Session 108: Food Fraud! Avoiding and Litigating Food Labeling Cases

Food labeling litigation is exploding. The food and beverage industry is under fire – from plaintiffs’ lawyers, public interest organizations, and in some cases, government regulators – for claiming that products are “all natural,” free of harmful ingredients, or have other health benefits. In the absence of FDA guidance in numerous key areas, there has been a spike in new class actions focused on allegedly false and misleading food labels and marketing claims. Our expert panel – consisting of in-house food company attorneys and seasoned litigators from both the plaintiffs and defense bar – will discuss why the increase in food related litigation; the legal battle grounds (at both the pleading and class certification stages) where food fraud cases are won and lost; and how companies can avoid or mitigate their exposure to food labeling litigation. The panel will also discuss the particular risks posed to Asian and Asian American food companies, whose marketing campaigns may be targets for the next wave of food labeling class actions.

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A Comprehensive Strategy to Overhaul FDA Authority for Misleading Food Labels

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The modern food environment is considered a primary driver of obesity and other nutrition-related chronic diseases. A significant contribution to this environment is the proliferation of claims on food packaging that provides a misleading picture of a

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product’s healthfulness. The Food and Drug Administration (FDA) is the agency responsible for food labels but it lacks the regulatory authority and adequate resources to address the majority of questionable labeling practices. The FDA’s current system of enforcement is thus essentially based on voluntary compliance and consumer- and manufacturer-initiated litigation has not successfully filled the regulatory gap. This manuscript reviews the current state of food labeling claims and the FDA’s inadequate authority over misbranded food products. It analyzes competing views on regulatory compliance strategies and argues that a regulatory overhaul consistent with the best science and the First Amendment is necessary. With increased resources and authority, the FDA can meet current public health challenges and adequately ensure that labels are clear and consumers are properly informed and protected.

I. INTRODUCTION

The greatest challenge to public health in the United States stems from chronic diseases related to poor nutrition. Over thirty-five percent of adults and almost seventeen percent of children and adolescents are obese in the United States. Studies reveal that obesity increases as people consume a higher proportion of processed food and beverages (collectively “food”) in their diets. Technological innovation in processed food manufacturing has led to the creation of thousands of new products a year, adding to the abundance of products (more than 300,000) on U.S. store shelves. Experts point to this modern food environment as the primary driver of the obesity epidemic.

A significant development within this current food environment is the proliferation of claims on food packaging that gives a misleading picture of a product’s healthfulness. Current food labeling practices include both actual misbranding and permissible but potentially misleading claims about the healthfulness of processed foods. The latter is due to regulations that are too lax or do not reflect the most current science on nutrition. Such confusing food labels

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3 Abay Asfaw, Does Consumption of Processed Foods Explain Disparities in the Body Weight of Individuals? The Case of Guatemala, 20 HEALTH ECON. 184, 184 (2011); Darshsh Mozaffarian et al., Changes in Diet and Lifestyle and Long-Term Weight Gain in Women and Men, 364 NEW ENG. J. MED. 2392, 2392 (2011).
4 David M. Cutler et al., Why Have Americans Become More Obese?, 17 J. ECON. PERSP. 93, 93-95 (2003); see also Bo MacInnis & Gordon Rausser, Does Food Processing Contribute to Childhood Obesity Disparities?, 87 AM. J. AGRIC. ECON., 1154, 1154 (2005).
6 Kelly Brownell, Food Fight: The Inside Story of the Food Industry, America’s Obesity Crisis, and What We Can Do About It 27 (2004); cf. Shu Wen Ng et al., Use of Caloric and Noncaloric Sweeteners in U.S. Consumer Packaged Foods, 2003-2009, 112 J. ACAD. NUTRITION & DIET 1828, 1828, 1833 (2012) (noting that because caloric sweeteners represented seventy-seven percent of all calories purchased from consumer packaged goods from 2003-2009, it is critical to focus legislative and research efforts on this issue).
undermine public health and have become a widespread problem of their own, in need of regulatory response.

Congress granted the Food and Drug Administration (FDA) the authority to protect consumers and the public health from misbranded products such as prescription drugs, food, medical devices, and cosmetics. However, the agency’s enforcement authority is not uniform. In the area of food labeling, the FDA lacks particular authorities that it holds over other products or that Congress has granted to another consumer protection agency, the Federal Trade Commission (FTC). The FDA does not have the resources to sufficiently address the current state of labeling, nor is there funding allocated to feasibly increase its enforcement power. Due to competing interests and First Amendment concerns, the FDA has not utilized what little authority it does have to adequately address food misbranding or revise current regulations on permissible claims. Thus, the FDA’s current system of enforcement is essentially based on voluntary compliance. The agency issues a Warning Letter to put a company on notice that it violated a regulation; this is typically the extent of its enforcement activity.

As a result of these regulatory deficiencies, consumers and manufacturers have turned to litigation to reign in questionable claims. There is no private right of action under the Food Drug and Cosmetic Act (FDCA). Consumers thus sue food manufacturers under theories of tort liability and pursuant to state consumer protection acts. Similarly, manufacturers litigate pursuant to the Lanham Act as a method to police their competitors’ false or misleading labels. The premise underlying these lawsuits is that labels should be truthful and not misleading to ensure a fair and efficient marketplace. But litigation is not a global solution and has not corrected the problematic labeling environment or provided an adequate substitute for stronger regulations.

The FDA’s forced reliance on a system of voluntary compliance has led to an overwhelming number of legal (but questionable) and non-legal claims and statements on food packaging. There currently seems to be little business incentive to comply with food labeling regulations (or FDA guidance documents). Whatever practical threat a Warning Letter holds, this is not a primary disincentive to follow food labeling regulations. The potential for negative publicity and the threat of a lawsuit likely are more compelling incentives to comply; however, these are also not very imposing. So far, labeling non-compliance has not resulted in significantly adverse consequences for companies.

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1. See Michelle Meadows, Promoting Safe and Effective Drugs for 10 Years, FDA CONSUMER MAG. (Jan.-Feb. 2006), http://www.fda.gov/AboutFDA/WhatWeDo/History/ProductRegulation/PromotingSafeandEffectiveDrugsfor10Years/default.htm.


3. Shames et al., U.S. Gov’t Accountability Office, GAO-08-597, Food Labeling, at 5-7, 61-64.


5. For example, one of the more notable cases of a regulatory response to a questionable claim occurred when the FTC reprimanded Kellogg’s for its immunity claims in June 2010. During that month, the company’s stock prices did not significantly dip and Kellogg’s remains a Fortune 500 company. See Fortune 500: Kellogg, CNN MONEY, http://money.cnn.com/magazines/fortune/fortune500/2012/snapshots/242.html (last visited Oct. 23, 2013); Kellogg Company (K): Historical Prices, YAHOO! FIN.,
questionable claims are due to lax enforcement, no threat of penalty, ineffectiveness of litigation as a regulatory mechanism, and little threat of reputational tarnish.

This paper will review the current state of food labeling claims in Part II. Part III will discuss the FDA's inadequate authority over misbranded food products and the need for increased regulations to control the use of misleading claims. In Part IV, the paper will analyze competing views on regulatory compliance strategies and argue that a regulatory overhaul to require all claims be pre-approved is necessary. This is consistent with the First Amendment and would support honest competition and informed consumer decision making. The paper argues that Congress should ensure the FDA is properly funded through a registration fee structure and amend the FDCA to expressly provide the FDA with revised authority to enforce its regulation. Specifically, the FDA needs the authority to seek civil penalties, prohibit claims proven to be deceptive, and compel companies to turn over their substantiation documents when new claims are proffered. With increased resources and authority, the FDA can meet current public health challenges and adequately ensure that labels are clear and consumers are properly informed and protected.

II. CURRENT FOOD LABELING CLAIMS

A. MISLEADING FOOD

In the food labeling context, it is unlawful to introduce misbranded food into interstate commerce. A food meets the definition of misbranded if it has a false or misleading label, is not properly named or identified, is missing required disclosures or nutrition information, or if health and nutrition claims are not made according to specified requirements. Although the definition includes "misleading" as a condition of misbranding, this is one area the FDA does not generally address, meaning it does not send Warning Letters or otherwise seek correction for labels solely deemed misleading. Misleading labels are their own issue; the prohibition against them is in need of enforcement. Further, although there are specific requirements for certain permissible health-related claims, others are permitted based on the manufacturers’ representation of accuracy. The requirements for the former have become too permissive in light of the proliferation of food-based claims and the allowances made for the latter leaves labels susceptible to a variety of questionable claims. This paper will refer to the dual issue of misbranded claims and permissible but questionable claims as "misleading" food claims.


14 Id. § 343.
15 Id.
16 For example, food products are permitted to make claims about “whole grain” content, whether or not the product is high in sugar, calories, or contains trans fats. 21 C.F.R. § 101.13 (2013); id. §101.54. Given the current emphasis on consuming a diet rich in whole grains, many products with whole grain claims might be attractive to consumers despite the fact that they contain other ingredients rendering them not healthful. Rebecca S. Mozaffarian et al., Identifying Whole Grain Foods: A Comparison of Different Approaches for Selecting More Healthful Whole Grain Products, 15 PUB. HEALTH NUTRITION 2 (2013).
Misleading food claims are a barrier to a fair and efficient marketplace. Research shows that from 2001 to 2010, the number of health- and nutrition-related claims on new products increased from 2.2 to 2.6 per product. However, research also reveals that consumers are confused by the intent of commonly used claims on food packaging and are misled by such claims to underestimate total calorie content in the product and overestimate a product's overall positive attributes. Claims create a "health halo" around the product, whether or not the consumer is seeking a healthier choice. This means that consumers misperceive the total nutritional quality of the food and may eat more of it than in the absence of such a claim. Despite the confusion, health and nutrition claims increase consumers' intent to purchase the products bearing them. Consumers are in fact increasingly seeking healthier foods, so it is not surprising that sales of new products with such claims are higher than those without them. Therefore, accurate information is necessary for consumers to make appropriate choices.

Manufacturers additionally have a financial interest in consumers choosing their products over their competitors' products; thus, they have a stake in ensuring that consumers are not deceived by the competition through misleading labels. Clear factual information is necessary to meet these compatible interests.

The current food labeling environment suffers from dual problems of lack of regulations that restrict questionable claims and inadequate enforcement of questionable claims that do violate the regulations. The first problem stems from the

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18 Jennifer L. Harris et al., Nutrition-Related Claims on Children’s Cereals: What Do They Mean to Parents and Do They Influence Willingness to Buy?, 14 PUB. HEALTH NUTRITION 2207, 2207 (2011).
20 See Chandon & Wansink, supra note 19, at 301-02, 311.
21 Id. at 311.
22 Harris, supra note 18, at 2207.
24 MARTINEZ, supra note 17, at 27.
25 See Open Letter from Margaret A. Hamburg, Comm’r of Food & Drugs, FDA, to Industry (Mar. 3, 2010), available at http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm202733.htm (“Today, ready access to reliable information about the calorie and nutrient content of food is even more important, given the prevalence of obesity and diet-related diseases in the United States.”). Whether or not one views diet and obesity as a personal responsibility issue, truthful factual information is a prerequisite to making an informed choice. Consumers’ decisions to purchase the product should be based on the actual properties of the food. Industry associations have publicly stated that nutrition education and information are the best solutions to obesity. See Press Release, Am. Beverage Ass’n, Beverage Industry Addresses Sugar-Sweetened Beverages and Obesity Articles in the New England Journal of Medicine (Sept. 21, 2012), available at http://www.ameribev.org/news-media/news-releases-statements/more/285/ (“Taxes, bans and other forms of government regulation are not the solution to childhood obesity—nutrition education, information and support for physical education are.”); The Industry’s Commitment to Keeping Kids Healthy, GROCERY MFRS. ASS’N, http://www.gmaonline.org/issues-policy/health-nutrition/responsible-public-policy-solutions/the-industry’s-commitment-to-keeping-kids-healthy/ (last visited Oct. 24, 2013) (“The Healthy Weight Commitment Foundation helps kids and adults achieve a healthy weight through energy balance and focuses on three critical areas—the marketplace, the workplace and schools. The key component is a public education campaign aimed at 6-11 year olds and their parents.”).
evolution of permissible claims so that now even misleading and deceptive claims are expressly permitted or tactically ignored. The second problem stems from a lack of authority and resources granted to the FDA to properly address misleading claims or misbranded food products. Both are reviewed below.

