summary judgment should be granted. *See Wilson v. Frito-Lay N. Am., Inc.*, 260 F. Supp. 3d 1202, 1209 (N.D. Cal. 2017); *Major v. Ocean Spray Cranberries, Inc.*, 690 F. App'x 564, 565 (9th Cir. 2017).

D. <u>As A Matter Of Law, Plaintiffs' Theory Of Deception Fails</u>

Plaintiffs' CLRA, FAL, and UCL claims all require plaintiffs to prove that reasonable consumers are likely to be deceived by the challenged 48% slack-fill in the products.[3] "Likely to deceive implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers reviewing it in an unreasonable manner," it requires

[3] Plaintiffs allege that all slack-fill is deceptive because they expected the boxes to be filled to the top with candy. At class certification, plaintiffs presented a completely different theory – that there was a difference between consumers' expected fill-level and the "actual" fill-level of the challenged products. But, that is *not* what the TAC alleges or what plaintiffs detailed in their depositions. Accordingly, plaintiffs' class certification deception theory is irrelevant and cannot save the claims the plaintiffs' actually alleged from summary judgment. *See FPI Dev. Inc. v. Nakashima*, 231 Cal. App. 3d 367, 381 (1991) (complaint governs claims on summary judgment). Regardless, this tortured theory fails because there is no difference between consumer's expectation of slack-fill (approximately 35%) and the percentage of *nonfunctional* (actionable) slack-fill measured (approximately 35%). *See* SSUF 51, 58, 120, 127, 189, 196. Thus, even if plaintiffs' actual allegations and testimony are disregarded, there still is no deceptive slack-fill.

plaintiffs to prove that it is "probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably under the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003); *Colgan*, 135 Cal. App. 4th at 681-82, (a plaintiff is required to "show that members of the public are likely to be deceived").

Under this standard, plaintiffs must prove that reasonable consumers: (i) expected the candy boxes to be filled to the top, and (ii) would be deceived by the existence of *any* slack-fill in the candy boxes. But, as a matter of law, reasonable consumers don't think that way and are not deceived by slack-fill. *See Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1165-66 (2018) (finding that if "a claim of misleading labeling runs counter to ordinary common sense or the obvious nature of the product, the claim is fit for disposition at the demurrer stage of litigation"). Plaintiffs cannot demonstrate that a significant portion of reasonable consumers are deceived by the existence of slack-fill in candy boxes.

1. Reasonable Consumers Are Not Deceived By Slack-Fill

There is no evidence that consumers expect packaged foods, like the challenged candy boxes, to be completely free of slack-fill. Instead, both plaintiffs and their experts confirm that consumers expect slack-fill. SSUF 9, 51-52, 78, 120-121, 147, 189-190. A long line of court decisions going back at least seventy years confirms that, as a matter of law, consumers *expect* food packages to contain slack-fill. *See U.S. v. Cataldo*, 157 F.2d 802 (1st Cir. 1946); *U.S. v. 116 Boxes of Arden Assorted Candy Drops*, 80 F. Supp. 911 (D. Mass. 1948); *U.S. v. 174 Cases of Delson Thin Mints*, 180 F. Supp. 863 (D.N.J. 1960), *aff'd after remand*, 302 F.2d 724 (3d Cir. 1962). As the *Arden* court explained:

> The [FDCA] . . . prohibits the shipment of a package of candy which is in fact so slack-filled as to be misleading . . . . [But] [i]nfantile anticipation is not the test. Rather it is what would be expected by an ordinary person . . . who has been led to expect and desire machine-packing . . . . [F]rom buying various types of five-cent candies, cough drops, and lozenges packed by machine in standard rectangular containers, [the ordinary consumer] *has come to expect some slack or air space.* Indeed, he recognizes that tight packing would often solidify into a mass pieces which he prefers to have separate. It is the expectations of a person who has that common degree of familiarity with our industrial civilization which furnish the standard . . . .

80 F. Supp. at 913 (emphasis added). That same reasoning used in FDA enforcement actions applies equally to consumer class actions, where courts have overwhelmingly found that the mere

existence of slack-fill does not deceive consumers. *Kennard*, 2019 WL 1586022, at *5 (not plausible that consumers are deceived by slack-fill because they think a container is "filled to the brim"); *Ebner v. Fresh, Inc.* 838 F.3d 958, 967 (9th Cir. 2016) ("Because of the widespread nature of . . . [slack-fill], no reasonable consumer expects the weight or overall size of the packaging to reflect directly the quantity of product contained therein."); *Alce v. Wise Foods, Inc.*, 2018 WL 1737750, at *11 (S.D.N.Y. Mar. 27, 2018) ("[C]onsumers may have come to expect significant slack fill in potato chips and other snack products."); *Daniel v. Mondelez Int'l Inc.*, 287 F. Supp. 3d 177, 191 (E.D.N.Y. 2018) (same).