B. CLAIMS

Food manufacturers are permitted to utilize four types of claims on food packaging, but in practice, over eighty-five percent of them are nutrient content or implied nutrient content claims (collectively, nutrient content claims). The remaining claims are health claims, qualified health claims, and structure/function claims. Nutrient content claims expressly or implicitly characterize the level of a nutrient of the type required to be disclosed in nutrition labeling, such as "low sodium," and must be made in accordance with Reference Amounts Customarily Consumed or the Recommended Daily Value of a food or nutrient. Health claims characterize the relationship of a substance to a disease or health-related condition and must be based on a "significant scientific agreement standard." An example is: "Healthful diets with adequate folate may reduce a woman’s risk of having a child with a brain or spinal cord defect." Qualified health claims are permitted when credible emerging or limited scientific evidence supports a relationship between a food and reduced risk of a disease or health-related condition. They are similar in intent to health claims but additionally must contain a disclaimer such as, "very limited and preliminary scientific research suggests" and a notation that the "FDA concludes that there is little scientific evidence supporting this claim." The final category, structure/function claims, describes the role of a nutrient or ingredient intended to affect or maintain normal structure or function in the body; for example, "calcium builds strong bones." Structure/function claims do not need preapproval and there are no specific requirements for their use, so the manufacturer alone is

26 U.S. GOVT ACCOUNTABILITY OFFICE, GAO-11-102, FOOD LABELING: FDA NEEDS TO REASSESS ITS APPROACH TO PROTECTING CONSUMERS FROM FALSE OR MISLEADING CLAIMS 13 (2011).
27 Id.
29 Id. § 101.13(j). Nutrient content claims characterize the level of a nutrient of the type required to be disclosed in nutrition labeling, such as "low sodium." Id. § 101.13.
30 Id. § 101.14.
31 Id. § 101.79.
33 Id.; Summary of Qualified Health Claims Subject to Enforcement Discretion, FOOD & DRUG ADMIN., http://www.fda.gov/food/ingredientspackaginglabeling/labelingnutrition/ucm073992.htm (last updated Mar. 13, 2013) ("Very limited and preliminary scientific research suggests that eating one-half to one cup of tomatoes and/or tomato sauce a week may reduce the risk of prostate cancer. FDA concludes that there is little scientific evidence supporting this claim.").
34 U.S. GOVT ACCOUNTABILITY OFFICE, GAO-11-102, FOOD LABELING: FDA NEEDS TO REASSESS ITS APPROACH TO PROTECTING CONSUMERS FROM FALSE OR MISLEADING CLAIMS 11 (2011) (reporting that the FDA has spent at least $12.8 million dollars implementing just health claims and qualified health claims between 2000 and 2010).
permitted on prohibition. A present packaging containing disqualifying nutrient claims ignored.3s

responsible the a sugar.o2


Legally permissible health and nutrition claims on product packaging may present a misleading picture of a product’s overall healthfulness because they are permitted on food despite other less healthful characteristics of the product. Health claims are not permitted on products that contain “disqualifying nutrient levels” of total fat (13 grams), saturated fat (4 grams), cholesterol (60 milligrams) or sodium (480 milligrams).39 The FDA has not instituted a disqualifying level of artificial trans fat or added sugar in order for manufacturers to make claims.40 Thus, products containing artificial trans fat and high levels of added sugar may bear health claims.

The regulations for nutrient content claims are more permissive because the disqualifying nutrient list above does not prevent a manufacturer from making such a claim. Manufacturers are permitted to make nutrient content claims even if a nutrient in the product exceeds the level indicated above as long as the package bears a statement about the suspect nutrient as follows: “See nutrition information for [subject nutrient] content.”41 It is unclear how effective this directive to examine the Nutrition Facts Panel is in terms of consumer education or attention. Regardless, this requirement likewise does not apply to foods high in artificial trans fat or added sugar.42 Thus, products containing high levels of total and saturated fat, cholesterol, sodium, artificial trans fat, and added sugar can bear nutrient content claims, the latter two without any note to consult the Nutrition Facts Panel.

Perhaps the most problematic result of these lax regulations is that products high in added sugar carry a wide variety of nutrient content claims, which misleadingly convey healthfulness in an otherwise unhealthy product.43 For example, in one study of 115 cereal brands, a large percent of the least healthy cereals that were marketed to children bore the most number of health or nutrition-related claims, at three to four per box.44 In another study, products bearing the Whole Grain Stamp, a symbol manufacturers pay an organization to use, had the most sugar of the 545 products

36 Id.


38 U.S. Gov’t Accountability Office, GAO-11-102, Food Labeling, at 13 (suggesting that the FDA should provide clear guidance to companies for structure function claims so they are not false or misleading and that the FDA should provide food inspectors with clear instructions to identify false and misleading claims). This is a valid suggestion; however, without the authority to enforce the guidance or obtain substantiation documents, it may not go all the way to change industry practices. See also discussion infra Part III.B.


40 See id.

41 Id. § 101.13(h)(1). Disclaimers are also required if the statement implicitly characterizes the level of the nutrient in the food but is not consistent with the allowance for the claim, such as “only 200 mg of sodium per serving, not a low sodium food.” Id. § 101.13(i).

42 See id. § 101.13(b).

43 Harris et al., supra note 18, at 2207-08.

assessed. Candy manufacturers have also begun advertising the protein content of their products (e.g., Baby Ruth) derived from peanuts as an ingredient. Given that health and nutrition-related claims create a perception of health notwithstanding the actual properties of the food or whether consumers are seeking a healthy product, it is problematic that foods of less than optimal nutritional value increasingly bear such claims.

The proliferation of questionable but legal claims likely has its origin from litigation in the 1990s, which marked the advent of qualified health claims. The FDA had originally disallowed the use of a health claim that did not meet the robust "significant scientific agreement" standard. Marketers of dietary supplements brought litigation against the FDA claiming the restriction violated their First Amendment rights. In *Pearson v. Shalala*, a federal appellate court agreed with the marketers and held that the FDA could not ban health claims that failed to meet this standard. The court held that the agency must allow a modified health claim or one with a clarifying disclaimer. The FDA has since applied this rationale to food products, so claims with substantially less evidence, i.e., qualified health claims, are now permitted. Since *Pearson*, there has been a recognizably more lax environment for all claims, likely due in part to the court's strong language supporting the manufacturer's First Amendment rights.

At the time the court decided *Pearson*, the finding was supportable from both an evidence-based and First Amendment perspective. Truthful labeling is considered commercial speech, protected by the First Amendment. However, false, deceptive, and misleading speech on a product label is not protected and may be regulated. The government may ban speech that has been proven to be misleading. If the speech is only potentially misleading, which means that it can be presented in a way that is not deceptive, or can be explained through disclaimers or disclosures, it cannot be banned. The government can only require that potentially misleading speech be presented in a non-misleading manner by requiring factual disclosures or

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45 Mozaffarian et al., supra note 16, at 7-8.
46 The candy bar Baby Ruth states that it has "4 grams protein per bar" (which is accurate due to peanuts as a ingredient), but, because it is a candy bar, it contains thirty-three grams of added sugar. *Baby Ruth Touts Protein Content, Archived in Worst Food Marketing Practices, Yale Rudd Center For Food Policy And Obesity* (May 2012), http://www.yaleruddcenter.org/bestandworstfoodmarketingarchive.aspx?t=w. Goobers also has packaging stating that it contains 5 grams of protein, which, as with Baby Ruth, comes from its peanut content. See *Nestle Goobers Candy*, WEGMANS, http://www.weggmans.com/webapp/wcs/stores/servlet/ProductDisplay?productId=391582&storeId=10052&langId=- (last visited Oct. 17, 2013).
47 Chandon & Wansink, supra note 19, at 301-03, 311.
49 Id. at 654.
50 Id. at 661.
51 Id. at 658-59.
52 Guidance for Industry, supra note 32; Summary of Qualified Health Claims, supra note 33 ("Very limited and preliminary scientific research suggests that eating one-half to one cup of tomatoes and/or tomato sauce a week may reduce the risk of prostate cancer. FDA concludes that there is little scientific evidence supporting this claim.").
53 See, e.g., Notice Regarding Implementation of Pearson Court Decision, 65 Fed. Reg. 59,855, 59,856 (Oct. 6, 2000) (stating that the FDA will use its enforcement discretion to allow certain health claims in appropriate circumstances).
56 Id.
57 Id.
explanations to cure the potential deception. At the time of Pearson, there were no studies to indicate the proposed claim was misleading. Thus, the court prescribed further explanation through disclosures consistent with First Amendment jurisprudence. Since Pearson, however, several studies confirm that qualified health claims are in fact confusing to consumers. Still, the FDA has not indicated a renewed interest in addressing qualified health claims. Practically, the food industry rarely uses qualified health claims. Legally, since Pearson, the Supreme Court's interpretation of the First Amendment has provided increasing protection to commercial speech (and other forms of business-related speech), creating a disincentive for the agency to address questionable marketing practices and risk negative judgment in court. At this point, no activity on health-related claims seems imminent and these four types of claims remain permissible.

In addition to confusing but legally permissible claims, a whole range of questionable labeling practices can be found on food product packaging. Some of them directly violate FDA regulations or guidance documents; others are perfectly legal but highly questionable. Consumers, competitors, and government officials seeking to protect the public have initiated litigation or issued formal requests to the FDA to address such claims utilized on food and beverages. An examination of select cases related to labeling deficiencies provides a useful lens to review the different types of misleading claims that adorn processed food products. The confusing nature of these claims helps shed light on the need for increased FDA oversight, authority, and resources.

C. MISLEADING LABEL EXAMPLES

1. Product Names

FDA regulations require that the principal display panel of a food bear a statement of identity of the product. Unless there is a legally required name, this is generally the common name of the food or a "fanciful name commonly used by the public for such food," such as "Vanilla Wafers." FDA regulations also explain that the name of a food "shall accurately identify or describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients." However, products have names that do not follow this directive; for

38 Id.
39 Lisa Shames et al., U.S. Gov't Accountability Office, GAO-08-597, Food Labeling: FDA Needs to Better Leverage Resources, Improve Oversight, and Effectively Use Available Data to Help Consumers Select Healthy Foods 5 (2008); see also Harris et al., supra note 18, at 2209.
42 See discussioninfra Part II.C.
43 21 C.F.R. § 101.3(a) (2013).
44 Id. § 101.3(b).
46 21 C.F.R. § 102.5(a).
example, popular ready-to-eat cereals have “blueberry” named versions of a product line that do not actually contain any blueberries.\textsuperscript{67}

A regulation in the beverage context explicitly permits confusing names, which undermines the force of the general naming regulation. Specifically, the name of juice may reflect one of many juice ingredients as long as there is a qualifying word, such as “blend.”\textsuperscript{68} This results in misleading product names, such as a Minute Maid juice named, “Pomegranate Blueberry,” but which contains 99.4% apple and grape juices (and only 0.3% pomegranate juice, 0.2% blueberry juice, and 0.1% raspberry juice).\textsuperscript{69} Pom Wonderful, manufacturer of 100% pomegranate juice, sued Minute Maid’s manufacturer, Coca-Cola, under the Lanham Act. Pom Wonderful claimed that the name of Minute Maid’s juice misled consumers to believe that it primarily consists of pomegranate and blueberry juices.\textsuperscript{70} Pom was unsuccessful because the product adhered to FDA regulations.\textsuperscript{71} In pursuit of its claim, Pom conducted a survey that determined that more than 30% of consumers misunderstood the juice’s ingredients based on the label.\textsuperscript{72} As noted by the Ninth Circuit in this case, this is an area where the FDA would need to amend the regulations to prevent such deception.\textsuperscript{73}

2. Fortification

Fortification is the addition of nutrients to a food\textsuperscript{74} and nutrient content claims are permitted when the nutrient is added to a product through fortification.\textsuperscript{75} It is unclear whether there are health benefits or detriments to consuming a diet largely derived from fortified products, but it is clear that fortification increases the perception of healthfulness for consumers.\textsuperscript{76} Market research indicates that health-seeking consumers look for specific ingredients or fortification elements including

\textsuperscript{67} See, e.g., \textit{Blueberry Cereal}, KELLOG’S FROSTED MINI WHEATS, http://www.frostedminiwheats.com/Products/Blueberry-muffin (last visited Sept. 17, 2013) (“Ingredients: Whole grain wheat, sugar, contains 2% or less of milled corn, brown rice syrup, corn syrup, natural and artificial flavor, modified corn starch, gelatin, soybean oil, glycerin, sorbitol, blue 2 lake, red 40 lake, red 40, BHT for freshness.”).

\textsuperscript{68} 21 C.F.R. § 102.33(c).

\textsuperscript{69} Pom Wonderful L.L.C. v. Coca-Cola Co., 679 F.3d 1170, 1173 (9th Cir. 2012) (showing the label of Coca-Cola’s Pomegranate Blueberry Juice which includes both the description “Flavored Blend of 5 Juices” in relatively small type font and a picture of an equally large apple and pomegranate surrounded by berries).

\textsuperscript{70} Id. at 1174.

\textsuperscript{71} Id. at 1177 (citing 21 C.F.R. § 102.33(c), (d)).

\textsuperscript{72} Pom Wonderful L.L.C. v. Coca-Cola Co., 727 F. Supp. 2d 849, 857 n.8 (C.D. Cal. 2010), aff’d in part and vacated in part, 679 F.3d 1170 (9th Cir. 2012) (“According to Pom, ‘36% of the test group in the Field Survey indicated that they believed the Juice mainly contains pomegranate and blueberry juice, and not other types of fruit juice,’ . . . ‘32% of the test group in the Field Survey indicated that they believed the Juice mainly contains pomegranate and blueberry juice, and not other types of fruit juice, because of the words “pomegranate blueberry” on the label.’”).

\textsuperscript{73} Pom Wonderful L.L.C., 679 F.3d at 1178 (stating that by holding that the Lanham Act claim is barred, the court does “not hold that Coca-Cola’s label is non-deceptive,” instead putting the onus on the FDA to act if “the FDA believes that more should be done to prevent deception, or that Coca-Cola’s label misleads consumers”); see also Pom Wonderful L.L.C., 727 F. Supp. 2d at 872 (noting that Pom’s only recourse was to “lobby Congress or petition FDA to change its rules”).

\textsuperscript{74} 21 C.F.R. § 104.20(a).

\textsuperscript{75} Id. §§ 101.5(e)(ii), 101.65(d)(2)(iv).

antioxidants, among others. This has led to carbonated beverages touting fortification in direct violation of the FDA’s Fortification Policy against fortifying candy and carbonated beverages. Diet Coke Plus and 7Up with Antioxidants are two such products. The FDA sent a Warning Letter to Coca-Cola for Diet Coke Plus, but the agency failed to send a Warning Letter to the manufacturer of 7Up with Antioxidants, Dr. Pepper Snapple Group, despite the fact that the products violated the same regulations. Consumer groups have sued over both products with few results.

3. Definitions

Due to evolving preferences, fads, and dietary guidelines, among other influences, certain properties of food become more or less attractive to consumers over time. The food processing industry reported that in 2010, the majority of the top ten most successful new products in the packaged food and beverage genre focused on “health and wellness.” This trend is evident by the increasing use of organic and

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77 See id. (noting that in a nationally representative poll, the four ingredients that grocery shoppers said they looked for most in a product were fiber, whole grain, protein, and omega-3).
78 21 C.F.R. § 104.20(a) (“The Food and Drug Administration does not encourage indiscriminate addition of nutrients to foods, nor does it consider it appropriate to fortify fresh produce; meat, poultry, or fish products; sugars; or snack foods such as candies and carbonated beverages.”). This policy is weakly stated and includes “snack foods” in the list of products that should not be fortified but does not define the term. See § 104.20. Regardless, the FDA does not seem to enforce this regulation outside the two products listed, carbonated beverages and candy, because snack products are regularly fortified and bear nutrient content claims. See, e.g., POPTARTS, http://www.poptarts.com/flavors/chocolate/hot-fudge-sundae (touting Pop-Tarts as a good source of 7 vitamins and minerals).
81 See Warning Letter, supra note 79.
82 An antioxidant claim can be a permissible nutrient content claim when all the conditions of use are met; this includes the conditions for the nutrient claim and those imposed by the FDA’s Fortification Policy. See 21 C.F.R. §§ 101.54(g), 104.20. In regards to these two regulations, the 7Up antioxidant claim violated the latter. See id. § 104.20(a).
83 Mason v. Coca-Cola Co., 774 F. Supp. 2d 699, 705 n.4 (D.N.J. 2011) (“At its core, the complaint is an attempt to capitalize on an apparent and somewhat arcane violation of FDA food labeling regulations. But not every regulatory violation amounts to an act of consumer fraud . . . . The complaint does not allege that consumers bought the product because they knew of and attributed something meaningful to the regulatory term ‘Plus’ and therefore relied on it. Rather, they allege merely that they thought they were buying a ‘healthy’ product that happened to apparently run afoul of FDA regulations.”).
84 CSPI sued Dr. Pepper Snapple Group, with Dr. Pepper Snapple Group recently agreeing to stop fortifying with vitamins some of its 7UP drinks as well as to stop claiming that its fortified 7UP drinks contain antioxidants. See 7UP To Drop “Antioxidant” Marketing, CTR. FOR SCIENCE IN THE PUB. INTEREST (July 22, 2013), http://www.cspinet.org/new/201307221.html.
eco-friendly labels, with the newest descriptor, “natural,” spurring litigation over the accurate definition of the term.\textsuperscript{86} Products ranging from cereals, savory chips, sugary beverages, dairy creamers, and artificial sweeteners have labels claiming that they are “natural.” In the beverage context, several plaintiffs have sued manufacturers alleging that the addition of high fructose corn syrup and citric acid renders the “natural” claim on the product false or misleading. These lawsuits have generally not been successful. Courts have dismissed such claims due to lack of FDA guidance on a precise definition of the term.\textsuperscript{88} Plaintiffs have not been successful even when a court is willing to entertain the claim; in one case the judge dismissed the case despite recognizing that the ingredients were “produced” and not “grown in a garden or field,” because he found plaintiffs’ arguments were simply “rhetoric.” \textsuperscript{89}

Notwithstanding repeated requests by both consumers and companies,\textsuperscript{90} the FDA has declined to define the term “natural” beyond its statement that it will not “restrict the use of the term ‘natural’ except for added color, synthetic substances, and flavors . . . .” \textsuperscript{91} The FDA explained that “resource limitations and other agency priorities” prevent the agency from “undertaking rulemaking to establish a definition for ‘natural’ . . . .”\textsuperscript{92}
4. Misbranding

New products and product categories provide ongoing challenges for regulators. Energy drinks are a relatively new category of beverages marketed as sources of increased energy. They generally contain, and tout, high levels of caffeine and a wide array of approved food additives and unapproved ingredients.

The FDA issued a non-binding guidance document in 2009, which distinguished between beverages and liquid dietary supplements. According to this guidance, energy drinks are beverages which should be labeled as conventional food and not dietary supplements. The FDA has not enforced this in a comprehensive manner and litigation has not addressed this issue either. When confronted with this issue, one court dismissed the claim, stating that it was a "straightforward misbranding claim best resolved by the FDA."

The FDA warned one energy drink manufacturer that labeling its product an "energy supplement" did not make it a dietary supplement, and further that it was adding unapproved additives into the food supply (i.e., Rockstar Roasted Coffee & Energy, containing Ginko). However, the agency is not consistent in even these efforts and ignores other products with the same deficiencies by different manufacturers (e.g., Monster Java containing the unapproved additives taurine and...
panax ginseng).\textsuperscript{101} It is unclear why there is inconsistent enforcement for these two products.\textsuperscript{102} But inconsistent enforcement minimizes any deterrent effect Warning Letters may have.

D. SUMMARY

The cases above indicate various types of claims consumers face on a regular basis but which are largely unaddressed by the FDA. The norm is now a supermarket full of food with claims that are misleading or create an impression that even some of the least healthy products are nutritious.\textsuperscript{103} Permissible claims adorn highly processed food with unhealthy properties, especially those high in added sugar. Other practices have proven to be confusing or have provoked litigation claiming that they misrepresent a product’s overall healthfulness or its true properties.\textsuperscript{104} The FDA is faced with a wide array of misleading claims that overwhelm the little regulatory authority it does have. The agency’s lack of regulatory authority is explored below.

III. FDA ENFORCEMENT AUTHORITY

The FDA has regulatory authority over consumer products including drugs, medical devices, dietary supplements, food, and cosmetics.\textsuperscript{105} However, the FDA’s enforcement authority differs for each type of product. In various sections of the FDCA, Congress has made its intent clear that the FDA’s power to enforce most food labeling violations is limited as compared to the FDA’s authority in other contexts.\textsuperscript{106}

The FDA’s authority is also limited as compared to the FTC’s authority over false, unfair, and deceptive advertising which includes all other media outside of food packaging. The FDA and FTC divided the responsibility over food marketing pursuant to a Memorandum of Understanding, under which the FDA has primary responsibility for regulating food labeling and the FTC has primary responsibility

\textsuperscript{101} The FDA has not sent a similar letter to Monster regarding its Java energy drink line although it existed simultaneously and suffered from the same problems as Rockstar’s coffee variety: they were labeled as dietary supplements despite being coffee-like drinks (containing coffee extract) and containing the unapproved food additives taurine and panax ginseng. Since at least June 2007, Monster has had a Monster Java line. See Java Monster, BEVNET, http://www.bevnet.com/reviews/Java_Monster (last visited Oct. 27, 2013). The CEO announced on February 13, 2013 that the company would begin labeling its beverages correctly as beverages and include a nutrition facts panel. See Karen Bleier, Monster Beverage changes label to qualify as “drink”, CBS MONEY WATCH (Feb. 13, 2013), http://www.cbsnews.com/8301-505123_162-57569295/monster-beverage-changes-label-to-qualify-as-drink/. However, this will not fix the problems with unapproved additives in the drink.

\textsuperscript{102} See Stephanie Strom, Drink Ingredient Gets a Look, N.Y. TIMES, Dec. 12, 2012, http://www.nytimes.com/2012/12/13/business/another-look-at-a-drink-ingredient-brominated-vegetable-oil.html?pagewanted=all&_r=0 (“A company can create a new additive, publish safety data about it on its Web site and pay a law firm or consulting firm to vet it to establish it as ‘generally recognized as safe’—without ever notifying the F.D.A., Mr. Neltner said.”).

\textsuperscript{103} See Jennifer L. Harris et al., supra note 18 at 2208.


\textsuperscript{105} See What We Do, FOOD & DRUG ADMIN. (Sept. 19, 2013), http://www.fda.gov/AboutFDA/WhatWeDo/default.htm.

A COMPREHENSIVE STRATEGY

for regulating food advertising. This division was further solidified when Congress passed the Nutrition Labeling and Education Act of 1990, providing the FDA authority to require standardized nutrition and health related information on food packaging. The following analysis respects this division of authority. However, an alternative method to address problematic food labeling practices would be for the agencies to amend the Memorandum of Understanding to recognize the FTC as the primary entity responsible for misleading claims on food packaging. Congress could also mandate this. Currently, the FTC has more authority to pursue questionable marketing practices, including the authority to obtain civil penalties for unfair and deceptive acts or practices and the dissemination of false advertisements.

A. WARNING LETTERS VERSUS CIVIL MONETARY PENALTIES

The FDA has the authority to pursue civil penalties in non-food labeling contexts, for example, for the dissemination of false or misleading direct-to-consumer advertisements for drugs. However, Congress explicitly precluded the FDA from exacting penalties in the food context based on advertisements on packaging that are materially false or misleading (or if vitamin or mineral ingredient labeling is incorrect). The definition of materially false or misleading advertising in this context is quite broad, which would be positive if the FDA had the authority to address it properly. Instead it is a categorical brush away of enforcement authority over a large field of labeling deficiencies.