Against this backdrop, plaintiffs' idiosyncratic and unreasonable expectation that these particular candy boxes would contain *zero* slack-fill are insufficient to establish deception based on the "reasonable consumer" standard.

2. Reasonable Consumers Are Not Deceived Because The Label Discloses How Much Candy Is In The Package

Significantly, a reasonable consumer cannot be deceived as to how much candy is in the challenged candy boxes because the label contains multiple statements – in ounces *and* grams, as well as in cups, pieces or tablespoons, and sometimes paired with images of the actual size of the candy pieces – that provide that information. SSUF 1, 70, 139. Those label statements convey the information plaintiffs and the reasonable consumer could use to determine the amount of candy in the box. And, if the amount of candy in the box was material to their purchasing decision, plaintiffs, and the reasonable consumer, knew where to look on a product label to find this kind of information. If that wasn't enough, immediately on picking up the product, plaintiffs, and the reasonable consumer, would also know that the product was not "full to the top" because you can hear and feel the contents moving around in the box. In the face of these label statements, it is unreasonable for plaintiffs to guess how much candy is in the package based solely on the size of the container, and then claim deception because their haphazard guess was wrong.

Plaintiffs' theory of deception – expecting the boxes to be completely *full* and ignoring the label statements that told them *exactly* how much candy was in the box – is incompatible with their own admitted understanding of slack-fill and objective label statements, and certainly

doesn't represent reasonable consumers acting reasonably under the circumstances. That is why courts routinely find that allegations regarding deceptive slack-fill are not viable when the product label tells consumers how much product is in the package. *See Bush v. Mondelez Int'l, Inc.*, 2016 WL 7324990 , at *2 (N.D. Cal. Dec. 16, 2016) (consumers not plausibly deceived when labels disclose the net weight and piece count and consumers expect there to be slack-fill); *Hawkins v. UGI Corp.* 2016 WL2595990, at *3 (C.D. Cal. May 4, 2016) (consumers not deceived by slack-fill where net weight statements are accurate); *Buso v. ACH Food Cos., Inc.* 2020 WL 1929024, at *4 (S.D. Cal. Apr. 20, 2020) ("[I]t is unreasonable for a customer to be deceived as to the amount of product" where it "discloses the product's net weight and the approximate number of servings per container."); *Bush v. Mondelez Int'l Inc.*, 2016 WL 5886886 (N.D. Cal. 2016) (products with accurate net weight statement not deceptive); *Martinez-Leander v. Wellnx Life Scis., Inc.* 2017 WL 2616918, at *8 (C.D. Cal. March 6, 2017) (reasonable consumers not deceived where product package identifies the net quantity); *Kennard*, 2019 WL 1586022 at *5 (reasonable consumers not deceived by slack-fill if there is accurate net weight and servings per container information); *Fermin v. Pfizer, Inc.* 215 F. Supp. 3d 209, 211-212 (E.D.N.Y 2016) (packaging not misleading where it contained information stating the amount); *Daniel v. Tootsie Roll, Indus. LLC*, 2018 WL 3650015, at *11 (S.D.N.Y. Aug. 1, 2018) (as a matter of law, slack-fill not deceptive where candy boxes provided accurate information regarding the amount of contents); *Hu v. Iovate Healthy Scis, Inc.*, 2018 WL 4954105, at *3 (S.D.N.Y. Oct. 12, 2018) (as a matter of law reasonable consumers are not misled by slack-fill where the products accurately disclose the net weight); *Green v. SweetWorks Confections, LLC*, 2019 WL 3958442 (S.D.N.Y. Aug. 21, 2019) (slack-fill is not deceptive because the package accurately disclosed net weight).

E. Plaintiffs Cannot Show Deception Because The Slack-Fill Is Functional

Plaintiffs can only pursue claims based on nonfunctional slack-fill because any state law claim based on the assertion that functional slack-fill is deceptive is expressly preempted as imposing requirements different than or in addition to federal law. *See* 21 U.S.C. 343-1(a)(4) & 21 U.S.C. 343(d); *Cordes v. Boulder Brands USA, Inc.*, 2018 WL 6714323, at *6 (C.D. Cal. Oct. 17, 2018) (Only nonfunctional slack-fill is actionable). Plaintiffs must demonstrate that the slack-

fill that they are suing over – all slack-fill since they expected the boxes to be completely full – is *non*functional because only *non*functional slack-fill is deceptive.[4] *Jackson v. Gen. Mills, Inc.*, 2020 WL 5106652 (S.D. Cal. Aug. 28, 2020) (dismissing claims as preempted because plaintiff failed to meet her burden of showing that the challenged slack-fill was nonfunctional); *Morrison v. Barcel USA, LLC*, 2019 WL 95477 (S.D.N.Y. Jan. 2, 2019) (same). Plaintiffs cannot do so here because the slack-fill is functional under FDA rules.