The FDA does have the authority to issue civil monetary fines in the context of food safety, for the introduction of an article of food containing an unsafe pesticide chemical residue and, since the enactment of the Food Safety Modernization Act of 2011 (FSMA), for violations of a recall order. The FSMA provided the FDA with the authority to enforce compliance with recall orders if the agency finds an article of food is adulterated or misbranded, but only in terms of missing allergen information. The purpose of this authority is to protect the public from being exposed to an article that “will cause serious adverse health consequences or death.” In the context of food labeling, Congress determined that non-acute health outcomes from misbranding do not rise to the level of requiring such an enforcement


\[110\] See id. §§ 52, 54.


\[112\] See id. § 333(d).

\[113\] Id. § 321(n) (“If an article is alleged to be misbranded because the labeling or advertising is misleading, then in determining whether the labeling or advertising is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the articles to which the labeling or advertising relates under the conditions of use prescribed in the labeling or advertising thereof or under such conditions of use as are customary or usual.”).

\[114\] Id. § 333(f)(2)(A).

\[115\] Id. § 351(a) (adulterated pursuant to § 342 or misbranded under § 343(w)).

\[116\] See id. § 342.
mechanism. Thus, the FDA lacks the ability to impose or seek a civil penalty or recall otherwise misbranded or misleading food products that are placed into the stream of commerce.

If the FDA discovers a labeling violation, it has a short list of recourse options available to it. First, the agency is instructed to issue a Warning Letter or hold a regulatory meeting to discuss the labeling violation. The purpose of the Warning Letter is to put the company on notice that a violation occurred. The FDA has explained that this is “the Agency’s principal means of achieving prompt voluntary compliance with the Act.”

Pursuant to the FDCA, the FDA is permitted to condemn and seize misbranded food after the agency gives the company proper notice and an opportunity to respond. This is permissible only when the agency has “probable cause to believe ... that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer.” This does not generally occur in the typical misbranding context (i.e., not related to allergens or pesticides), which is the type of misbranding of concern in this paper.

Another option available to the FDA after issuing a Warning Letter is to work with the Department of Justice (DOJ) to seek an injunction or initiate a criminal prosecution. However, the FDA has little guidance to determine when a food-related violation rises to the level of criminality, and misbranding rarely rises to the level of criminal sanctions. The FDA understandably would be reluctant to pursue violations of the misbranding regulation with the DOJ since Congress did not intend for it to make that a regular practice. The FDCA specifically admonishes the agency from reporting “minor violations” to the DOJ when the Secretary “believes that the public interest will be adequately served by a suitable written notice or warning.” Congress seemed to have made its intention clear that it believes the public interest is adequately served by written Warning Letters and the FDA has taken the cue. The FDA seeks relatively few criminal actions for food misbranding, although it uses this remedy widely for other violations of the Act. The result is that the FDA regularly issues Warning Letters alerting the responsible

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117 See id.
122 See id. § 335. The FDA must issue a Warning Letter to the company before reporting a violation to the DOJ for criminal proceedings. Id.
125 But see United States v. Randazzo, 80 F.3d 623, 626-27 (1st Cir. 1996).
company of the violation and seeks assurance from the company that it will change its practices.\(^\text{127}\)

The FDA has said that Warning Letters should be issued for violations “that may actually lead to an enforcement action” if not corrected,\(^\text{128}\) however, this is not an accurate account of its enforcement activity. Rather, the Warning Letter represents the enforcement action for cases of mislabeled food products. There is no other viable enforcement action when a violation occurs and worse, not all violations actually garner a letter.\(^\text{129,130}\) This represents an error of enforcement, which dilutes deterrence.\(^\text{131}\) In the area of misbranded food products, seeking voluntary compliance is thus the agency’s primary avenue of enforcement for labeling violations.

The FDA database houses Warning Letters dating from 1996 onward. Starting on September 1, 2009, the agency began tracking whether it issued a close-out letter, which it “may issue when, based on FDA’s evaluation, the firm has taken corrective action to address the violations contained in the Warning Letter.”\(^\text{132}\) The FDA states that it requires proof of the corrective action.\(^\text{133}\) For all Warning Letters sent, a small percentage have been “closed out” according to the FDA’s database\(^\text{134}\) and an even smaller percentage have letters of response from the responsible business.\(^\text{135}\) The Warning Letter method of enforcement is lax, does not sufficiently deter noncompliance, or definitively lead to corrective actions. As discussed further

\(^{127}\) Food & Drug Admin., Procedures for Clearing FDA Warning Letters and Untitled Letters, Regulatory Procedures Manual Exhibit 4-1, at § 4.1 (2012), http://www.fda.gov/downloads/ICECI/ComplianceManuals/RegulatoryProceduresManual/UCM176965.pdf (“Typically, a Warning Letter notifies a responsible individual or firm that the Agency considers one or more products, practices, processes, or other activities to be in violation of the Federal Food, Drug, and Cosmetic Act (the Act), its implementing regulations and other federal statutes. Warning Letters should only be issued for violations of regulatory significance, i.e., those that may actually lead to an enforcement action if the documented violations are not promptly and adequately corrected. A Warning Letter is one of the Agency’s principal means of achieving prompt voluntary compliance with the Act.”).

\(^{128}\) Id.


\(^{130}\) See 7Up Maker Sued Over Antioxidant Claims, CBS News (Nov. 8, 2012, 3:44 PM), http://www.cbsnews.com/8301-204_162-57547263/7up-maker-sued-over-antioxidant-claims/. This is another example of fortification of a soda.


\(^{133}\) Id.


below, the agency’s lack of resources and other authorities necessary to meaningfully enforce the regulations further compound its inability to enforce misbranding regulations.

B. SUBSTANTIATION DOCUMENTS

The FDA lacks the authority to require that companies provide the agency with substantiation documents if it questions a claim, which means that the agency cannot compel the responsible company to disclose the research or scientific data that presumably served as the basis for the claim. The burden is on the FDA to conduct its own research. This puts the agency at a disadvantage and hinders it from challenging questionable claims.

Without the authority to obtain substantiation documents, the FDA cannot always effectively challenge questionable claims. Conversely, the FTC has the authority to compel companies to turn over substantiation documents and the Commission successfully uses this power to protect consumers by addressing questionable claims. For example, Kellogg’s placed an “Immunity” claim on its Rice and Cocoa Krispies children’s cereals. The FDA has jurisdiction over such claims on packaging, but it did not address the “Immunity” claim, likely because it is considered a structure/function claim, where enforcement authority is at its weakest, and also because the FDA could not require the company to submit its scientific basis for the claim. However, the FTC did respond to the related advertising campaign and publicly reprimanded the company.

Obtaining substantiation documents is a normal and necessary part of regulatory control. There is no logical basis to bar the FDA from obtaining the scientific data to support a company’s questionable claim, especially given that the FTC, and state attorneys general for that matter, are legally permitted to obtain the identical documents based on the same principles of enforcement.

136 See OFFICE OF INSPECTOR GEN., DEP’T OF HEALTH & HUMAN SERVS., FDA INSPECTIONS OF DOMESTIC FOOD FACILITIES iii (2010) (recommending that the FDA “[s]eek statutory authority to allow FDA access to facilities’ records during the inspection process”), available at https://www.hhs.gov/oei/reports/oei-02-08-00080.pdf; U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 34.

137 See U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 34, at 25.

138 See id. at 26.

139 Bruce Horovitz, Critic Blast Kellogg’s Claim that Cereals Can Boost Immunity, USA TODAY (Nov. 6, 2009), http://www.usatoday.com/money/industries/food/2009-11-02-cereal-immunity-claim_N.htm. This was during the time period when “swine flu” was making headlines.

C. Litigation as “Regulation” Has Not Filled Regulatory Gaps

In the food labeling context, private plaintiffs have sought to reign in questionable claims through litigation. Because there is no private right of action under the FDCA, plaintiffs bring cases pursuant to common law tort claims and state consumer protection statutes. The initiation of such lawsuits has been increasing but has not led to a global change in food labeling. Litigation costs a substantial amount of time and resources and could be avoided by both stricter labeling regulations enforced by the FDA and by manufacturers spending initial resources ensuring their claims are compliant.

Only a small handful of cases among the dozens filed have been successful. Courts infrequently find that a plaintiff has brought an actionable claim. Even more rare are the cases that make it to trial and where the judge or jury finds a claim was sufficiently misleading, deceptive, or false to constitute an injury. One notable example of such a case was when a plaintiff sued Gerber Products Company pursuant to California’s unfair business practices statute, arguing that the package of Gerber Fruit Snacks was deceptive because the fruit represented in the picture was not the fruit in the product. The Ninth Circuit agreed, finding that the package could likely deceive a reasonable consumer who should not “be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.” More often than not, however, courts find that reasonable consumers would not be misled by fruit images or that there is no cognizable harm despite violations of the FDCA. Even under the best conditions, the threat of tort liability is a highly imperfect and inconsistent method to reign in questionable claims.

142 Id. (“[F]ood manufacturers are spending ‘hundreds of thousands of dollars in legal fees and settlement amounts’ to resolve cases that are entirely avoidable [by having someone review their labels], according to one leading food law attorney.”).
143 Id. See also Elaine Watson, PepsiCo Targeted in New Class Action Lawsuit over Improper Nutrient Content Claim, FOOD NAVIGATOR-USA (Apr. 4, 2012), http://www.foodnavigator-usa.com/Regulation/PepsiCo-targeted-in-new-class-action-lawsuit-over-improper-nutrient-content-claims. The plaintiffs pointed out a clear regulatory violation. However minor, it was easily avoided by Pepsi following the regulation. Defense attorneys not associated with the case stated that these lawsuits are provoked by plaintiffs’ attorneys who scour labels for technical violations. It is unnecessary to take a position on this point. The problem stems from the fact that lax regulatory oversight leads to lax regulatory compliance. The reasons there are so many technical violations is that only plaintiffs’ attorneys are seeking to enforce the FDCA.
144 See, e.g., Sugawara v. PepsiCo, Inc., No. 2:08-cv-01335, 2009 U.S. Dist. LEXIS 43127, at *14 (E.D. Cal. May 21, 2009) (finding that Plaintiff failed to state a claim that the labeling of Cap’n Crunch with Crunchberries was misleading, even though the cereal contains no actual berries).
145 See Watson, supra note 143 (“[I]f these cases ever make it to completion, plaintiffs may be hard pressed to prove any significant damage.”).
146 Williams v. Gerber Prods. Co., 552 F.3d 934, 936 (9th Cir. 2008).
147 Id. at 939.
148 Sugawara, 2009 U.S. Dist. LEXIS 43127, at *3 (“This Court is not aware of, nor has Plaintiff alleged the existence of, any actual fruit referred to as a ‘crunchberry.’ Furthermore, the ‘Crunchberries’ depicted on the [principal display panel] are round, crunchy, brightly-colored cereal balls . . . . Thus, a reasonable consumer would not be deceived into believing that the Product in the instant case contained a fruit that does not exist.”).
Manufacturers also use litigation pursuant to the Lanham Act to restrain their competitors' use of misleading claims. The Lanham Act provides a cause of action to a company that may be injured by its competitor's false or misleading representation of the latter's product.  

However, this provides a remedy for direct competitors only and "does not act as a 'vicarious avenger' of the public's right to be protected against false advertising." Some Lanham Act cases do result in the withdrawal of questionable claims from the marketplace, thereby protecting consumers; however, this has not significantly altered the food labeling environment. Moreover, if a claim misleads consumers but does not hurt competition, it would not be subject to such litigation.

Litigation through the Lanham Act suffers from the same deficiencies as private plaintiff-based litigation as a non-viable substitute for regulation. Plaintiffs and manufacturers cannot enforce the FDCA, so they must seek to establish an individualized injury, which, even if successful, does not generally extend to correct a market-wide problem. Thus, violations of the FDCA that do not rise to that level of cognizable injury would remain unresolved. Second, a party that wins monetary damages (as opposed to injunctive relief) is the party that profits, and this does not benefit other similarly situated groups. Third, litigation does not provide a consistent regulatory mechanism to ensure a uniform labeling requirement. It is often protracted, unpredictable, and can have inconsistent (or wrong) outcomes that do not necessarily deter future bad activity. Litigation has not effectively reigned in questionable claims, the more effective solution is to improve the regulatory system.

D. FUNDING

Finally, the FDA is under-funded in the food labeling area. In 2008, the Government Accountability Office found that the FDA's resource constraints and numerous responsibilities made it difficult for the agency to enforce all of its citations:


152 Cf. Clifford Rechtsaffen, Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement, 71 S. CAL. L. REV. 1181, 1233-34 (1998) (explaining that citizen enforcers cannot replace the cooperative system of enforcement in the environment context because, among other reasons, they "do not have the resources, expertise, or access to company information to be consultants" and "do not enjoy continuing relationships with regulated firms").


154 Manufacturers do not seem to be sufficiently threatened by current litigation efforts because they do not invest in the time or resources to confirm that their labels comply with the NLEA prior to releasing the product, as reported by Food Navigator. See Watson, supra note 143.

155 Proponents of litigation consider it a viable option to fill the gaps left by regulatory control. See Bruce Silverglade & Ilene Heller, Food Labeling Chaos: The Case for Reform VIII-9 (2010); Jennifer L. Pomeranz et al., Innovative Legal Approaches to Address Obesity, 87 MILBANK Q. 185, 199 (2009). One legal scholar and co-author noted: "The argument against litigation, however, assumes the existence of an effective regulatory process that renders litigation unnecessary, which does not seem to be the case. Regulatory agencies are notoriously understaffed and underfunded, so they often are unable to carry out their regulatory purpose." Id. at 199. The current article argues that the better solution is to address the regulatory deficiencies.
labeling requirements.\textsuperscript{156} The same lack of sufficient resources to address food labeling issues remains today. In the FDA’s fiscal year 2013 budget, food labeling allocations were the lowest of all nineteen programs under its jurisdiction.\textsuperscript{157} The FDA has cited lack of resources as a reason for not addressing pressing labeling issues.\textsuperscript{158} In order to address the pervasive labeling problems outlined above, increased resources will be necessary.

E. SUMMARY

Warning Letters are the FDA’s primary response to labeling violations. These do not pose a sufficient threat to companies to abide by labeling regulations or avoid misleading claims. Further, the FDA does not have the resources to issue a letter for all violations. The absence of a true penalty, coupled with errors of enforcement, dilutes deterrence.\textsuperscript{159} This lack of regulatory oversight diminishes any concern by food companies about compliance. Against this background, there has been a proliferation of legal and non-legal questionable claims on food products.\textsuperscript{160} Litigation has arisen as a method to reign in questionable claims, but this has not been successful for most plaintiffs and certainly has not effectively altered the labeling environment.\textsuperscript{161} A new regulatory regime is warranted to enhance the FDA’s authority over labeling violations.

IV. STRENGTHEN THE FDA

There is not an effective regulatory mechanism in place for the FDA to promote compliance or deter non-compliance for misleading food labels. The FDA lacks the authority necessary to both deter noncompliance and address the non-compliance once it occurs. The regulatory environment for food labeling claims is essentially voluntary based. Thus, left to its own devices, the market has failed to support the utilization of factually accurate non-misleading food labels. A revised regime is necessary.

Pursuant to various theories of regulation, there is a consensus that industry members are more likely to comply with regulations with which they agree, and this includes regulations that support honest competition and protect the integrity of the marketplace.\textsuperscript{162} Clear labeling requirements support both goals. The Lanham Act cases dedicated to food claims reveal a business interest in companies’ competitors complying with fair labeling standards. Straightforward regulations would benefit competition and minimize the need for inefficient and expensive litigation.


\textsuperscript{157} Food & Drug Admin., Fiscal Year 2013, Justification of Estimates for Appropriations Committees 548 (2012).

\textsuperscript{158} Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 5, 101); see also Oliver Nieburg, Frito Lay Hit with Lawsuit on All-Natural Claims, Food Navigator-USA (Dec. 20, 2011), http://www.foodnavigator-usa.com/Regulation/Frito-Lay-hit-with-lawsuit-on-all-natural-claims (noting “the FDA told [another publication] that it had no plans to define the term ‘all-natural’ because of limited resources”).

\textsuperscript{159} Polinsky & Shavell, supra note 131, at 71; see also Watson, supra note 141.

\textsuperscript{160} See Harris et al., supra note 18, at 2207-08.

\textsuperscript{161} See Watson, supra note 143.

\textsuperscript{162} Rechtschaffen, supra note 152, at 1193.
Congress should concurrently increase the FDA’s authority and resources to revise food labeling regulations to address misleading labels, and permit the agency to recover penalties for noncompliance.

A. COMPLIANCE VERSUS DETERRENCE REGULATORY SYSTEM

Two theoretical underpinnings exist to support a regulatory system of government: a cooperative-compliance based system and a deterrence based system. In practice, most enforcement agencies use a hybrid of both strategies and undertake both cooperative and coercive measures. 163

Legal and economic scholars debate the efficacy of a cooperative-compliance based system versus deterrence-based enforcement in other contexts. 164 Discourse in the environmental enforcement area provides a valuable lens to think about a proper regulatory system for food labeling claims. 165 The EPA and FDA are both “protective agencies” 166 that regulate activities to address modern conditions that serve as a barrier to population health.

Under a cooperative system of regulation, an agency seeks to work with the regulated industry to support compliance. 167 The agency’s role is to foster conditions that induce compliance so that any sanctions are typically withdrawn if compliance is achieved. 168 This theory of enforcement tends to view industry members as “citizens,” “influenced by civic and social motives,” seeking to avoid tort liability, and maintain a good corporate image. 169 Agency officials are considered partners to the regulated industry members and they work together to ensure compliance. In the EPA context where this is the case, government officials engage in on-site inspections to confirm compliance with technical requirements, so partnerships are a natural and perhaps positive outcome of the cooperative system. 170 The combination of regulations and inspections reportedly create a “culture of compliance” in the environmental context. 171

The deterrence-based model, on the other hand, is concerned with detecting noncompliance and penalizing violators. This theory of enforcement tends to view industry members as “rational economic actors that act to maximize profits.” 172

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163 Id. at 1189.
164 Diana Crumley, Achieving Optimal Deterrence in Food Safety Regulation, 31 REV. LITIG. 353, 400 (2012); Neil A. Gunningham et al., Motivating Management: Corporate Compliance in Environmental Protection, 27 LAW & POL’Y 289, 289 (2005); Polinsky & Shavell, supra note 131; Rechtschaffen, supra note 152; Dorothy Thornton et al., General Deterrence and Corporate Environmental Behavior, 27 LAW & POL’Y 262, 262 (2005).
165 Rechtschaffen, supra note 152, at 1189 (noting that many enforcement agencies use a hybrid of cooperative-compliance and deterrence-based strategies).
166 Rena Steinzor, The Future of Regulation: The Truth About Regulation in America, 5 HARV. L. & POL’Y REV. 323, 325 (2011) (identifying six protector agencies with the mission to safeguard people and the environment, including the FDA and EPA).
167 See Rechtschaffen, supra note 152, at 1184.
168 Id. at 1188.
169 Id. at 1191, 1195.
170 See Gunningham et al., supra note 164, at 295-96; see also Rechtschaffen, supra note 152, at 1204.
171 Gunningham et al., supra note 164, at 309. Note also that unlike under the FDCA, in the environmental context, the Clean Water Act expressly permits citizen suits with the potential for civil monetary penalties or injunctive relief: 33 U.S.C. § 1365 (2012). The citizen enforcement provision has been found to play “an extremely valuable role in achieving compliance with environmental law, including . . . providing[] an important deterrent to non-compliance when government agencies fail to act either because of lack of resources or political will.” Rechtschaffen, supra note 152, at 1231.
172 Rechtschaffen, supra note 152, at 1186.
Therefore, penalties are utilized as a mechanism to punish rule-breakers and deter future violations. This theory of enforcement looks skeptically at partnerships formed out of the regulatory relationship based on concerns of agency capture and the potential for unequal treatment. Penalties thus additionally send a message that everyone is treated uniformly.

In the food labeling context, stronger and clearer regulations would need to be enacted, as explored below. Thereafter, the FDA should enforce the regulations through a deterrence-based model, with the threat of civil penalties for non-compliance. In order to comply, food manufacturers need only dedicate an insignificant amount of time and resources to reviewing regulations to ensure compliance. As opposed to the environmental context, where agency partnerships make sense, cooperation would not be a necessary element of addressing violations of the revised food labeling standards. After the questionable package is introduced and the misleading label is in the stream of commerce, it is on store shelves and in home kitchens possibly for years. Post-marketplace cooperative enforcement to ensure a corrected label would not deter future non-compliance or correct the damaging label already present.

Pursuant to the plan delineated below, Congress should require the FDA to overhaul its regulations for permissible food claims and create a deterrence-based enforcement system.

B. REVISE FOOD LABELING REQUIREMENTS FOR ALL CLAIMS

Congress should require the FDA to revise and update its regulations related to all health, nutrition, and structure/function claims. At a minimum, the lax requirements identified above should be corrected. This includes creating a pre-approval structure for structure/function claims, instituting disqualifying levels of trans fat and added sugar for manufacturers to be able to make health claims, extending this disqualifying list to disqualify nutrient content claims, and enabling the FDA to obtain substantiation documents for questionable claims. Further, the FDA should strengthen and enforce its requirements for product names and product fortification. It should define terms such as "natural" and address clear misbranding cases, such as the case of energy drinks labeled as dietary supplements. These remedies would certainly resolve some of the most pervasive problems in need of attention.

The FDA could enact the aforementioned regulatory amendments and stop there. However, resource limitations would remain and this would leave in place a reactionary regulatory system that would not enable the FDA to address non-compliance any better than it does now. In addition, innovative product types and new misleading labeling practices will arise that will require FDA responses not yet

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174 Recitschaffen, supra note 152, at 1188, 1226-27.
175 Hank Schultz, Protecting Against Label Claims Lawsuits, FOOD NAVIGATOR-USA (Jan. 19, 2013), http://www.foodnavigator-usa.com/Regulation/Protecting-against-label-claims-lawsuits; see also Watson, supra note 143.
176 This presupposes the regulatory overhaul discussed below, where cooperative resolution of the underlying permissible and non-permissible claims would be achieved. However, after the revised claim regulations are enacted, post-market cooperative compliance would not effectuate the purpose behind the regulatory overhaul.
conceived. The regulatory system would remain labor and resource intensive and over time these remedies might turn out to be a temporary solution to much larger regulatory deficiencies in FDA authority. Thus, a regulatory overhaul is warranted. The goal of the overhaul will be to address the deficiencies identified but also to ultimately create a system of regulatory control over food labels that would not be possible without greater intervention.

Congress may look to the European Union (EU) for guidance. In 2006, the European Parliament and Council enacted Regulation 1924/2006, setting EU-wide conditions for the use of nutrition and health claims.177 The goal of the measure was to ensure claims on food are “clear, accurate and based on evidence accepted by the whole scientific community,” thereby eliminating claims that “could mislead consumers.”178 The European Parliament sought to support “informed and meaningful choices” among consumers while fostering “fair competition” and protecting innovation among manufacturers.179 In the EU, nutrition and health claims must now be authorized prior to use.180 The European Commission compiled a register of approved and rejected claims to be updated regularly,181,182 which provides comprehensive guidance to manufacturers for the thousands of claims previously considered.

The European Commission is supposed to establish specific nutrient profiles with which “food or certain categories of food must comply . . . in order to bear nutrition or health claims,”183 but these are outstanding to date.184 The legislation provides that the nutrient profiles should account for “the quantities of certain nutrients and other substances contained in the food, such as fat, saturated fatty acids, trans-fatty acids, sugars and salt/sodium.”185 Once enacted, this should assist in restricting claims on unhealthy food products.

The United States could likewise move towards a system of prior approval for all claims to minimize the existence of questionable and misleading claims and support fair competition. Through its notice and comment procedures, the agency would gain the perspectives of manufacturers, public health researchers, consumer advocates, and the public. When a manufacturer proffers a new claim, FDA approval will be required prior to the release of a claim. Part of the approval process would be the requirement that manufacturers submit substantiation documents in support of the newly proposed claim. A pre-approval process would require the agency to work cooperatively with stakeholders to ensure claims are truthful, non-misleading, and based on scientific evidence. The FDA would then establish a register of approved claims.

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180 Id. at 20.  
181 Health and Nutrition Claims, supra note 178.  
and rejected claims and house them in a publically available database. This process would be labor and resource intensive up front but would result in the agency having greater control over food labels in the long run. This will reduce the need to constantly police food labels and rectify inconsistencies in enforcement.