Primarily, slack-fill in the boxes is a requirement of the machinery used to fill the product packages. *See* 21 C.F.R. 100.100(a)(2). The packages are filled on a high-speed line – boxes quickly moving by underneath as product drops from above – and they need to be of a certain height in order to act as a funnel and to ensure that the product doesn't spill outside of the box. Multiple products are also filled on the same lines, using the same or substantially the same packaging, which also requires slack-fill to accommodate the different fill levels of the products. Moreover, candy like Raisinets and Buncha Crunch are irregularly sized, which means that the same targeted weight of candy takes up a different amount of space in the box. The boxes need to be tall enough to accommodate these varying amounts (which means the amount of slack-fill between individual boxes varies). *See* Section II.D., *supra*. Plaintiff cannot dispute these facts, indeed Dr. Sand testified that she did not need to know *any* information regarding Nestlé's packaging equipment or the way in which it operates to reach her conclusion that *no* slack-fill was required to fill the boxes. SSUF 60, 129, 198. Instead, Dr. Sand testified that Nestlé's actual manufacturing processes are irrelevant because she believes that the slack-fill regulations *do not* contemplate the requirements of filling machines or the process of filling the boxes and that they *only* apply to the machinery used to apply adhesive to and seal that outer flaps of the box (which she believes requires no slack-fill). But her interpretation of the slack-fill regulation is not only

[4] Defendants disagree that the candy boxes contain 48% slack-fill (or that any of Dr. Sand's slack-fill measurements are accurate or meaningful). For example, Dr. Sand's "measurement" of the slack-fill in Butterfinger Bites (which she calculates as a whopping 69.5%) is unreliable because she does so by placing the box on its end and forcing the pieces into the bottom of the box. SSUF 68-69, 137-138, 206-207. Butterfinger Bites, however, are filled as the box lays flat. She performed no measurement of slack-fill utilizing that filling design. *Id.* As the product images show, if she had measured slack-fill based on how the product is actually filled, she would not have come up with the same measurements. Giali Decl., Ex. 12.

nonsensical but is directly contradicted by FDA's guidance regarding the slack-fill regulations. *See* Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 64123-01, 64132 (Dec. 6, 1993) (§100.100 (a)(2) "***covers not only the requirements of the filling itself*** but all of the equipment involved when product and package come together. FDA finds that to the extent that slack-fill is necessary for the efficient functioning of the machines used to enclose the contents in a package, such slack-fill is functional slack-fill.") (emphasis added); *id.* at 64129 (manufacturers are not required to purchase new or different equipment to reduce slack-fill and packing multiple types of products on a single manufacturing line is a recognized reason for slack-fill). Moreover, Dr. Sand's evasive explanations of why no slack-fill is required to fill the packages are nonsensical and illogical. *See* SSUF 61-63, 130-132, 199-201. Because Dr. Sand's opinions are based on an incorrect interpretation of the slack-fill regulations, plaintiffs are unable to raise a triable issue of fact that the slack-fill in the boxes is nonfunctional.

If that was not enough, the slack-fill in the candy boxes also performs additional functions recognized by FDA. First, slack-fill is necessary for the operation of the side dispenser tab on the package. 21 C.F.R. 100.100 (a)(4). In order to avoid product spilling out of the side dispenser tab, the fill level of the candy must be below the tab opening. SSUF 49, 118, 187. Dr. Sand opines only the space occupied by three pieces of candy is necessary to operate the side tab if it is "jammed" with candy, but that defies common sense. SSUF 64, 133, 202. Second, slack-fill is also required to accommodate unavoidable product settling. 21 C.F.R. 100.100(a)(3). The product needs room to settle into the bottom of the box as it moves down the manufacturing line and also to accommodate the product shifting and settling through the distribution process. SSUF 36-37, 105-106, 174-175. Dr. Sand first claims that no product settling exists because there is interstitial space between the candy pieces and the fact that the label does not contain a warning about product settling. SSUF 65, 135, 203. But even Dr. Sand was forced to admit that there would be some product settling, but she minimizes it without basis. SSUF 66, 135, 204. Finally, slack-fill is required because there is an inability to increase the level of fill. 21 C.F.R. 100.100 (a)(6). Nestlé cannot put more candy in the box without materially impacting efficiency. Moreover, because the size and the shape of the candy is highly variable and the candy packages are filled by weight,

slack-fill is needed to accommodate the varying fill levels that the same weight of candy will inhabit. SSUF 35-37, 45-47, 104-106, 114-116, 173-175, 183-185. Dr. Sand completely ignores these facts and bases her opinions solely on the inapplicable second half of that regulation that relates to the need to accommodate food labeling or to prevent pilfering. SSUF 67, 136, 205.