The guidelines for FDA approval of claims should include a requirement that all statements and claims have a scientific basis and not be misleading. The FDCA guides the FDA in determining whether a product meets the definition of misbranding due to misleading labeling or advertising by directing the FDA “take into account” the questionable statements, designs, and words, among other things, but also the extent to which the label “fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the articles.”186 The definition of misbranding due to misleading labeling thus requires a holistic view of the product and the range of representations made on the packaging. This underutilized requirement should be elevated in import and translate into a comprehensive requirement which restricts health and nutrition-related claims on otherwise unhealthy products.

The positive representation on the front of packaging has been found to increase consumers’ perception of health and likelihood to purchase some of the least healthy products in a food category.187 This is a clear indication that consumers are being misled by the claims. A method to address the misleading nature of claims on unhealthy food is to divide a product into its claim and its properties. For example, if a consumer chooses an orange flavored drink based on a Vitamin C nutrient content claim, but that is composed of high fructose corn syrup and water, and fortified with Vitamin C, the consumer might be getting a benefit from the fortification, but also a larger health detriment from drinking the remainder of the product. There is a strong argument that the health-related claim misrepresents the product as a whole and "fails to reveal" the negative health consequences of consuming the product notwithstanding the Vitamin C fortification. Products that are unhealthy in total should no longer be permitted to bear claims touting a singular positive nutrient.

The United States should further follow the EU’s lead and establish nutrient profiles which would permit or prohibit foods from being able to carry claims,188 and extend this to health, nutrient content and structure/function claims. Consumers seeking a singular positive nutrient can consult the Nutrition Facts Panel and ingredient list. A method for the FDA to accomplish this would be to revise the disqualifying nutrient list and include disqualifiers for trans fat and added sugar. This list should be applied to all claims. For example, orange juice would still be able to tout its vitamin C content but the fortified orange flavored drink would not. Studies are necessary to determine the best method to accomplish factually accurate, clear labels that do not mislead consumers about the health benefits of products.

186 21 U.S.C. § 321(n) (2012) ("If an article is alleged to be misbranded because the labeling or advertising is misleading, then in determining whether the labeling or advertising is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the articles to which the labeling or advertising relates under the conditions of use prescribed in the labeling or advertising thereof or under such conditions of use as are customary or usual.").

187 See Jennifer L. Harris et al., supra note 18, at 14. Health representations also create a health halo, which leads to over-consumption of the products carrying such claims. Brian Wansink, How Do Front and Back Package Labels Influence Beliefs About Health Claims?, 37 J. CONSUMER AFF. 305, 313-15 (2003).

FDA's fortification policy should be re-evaluated in this process to determine if fortification has health benefits for otherwise unhealthy highly processed products and permit or restrict such claims accordingly.

Revised labeling regulations should result in a more fair and efficient marketplace: one where consumers are not misled about a product's healthfulness and thus purchase products based on their true nutritional value.

C. THE FIRST AMENDMENT

In addition to its lack of authority, the agency has been hesitant to restrict claims based on First Amendment considerations. However, the government would be well within its authority to create a database of pre-approved claims and restrict manufacturers' ability to claim health benefits to foods meeting an overall nutritional profile.

The Supreme Court has expressed its preference for transparency in commercial transactions in order to support informed consumer decision-making. Food labels are protected as commercial speech under the First Amendment. The foundation of the commercial speech doctrine lies in the understanding that an "advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else" in order to increase profits. Therefore, the Court has explained that the government may "require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers as are necessary to prevent its being deceptive."

The Supreme Court created an intermediate test in Central Hudson Gas & Electric Corporation v. Public Service Commission to determine if government restrictions on commercial speech are valid, but such restrictions rarely pass the full test. However, the first prong of the test dictates that false, deceptive, and misleading speech is not protected by the First Amendment and may be restricted. The labeling issues of concern here are false, deceptive, and misleading claims and practices. Under the commercial speech doctrine, the government may restrict such speech or require that it be presented in a non-deceptive manner.

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189 See Lisa Shames et al., supra note 9, at 62.
190 See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976) ("it is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").
191 Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995) (invalidating Section 5(e)(2) of the Federal Alcohol Administration Act, which prohibited beer labels from displaying alcohol content, because it was "inconsistent with the protections granted to commercial speech by the First Amendment ... ").
192 Virginia State Bd. of Pharmacy, 425 U.S. at 772 n.24.
193 Id.
196 See in re R.M.J., 455 U.S. at 203 ("[W]hen the particular content or method of the advertising suggests that it is inherently misleading . . . the States may impose appropriate restrictions . . . . [T]he Court in Bates suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers of explanation.") (citing Bates v. State Bar of Arizona, 433 U.S. 350, 375 (1977)).
Under the revised regulatory regime and consistent with the First Amendment, factually accurate claims that do not mislead consumers would be permitted. Conversely, health-related claims on otherwise unhealthy products have proven to be misleading in studies. In developing revised regulation, Congress should direct the FDA to convene the Institute of Medicine to conduct additional studies to fully develop research-based restrictions. Thereafter, claims not based on this scientific evidence, and claims on otherwise unhealthy products as determined by an objective scientific criteria, would not be authorized. The revised approach would additionally address and restrict basic false practices such as conventional foods being mislabeled as dietary supplements and product identity names that misrepresent the contents of the product. Finally, the FDA could define confusing terms used on packaging, such as the descriptor ‘natural’ based on scientific data; this is within its regulatory authority to prevent deception and misleading representations and supports First Amendment goals.

Under the revised system, if a manufacturer seeks to proffer a new claim that has only the potential to mislead, the FDA could not restrict it but can require revised wording, the addition of a disclaimer, or both. The FDA may also require factual disclosures on product labeling to ensure the representations on the front of the package do not misrepresent the contents as whole. The Supreme Court has sustained the government’s ability to require factual commercial disclosures for this purpose. Consumer studies would be necessary to support this rulemaking and would inform the FDA which types of claims are informative and which claims are misleading.

D. INCREASED RESOURCES THROUGH REGISTRATION FEES

Given that financial resources would be required to carry out a regulatory overhaul, a registration fee structure should be implemented to fund increased agency activity. Congress has granted the FDA the authority to collect user fees in a variety of other contexts to allow the agency to “fulfill its mission of protecting the public health and accelerating innovation” in the industry assessed. None are assessed for the specific purpose of enforcing food labeling regulations. The FDA explained that the ability to collect user fees in other areas under its domain have been pivotal to its ability to support safety, effectively review such products, and achieve timely and enhanced pre-market review. For example, in the area of

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197 Id.
198 See Corn Products Refining Co. v. Eddy, 249 U.S. 427, 431 (1919) (stating that commercial entities have “no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold”); Cf Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 628 (1985).
199 Zauderer, 471 U.S. at 651 (“[W]e hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”); see also Milavec v. United States, 559 U.S. 229, 249-50 (2010) (citing Zauderer, 471 U.S. at 651).
201 President’s Fiscal Year 2013 Budget Request for the FDA: Hearing Before the Subcomm. On Agric., Rural Develop., Food & Drug Admin., and Related Agencies of the H. Comm. on
prescription drugs, the FDA was “understaffed, unpredictable, and slow,” so patients’ access to new medicines in the United States “lagged behind other countries.”

Congress enacted the Prescription Drug User Fee Act, providing the FDA with a stable, consistent source of funding through user fees, which “revolutionized the drug approval process.”

In the context of food, under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, food facilities are required to register with the FDA and re-register every two years under the FSMA, but under neither act are they required to pay a user fee upon registration. Under the FSMA, fees are assessed for “non-compliance materially related to a food safety requirement.” Therefore, the fee provisions only apply to those facilities subject to reinspection, to cover reinspection costs, and, for those who do not comply with recall orders, to cover the costs of recall activity. Under the FSMA, it is possible for a fee to be assessed in the context of misbranded food if the food label lacked the required disclosure related to food allergens and the food facility was thus subject to reinspection or failed to follow a recall order. This singular source of fees based on one type of misbranding leaves all remaining mislabeling issues unfunded.

Historically, Congress has augmented the FDA’s authority accompanied with user fees to carry out its increased responsibilities. In 2009, Congress expanded the agency’s authority over tobacco by passing the Family Smoking Prevention and Tobacco Control Act and funded this mandate through user fees assessed on manufacturers and importers of tobacco products. The Tobacco Control Act prohibits misbranding, which includes false or misleading labeling and advertising for tobacco products, and provides the FDA with the authority to enforce violations of the Act. The fees appropriated under the Act fund the costs associated with FDA’s enforcement activity.


Id.

201 Id.


206 The only other food-related user fee is assessed on color additives. Entities seeking to use color additives for food, drugs, devices and cosmetics must obtain batch certification (unless they are exempt) from the FDA. 21 U.S.C. § 379e(a) (2012). The agency will only admit a color additive to the listing subject to certification upon payment of a fee, determined according to the weight of the batch.

Id. § 379(e); see also 21 C.F.R. § 80.10(a), (b) (2013); Listing of Color Additives Subject to Certification, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ForIndustry/ColorAdditives/GuidanceComplianceRegulatoryInformation/ColorAdditiveListingRegulations/ListingofColorAdditivesSubjecttoCertification/default.htm (last updated May 19, 2009).


The FDA will need increased resources to undertake new regulatory activities outlined in this paper. Owners, operators, and agents of a facility engaged in the manufacturing, processing, packing, or holding of food for consumption in the United States are required to register with the FDA. Upon registration, each registrant must list the applicable food product categories for which they are responsible. Congress should enact a registration fee requirement similar to that mandated under the Tobacco Control Act for manufacturers of processed food that is distributed in interstate commerce. The goal would be to capture large manufacturers who produce the majority of packaged food consumed in the United States, and not burden small local producers. Further, facilities exempt from registration under the Bioterrorism Act include those that should not be assessed a registration fee: farms, retail and nonprofit food establishments, restaurants, fishing vessels and USDA regulated facilities that produce meat, poultry, and eggs. The fees appropriated would be available for the costs associated with FDA regulation of food products. This will support the FDA in fulfilling "its mission of protecting the public health" in the food labeling context by creating a clear and factually accurate information environment.

E. CIVIL MONETARY PENALTIES

Congress should grant the FDA the authority to issue civil monetary penalties for non-compliance of the revised regulations restricting misleading claims on food packaging. Congress and the Supreme Court have discussed the concept behind granting federal agencies the authority to issue civil monetary fines. Specifically, when Congress enacted the Federal Civil Penalties Inflation Adjustment Act of 1990 it explained that "the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations." The very purpose of the Act is to further the dual goals of "maintain[ing] the deterrent effect of civil monetary penalties and promot[ing] compliance with the law." Likewise, the Supreme Court has "recognized . . . that

21 C.F.R. § 1.225.
17 Id. (requiring registrants to list applicable food product categories as identified in 21 C.F.R. § 170.3; see 21 C.F.R. § 170.3(c) listing 43 general food categories that group specific related foods together, including the following: baked goods; non-alcoholic beverages, including soft drinks; frozen dairy desserts; snack foods, including chips, pretzels, and soft candy).
21 21 C.F.R. § 1.226.
216 Calculation of these fees would need to consider whether the manufacturers would pass the cost on to consumers. Consumer access to whole foods and differing responses to potential increased prices stemming from the fee provision due to socio-economic variation is beyond the scope of this paper. For a relevant discussion of strategies to address this point, see Jennifer L. Pomeranz, A Conditional Funding Strategy to Address the Modern Food Environment: From Public Health Prevention to State and Local Preemption, 40 DUKE FORUM FOR L. & SOC. CHANGE 39, 41-44 (2013).
217 See User Fees, supra note 200.
220 Id. § 2461(2)(b)(1) (requiring federal agencies to issue regulations to adjust their civil monetary penalties upward due to inflation).
221 Id. § 2461(2)(b)(2); see also Federal Civil Penalties Inflation Adjustment, 69 Fed. Reg. 43,299, 43,299 (July 20, 2004) (In responding to a comment requesting higher penalties in the context of violations of regulations regarding drugs, the FDA noted that the FCPIAA did not authorize
'all civil penalties have some deterrent effect.' In the environmental context, the Court explained that Congress' grant of civil penalties promoted immediate compliance and deterred future violations.

Penalties should also minimize enforcement errors because the threat of detection resulting in a penalty alone has been found to garner compliance. The same cannot be said of Warning Letters. Penalties additionally provide an expressive function by reminding companies to verify compliance and reassuring compliers that non-compliance is penalized.