All of the above shows that the slack-fill fill is functional for reasons recognized by FDA.

F. Plaintiffs' Claims Are Preempted Because The Slack-Fill Is Functional

In addition to failing to show deception, plaintiffs' claims are admittedly preempted because they are suing over admittedly functional slack-fill. Plaintiffs claim that all of the slack-fill in the boxes is deceptive, but plaintiffs' own expert concluded that a significant portion of the slack-fill in the candy boxes (between 12.7% and 33.2%) is *functional*. SSUF 59, 128, 197. Accordingly, plaintiffs' claims are preempted because they are inconsistent with federal law.

G. Plaintiffs' "Unfair" And "Unlawful" UCL Claims Fail

Plaintiffs' "unfair" and "unlawful" UCL claims fail for additional, independent reasons.

Plaintiffs' unfair claim fails because, regardless of what standard to determine unfairness the Court applies (*Cel-Tech* or *South Bay*), slack-fill in food packaging is not an "unfair" practice. *See Cel-Tech Commc'ns. Inc., v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 186-87 (1999). Applying the *Cel-Tech* standard, plaintiffs identify no legislatively declared policy that defendants' alleged conduct violates or that its conduct has any actual or threatened impact on competition. *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176, 1191 (2012) (*Cel-Tech* standard refers to conduct that violates antitrust law). Moreover, plaintiffs' claims fail even under the disfavored *South Bay* balancing test because, even if they could establish deception, they present no evidence that there is any harm to consumers from slack-fill, much less harm that outweighs the utility of being able to package goods on a high-speed line to sell them at a value price. *See South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886 (1999) (the court must balance the impact of the challenged business practice against the reasons, justifications, and motives of defendants).

Alternatively, plaintiffs assert a "strict liability" claim under the unlawful prong by alleging that all of the slack-fill is nonfunctional under FDA regulations. TAC, ¶ 170. Plaintiffs

cannot prevail on this claim, however, absent a showing that *all* of the slack-fill, not a subset of the slack-fill, is nonfunctional. *See Buso v. ACH Food Cos., Inc.*, 445 F. Supp. 3d 1033, 1040-41 (S.D. Cal. 2020) (to prevail on unlawful claim, plaintiffs must show that alleged slack-fill is nonfunctional). Plaintiffs cannot do so because the slack-fill in the boxes is functional; even Dr. Sand admits that some portion of the slack-fill in the packages is functional. *See* Sections III.E. and F., *supra*. Moreover, plaintiffs could not have relied on the slack-fill being functional because not only do they not know what it is, they were deceived because of the existence of slack-fill, not because of its underlying purpose. SSUF 151-152. Accordingly, if they were deceived at all, it is because there was slack-fill, not because it was nonfunctional as defined by FDA.

H. Plaintiffs' Common Law Claims Fail

For the same reasons the statutory claims fail – no deception, reliance, causation, or injury – plaintiffs' common law claims also fail. *See* SSUF 208-414. Additionally, the intentional and negligent misrepresentation claims require an *affirmative* misrepresentation of a material fact. *See Bains v. Moores*, 172 Cal. App. 4th 445, 454 (2009) (intentional and negligent misrepresentation require a false statement of fact). Here, plaintiffs have not (and cannot) identify any misrepresentations of fact made by defendants. Accordingly, these claims fail.

I. Plaintiffs Are Not Entitled To Injunctive Relief

Because plaintiffs are now aware that the Challenged Products are not filled to the top and contain slack-fill, they have no claim for injunctive relief because they "cannot be further deceived." *See* SSUF 415-421. Accordingly, injunctive relief is inappropriate. *See Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 458-59 (S.D. Cal. 2014); *see also Davis v. Farmers Ins. Exch.*, 245 Cal. App. 4th 1302, 1326–27 (2016) (injunctive relief is improper where injuries are in the past and there is no threat of real and immediate future injury). Because plaintiffs are not in danger of being injured or deceived in the future, they are not entitled to injunctive relief.

IV. CONCLUSION

For the foregoing reasons, and for good cause shown, defendants respectfully request that the motion for summary judgment, or in the alternative, summary adjudication, and a no merits determination be granted.

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