An optimal penalty covers the cost of enforcement and serves as a proper deterrent notwithstanding the benefits of noncompliance. Economic and legal scholars posit that when an enforcement agency has limited resources, the amount of the penalty should be increased to minimize enforcement costs without sacrificing deterrence. This would be a necessary consideration if Congress does not increase funding for the FDA to address labeling through the user fee provisions discussed above. Regardless, Congress should permit the recovery of civil fines for violations of the misbranding regulations.

F. SUMMARY

Congress should revise the FDA's authority over food labeling claims to require preauthorization for claims. The FDA would work with stakeholders to create the claims database and work with food companies on pre-market compliance. Pursuant to this process, the FDA must have access to substantiation documents when a manufacturer seeks to introduce a novel claim. The goal of the proposed regulations would be to clarify permissible claims and restrict impermissible claims. This will create a transparent regulatory regime for both manufacturers and consumers. Subsequent to this, a deterrence-based system is warranted and Congress should provide the FDA with the authority to issue civil monetary penalties for non-compliance of the revised food labeling standards. This will clarify the FDA's expectations of companies so it is clear when a penalty will be issued. Finally, Congress should provide the FDA the resources to carry out the new directives through registration fees paid by the regulated industry.

V. CONCLUSION

The FDA is severely underfunded and lacks significant authority necessary to address questionable food labeling practices utilized today. Congress should overhaul the regulatory requirements for manufacturers to make health- and nutrition-related claims by creating a pre-approval process for all claims and house them in a database accessible to the population at large. Claims that are not based on scientific evidence or that misrepresent the healthfulness of a product as a whole increases in penalties greater than ten percent, even though "higher civil monetary penalties might be a better deterrent."),

222 Friends of the Earth, 528 U.S. at 185.
223 Id.
224 Polinsky & Shavell, supra note 131, at 60-62.
225 Elaine Watson, supra note 141 (quoting a lawyer stating that some manufacturers believe the worst thing that can happen from an "improper labeling claim is that they would receive a warning letter [sic] and then they would fix it and move on").
226 Cunningham et al., supra note 164, at 295.
227 Crumley, supra note 164, at 383-84; Rechtschaffen, supra note 152, at 1188.
228 Polinsky & Shavell, supra note 131, at 72; Rechtschaffen, supra note 152, at 1215.
should no longer be permitted on food products. Violations of the revised labeling requirements should garner civil monetary penalties to deter violations. The goal of this regulatory overhaul is to eliminate questionable claims from product packaging to support a fair and efficient marketplace. Congress should fund the FDA’s revised authority through registration fees required of all food manufacturers and importers subject to the agency’s authority. Through this regulatory overhaul, the FDA can achieve its mission in the area of food labeling—something now left to voluntary compliance and inefficient and costly litigation.
On September 2, 2009 Plaintiff Haydee Stuart ("Plaintiff") filed a First Amended Complaint against Cadbury Adams USA LLC ("Cadbury" or "Defendant") alleging the following claims for relief: (1) violation of California’s Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, et seq.; (2) violation of California’s False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 et seq.; (3) violation of the California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.; and (4) fraud. Plaintiff alleges that Cadbury’s representations that its “Trident White” chewing gum is clinically shown to whiten teeth are misleading. FAC ¶¶ 31, 49.

I. LEGAL STANDARD ON A 12(b)(6) MOTION TO DISMISS

On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. Wyler Summit P’ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. Haddock v. Bd. of Dental Examiners, 777 F.2d 462, 464 (9th Cir. 1985).

Federal Rule of Civil Procedure 8(a)(2) requires
only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[]." . . . While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff’s obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not . . . Factual allegations must be enough to raise a right to relief above the speculative level . . .


"Two working principles underlie . . . Twombly." Ashcroft v. Iqbal __ U.S. __, 129 S. Ct. 1937, 1949 (2009). “First, the tenet that a court must accept as true all allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.” Id. at 1949-50. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that defendant has acted unlawfully.” Id. at 1949. “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id. at 1950.

“Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. . . . However, material which is properly submitted as part of the complaint may be considered” on a motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Documents whose contents are alleged in a complaint and whose authenticity
no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss without converting the motion to dismiss into a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). If the documents are not physically attached to the complaint, they may be considered if their “authenticity . . . is not contested” and “the plaintiff’s complaint necessarily relies” on them. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998). Furthermore, under Fed. R. Evid. 201, a court may take judicial notice of “matters of public record.” *Mack v. South Bay Beer Distribrs.*, 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991). “The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading.” 5C Wright & Miller, *Fed. Prac. & Pro.* § 1363 (3d ed. 2004).

Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted).

II. THE CRLA, FAL, AND UCL AND THE “REASONABLE CONSUMER” STANDARD

California’s Unfair Competition Law (“UCL”) prohibits any “unlawful, unfair or fraudulent business act or practice.” Cal. Bus. and Prof. Code § 17200. California’s False Advertising Law (“FAL”) prohibits any “unfair, deceptive, untrue, or misleading advertising.” Cal. Bus. and Prof. Code § 17500. Finally, California’s Consumer Legal Remedies Act (“CLRA”) prohibits “unfair methods of competition and unfair or deceptive acts or practices.” Cal. Civ. Code § 1770. Claims of deceptive advertising or practices under these statutes are governed by the “reasonable consumer test.” *See Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008). A plaintiff alleging that she has been misled need not plead “the exact language of every deceptive statement; it is sufficient for [the] plaintiff to describe a scheme to mislead customers,
and allege that each misrepresentation to each customer conforms to that scheme.” Committee on Children’s Television, Inc. v. General Foods Corp., 35 Cal.3d 197, 212-213 (1983). Allegations of deceptive advertising “may be based on representations to the public which are untrue, and “also those which may be accurate on some level, but will nonetheless tend to mislead or deceive . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under” ’ the UCL.” McKell v. Washington Mutual, Inc., 142 Cal. App. 4th 1457, 1471 (2006).

In cases under the CLRA, FAL, and UCL, “California courts . . . have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer.” Williams v. Gerber, 552 F.3d 934, 938-39 (9th Cir. 2008), citing Linear Technology Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 134-35 (2007) (“Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires consideration and weighing of evidence from both sides and which usually cannot be made on demurrer.”).

Despite the fact-specific inquiry of claims for deceptive or unfair practices, courts have granted dismissal when the plaintiff has failed to allege sufficient facts to enable a fact-finder to conclude that a reasonable consumer would be deceived. In Freeman v. Time Inc., 68 F.3d at 285 (9th Cir. 1995), the Ninth Circuit upheld the dismissal of a claim that an advertising mailer deceptively suggested that the plaintiff had won a million dollar sweepstakes. The court held that the advertisement itself—which stated multiple times that the plaintiff would win the prize only if he had a winning sweepstakes number—precluded the plaintiff from proving that a reasonable consumer was likely to be deceived. Id. at 289.
III. DISCUSSION

A. Plaintiff’s Theory of how Cadbury’s Representations Deceive Consumers

Plaintiff alleges that Cadbury’s advertising claim that its “Trident White” chewing gum is “clinically shown to whiten teeth” is misleading. FAC ¶ 49. Plaintiff alleges that Defendants “do not have competent and reliable scientific evidence to support the ‘whitening’ claims claims [sic] about Trident White.” FAC ¶ 52. Central to Plaintiff’s allegations is her contention that “extrinsic stain removal” and “whitening” are two different things. FAC ¶¶ 6-10; 21, 37-40; 48-62. Plaintiff alleges that “Trident White does not affect intrinsic tooth discoloration or otherwise ‘whiten’ teeth as she understood.” FAC ¶ 21. According to the FAC, Cadbury’s “whitening” claims about Trident white are misleading because consumers have the impression that “[t]eeth ‘whitening’ involves the remediation of intrinsic tooth discoloration, not simply removing daily food and beverage staining.” FAC ¶ 54. Plaintiff alleges that in marketing Trident White, Cadbury makes “separate and distinct substantiation claims that Trident White whitens teeth and removes stains,” and that “a reasonable consumer . . . is deceived by the separate and conjunctive representations on Trident White packaging, internet and television advertisements that proclaim that Trident White separately and both ‘whitens teeth’ and ‘removes stains.’” FAC ¶¶ 56, 58.

Plaintiff also alleges that Cadbury has attempted to mislead the public into believing that Trident White “separately and both ‘whitens teeth’ and ‘removes stains’” by making “separate and conjunctive representations” to that effect. FAC ¶ 58. According to this argument, by making “separate and conjunctive representations” that Trident White both “whitens teeth” and “removes stains,” Cadbury is misleading consumers into believing that Trident White has whitening capabilities beyond stain removal.
B. Accepting Plaintiff's allegations as true, Plaintiff fails to state any
cognizable UCL, FAL, or CLRA claim

Without intending to disparage the Plaintiff's apparent dismay, the allegations in
the FAC invite the question "Are you kidding me?" The allegations of consumer
deception defy common sense and are contradicted by the actual advertising claims made
by Cadbury.

Plaintiff herself points out that "there are many causes of tooth discoloration,"
including the "consumption of staining substances." FAC ¶ 38. The Iqbal standard
recognizes that "[d]etermining whether a complaint states a plausible claim for relief . . .
is a context-specific task that requires the reviewing court to draw on its judicial
experience and common sense." Id. at 1950. Given that the removal of stains will
necessarily cause a surface to look whiter, Cadbury's representations that Trident White
does both is not misleading.

Moreover, Cadbury's marketing claims, by which Plaintiff alleges to have been
deceived (and which Plaintiff has attached to her FAC), make clear that Trident White
makes teeth whiter by reducing stains. For example, Cadbury's website includes the
following statements:

How exactly does Trident White® work?
Trident White® is made with a proprietary whitening technology. Clinical
studies have shown that chewing two pieces of Trident White® gum four
times a day for four weeks can result in stain reduction when used in
combination with your daily oral care regimen. A clinical study has also
shown that chewing Trident White® gum prevents surface stains from
forming.
How long will it take to see results from chewing Trident White®?
Chewing two pieces of Trident White® gum four times a day can result in stain reduction in as little as four weeks.

FAC Exh. 4.

In the FAC, Plaintiff cites the American Dental Association’s lack of mention of chewing gum as an acceptable “whitening method” to support her argument that stain removal does not equate with whitening and that Cadbury does not have a reasonable basis to make such a claim. FAC ¶ 18. Yet, as Cadbury points out, the ADA specifically defines extrinsic tooth stain removal as a form of whitening. See Defendant’s Request for Judicial notice, Exh. 1 (print out of ADA web page entitled “ADA Positions and Statements: ADA Statement on the Safety and Effectiveness of Tooth Whitening Products”).

Notably, Plaintiff does not allege that Cadbury’s claim that Trident White is clinically proven to assist in stain removal is deceptive or misleading.¹ Although she

¹ The FAC contains one vague allegation regarding Cadbury’s claim that Trident White is clinically proven to assist in stain removal. In paragraph 62 Plaintiff alleges: “In sum, Defendants do not have the requisite evidence to support their claims that Trident White is clinically proven to remove stains and whiten teeth.” FAC ¶ 62. However, the preceding paragraphs set forth Plaintiff’s theory that by stating that Trident White is clinically shown to “whiten teeth” and “remove stains,” reasonable consumers are deceived into believing that Trident White will “whiten teeth” in the way that Plaintiff understands the concept (i.e. “intrinsic” whitening) in addition to removing extrinsic stains. Thus, Plaintiff’s entire theory of deception rests on Cadbury’s making two “conjunctive” claims regarding Trident White’s “whitening” properties. Consistent with these factual assertions, paragraph 62 is simply alleging that consumers are misled
states that she “did not experience whitened teeth (or anything close thereto) as a result of using Trident White,” FAC ¶ 24. Plaintiff makes clear throughout the FAC that she understood “whitening” to mean “intrinsic stain removal.” Id. ¶¶ 52-59. She alleges, for example, that the injury she suffered was that she would “not have purchased Trident White if she had known that the advertising as described herein was false—specifically that Trident White does not affect intrinsic tooth discoloration or otherwise ‘whiten teeth’ as she understood.” Id. ¶¶ 21, 67 (emphasis added). Thus, her entire theory of deception and harm is based on her position that “whitening,” as understood by consumers, refers only to “intrinsic” whitening and not “extrinsic” whitening.

As the foregoing analysis shows, even accepting all of Plaintiff’s allegations as true, she has not stated a claim that a reasonable consumer would be deceived or misled by Cadbury’s representation that Trident White is clinically shown to “whiten teeth.” Common sense, as well as the Trident White advertising itself, precludes Plaintiff from proceeding on the basis of the implausible (see Iqbal, supra) notion that a reasonable consumer would conclude that Trident White’s “whitening” claims refer only to “intrinsic” whitening. Moreover, Cadbury does not even claim that Trident White is clinically proven to assist in “intrinsic” whitening. As such, Plaintiff has not stated a claim under the UCL, FAL, or CLRA.

Because Plaintiff cannot prevail under Rule 8 pleading standards, it is not necessary to determine whether her fraud claims meet Rule 9(b)’s heightened pleading by Cadbury’s claims that Trident White is clinically shown to assist in both intrinsic whitening and extrinsic stain removal—not one or the other.

2 Plaintiff, in her Opposition, mischaracterizes this allegation as stating that “Trident White did not (i) remove any stains from Plaintiffs teeth, (ii) prevent stains from occurring on Plaintiff’s teeth and/or (iii) whiten her teeth in any way.” Opp’n. at 4:14-16. Clearly, this is not what is stated in the FAC, and it is entirely unsupported by the factual allegations in the rest of the FAC.
requirements.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant’s Motion to Dismiss.\textsuperscript{3} Standard principles of pleading practice ordinarily would entitle Plaintiff to one more try at framing a viable complaint, and the Court will grant her that leave ... with this proviso: if any amended complaint fails to pass the figurative “smell test”—\textit{i.e.}, it reeks of silly, hair-splitting contortions that clearly make the claim implausible under \textit{Iqbal}—the Court will entertain a Rule 11 motion. (Any such amendment should be filed by not later than February 16, 2010.)


This Order is not intended for publication or for inclusion in the databases of Westlaw or LEXIS.

\textsuperscript{3} Docket No. 12.
Food labeling litigation is exploding. In recent years, virtually every aspect of food product labeling – from representations about "all natural" ingredients, to health benefit claims, to the content of nutrient and calorie listings – has come under fire. Food manufacturers are facing heightened scrutiny from government regulators, who are initiating increasing numbers of enforcement actions. At the same time, consumer groups and plaintiffs' attorneys are filing new food labeling lawsuits (primarily class actions) at unprecedented levels. In some jurisdictions – particularly in California – barely a day goes by without a new filing or a new ruling in a case based upon allegedly false or misleading food marketing claims.

The Still-Evolving Regulatory Landscape

Food companies trying to navigate this new wave of litigation face a challenging course, for several reasons. First, food labeling cases are being decided against a backdrop of an unsettled and still incomplete regulatory framework. Litigation often tends to focus in areas where there is little or no statutory or regulatory guidance about what types of advertising and marketing claims can and cannot be made. For example, there are no Food and Drug Administration (FDA) regulations that specifically define "natural" or "all natural" as those terms are used in food product marketing. The FDA has consistently declined to engage in formal rulemaking to define the terms, citing "resource limitations and other agency priorities."²

¹ By Paul S. Chan, Los Angeles Lawyer Magazine (publication pending).
Plaintiffs and consumer groups have stampeded into this regulatory void, filing a spate of "natural" and "all natural" food labeling lawsuits involving a wide array of products ranging from yogurt to pasta.\(^3\) These cases are based upon allegations that, notwithstanding their "natural" or "all natural" labels, the products contain ingredients that are synthetic or not naturally occurring in organic foods. In the absence of clear statutory or regulatory definitions for the terms, many courts have concluded that "natural" and "all natural" lawsuits are not preempted by statute or regulations, and have allowed such actions to move forward (provided the plaintiff can satisfy the normal requirements of pleading and proof).

**New Legal Theories**

Second, food labeling lawsuits are increasingly based upon false advertising theories of liability, and are no longer confined to claims involving actual product defects or health and safety risks to consumers. Recent lawsuits based upon foods developed through use of genetically modified organisms (GMOs) are a prime example. The FDA does not require a separate labeling regime for food developed using biotechnology, nor does the FDA require that manufacturers make any special disclosures for foods that are the product of genetic engineering.\(^4\) That is so because both the FDA and the weight of scientific studies have

artificial or synthetic has been included in, or has been added to, a food that would not normally be expected in the food." 58 Fed. Reg. 2302, 2407.


\(^4\) The FDA has chosen to regulate food based upon the "objective characteristics of the food and the intended use of the food," regardless of "the method by which [the food] is developed." Statement of Policy: Foods Derived From New Plant Varieties, 57 Fed. Reg. 22,984 (May 29, 1992).
concluded that such foods do not pose any "different or greater safety concern than foods
developed by traditional plant breeding."\(^5\)

Nevertheless, in recent years there has been a proliferation of lawsuits based upon the
inclusion of GMOs in food products. Plaintiffs in these cases do not necessarily contend that
such ingredients raise actual safety or health risks for consumers. Instead, the theory is that the
product labels touting such foods as "natural" or "all natural" are false, because the labels either
ignore or do not call out the presence of GMOs. Under this "consumer's right-to-know" theory,
whether there are safety or health risks associated is irrelevant; consumers are "harmed" because
they paid to purchase a product believing it is "all natural," when they (allegedly) would not have
paid the same (or any) price had they known the products contains GMOs. These types of food
labeling lawsuits therefore mirror traditional consumer class actions involving product purchases
based upon false or misleading advertising claims, where the alleged harm is wholly economic.

Moreover, false advertising plaintiffs are no longer confined to consumers or consumer
rights groups. In the recent *POM Wonderful v. Coca-Cola* decision, the United States Supreme
Court held that in certain circumstances, food companies themselves have standing to sue
competitor food companies for engaging in false or misleading product labeling under the
Lanham Act. Specifically, the Supreme Court held that a business allegedly injured by a
competitor's false or misleading advertising (including through product labeling) can sue under
the Lanham Act, even if the competitor's labels were authorized by the FDA or otherwise
complied with the Food Drug and Cosmetics Act (FDCA). The Court effectively held that

\(^5\) 57 Fed. Reg. 22,984, 22,991. The FDA has expressly declined "to make a determination ...
regarding whether and under what circumstances food products containing ingredients produced
using genetically engineered ingredients may or may not be labeled 'natural'". Skadden, Arps,
Slate, Meagher & Flom LLP, Food and Beverage Labeling and Marketing Litigation Continues
to Play Out in the Courts and Legislatures, 2014 WL 59462.
regulatory approval provided the floor, but not the ceiling, with respect to what can be said in food product marketing claims. It is still uncertain whether this ruling will materially increase the volume of new false labeling lawsuits. What is clear is that food companies launching new marketing campaigns must now be prepared for potential labeling litigation initiated by their own corporate competitors, not just individual consumers or consumer groups.

**Changing Consumer Expectations and The New Media**

Finally, a growing consumer, academic and media focus on "all things food-related" has both simplified and accelerated the process of identifying potential food labeling cases and litigants. In today's increasingly health-conscious society, depending on the city or neighborhood, the range of food consumers may include not just vegetarians but vegans, paleos, locavores, raw foodies, and more. Increasing numbers of these conscientious consumers expect "full disclosure," or at least something close to precision, from their food product labels. Meanwhile, in law schools, food law is one of the most popular new areas of legal teaching and scholarship, with a primary focus on the need for increased regulation and the limitations of the existing food labeling regime. This scrutiny of food products and their labeling claims has only been amplified by the advent of new media. There are now numerous websites and blogs devoted to the subjects of food safety, ingredients and labeling. These new media serve as easy and instantaneous vehicles for communication and coordination between the plaintiffs' bar, public interest groups and consumers – and fertile ground for the identification of potential new cases and plaintiffs.

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Against this backdrop, it is unlikely that the number or frequency of food labeling lawsuits will relent in the foreseeable future. What strategies and defenses are available to companies attempting to mitigate the risks of or defend against these lawsuits?

**Challenging Implausible Pleadings**

The first line of defense for a company responding to a food labeling lawsuit is to challenge the reasonableness, or the plausibility, of the theory of liability set forth in the complaint. Food companies have had measured success attacking false labeling cases at the pleading stage based upon failure to satisfy this plausibility standard.

Under the pleading requirements applicable to federal court complaints, plaintiffs pursuing false or misleading food labeling claims must set forth factual allegations sufficient to give rise to at least a "plausible" entitlement to relief. Such complaints must set forth "enough facts to state a claim for relief that is plausible on its face," meaning factual content sufficient to allow "the court to draw [the] reasonable inference that [the] defendant is liable for [the] misconduct alleged." A number of early food labeling complaints were dismissed because they did not set forth facts that supported an objectively reasonable theory of recovery. For example, courts dismissed lawsuits alleging that Froot Loops and Cap'n Crunch Berries cereals were mislabeled because the products did not, in fact, contain fruit or berries. But most cases do not turn on whether it is plausible to believe that "Froot Loops" contain fruit. Plaintiffs' theories of recovery have

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become increasingly sophisticated, and as a result, recent pleading challenges based on the plausibility standard have generated decidedly more mixed results.

A series of decisions by California federal district courts involving "all natural" labeling claims, all issued in late 2013 and early 2014, illustrate the significant disparities (and inconsistency) in outcomes. In two of the cases, the courts ruled the pleadings failed to satisfy the plausibility threshold. In *Kane v. Chobani*, a federal judge in the Northern District of California dismissed an action based upon "all natural" yogurt labeling. Plaintiff alleged this label was misleading, because the product was artificially colored with fruit and juice concentrate. The court rejected the allegations because plaintiff failed to plausibly allege how Chobani's processing of the juices rendered them "unnatural."11 Similarly, in *Pelayo v Nestle*, a federal court in the Central District of California dismissed a lawsuit based upon "all natural" marketing claims for a pasta product, in part because the product's ingredient list clearly set forth its ingredients, such that no reasonable consumer could be confused by use of the "all natural" labeling on the product.12

But in numerous other labeling cases involving very similar if not identical theories of liability, different California federal courts rejected motions to dismiss based upon the same implausibility arguments. In *Surzyn v. Diamond Foods Inc.*,13 a different court in the Central District of California rejected Diamond's argument that its tortilla chips' "All Natural" labeling would not deceive consumers because other information on the products packaging would eliminate any customer confusion. Declining to follow *Pelayo*, the court found that it was not

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"implausible" that consumers would be misled or confused by the "All Natural" label on the packaging of food containing synthetic ingredients, notwithstanding that the synthetic ingredients were disclosed on the ingredient list.\textsuperscript{14} A court in the Northern District of California also refused to dismiss three separate class actions involving the labeling of General Mills granola bars as "100% natural," notwithstanding that they contained GMOs. The court found that the plaintiffs had plausibly alleged that the labeling was false and misleading, because it could lead consumers to believe the products contained only natural ingredients and not GMOs, and therefore went beyond mere puffery.\textsuperscript{15} And in \textit{In Re: Hain Celestial Seasonings Products Consumer Litigation}, yet another court in the Central District of California denied a motion to dismiss a complaint based upon the "100 percent natural" labeling of a tea product that contained traces of pesticides, also finding that the label was not mere puffery.\textsuperscript{16}

These disparate results illustrate the limitations (and uncertainty) of pleading challenges based upon the implausibility standard. The defense should certainly be asserted if it is available. But as more and more courts find that false and misleading labeling claims state "plausible" theories of relief, early dismissals of these cases are by no means assured.

\textit{Challenges Based on Preemption and Primary Jurisdiction}

Depending on the particular advertising claim and food product at issue, defendants may also be able to dismiss or stay false labeling lawsuits by asserting a federal preemption defense.

\textsuperscript{14} Surzyn v. Diamond Foods, 2014 WL 2514320.


Under the federal preemption doctrine, state laws are displaced or preempted with respect to subjects matters governed exclusively by federal laws or regulations. In the food labeling context, the preemption defense has largely focused on the 1990 Nutrition Labeling and Education Act (the NLEA), which amended the Food Drug and Cosmetics Act (FDCA) and which prohibits the "misbranding of foods." The NLEA prohibits state regulations that are not "identical" with its or the FDCA's requirements.

The NLEA, however, specifically regulates only certain aspects of food product labeling. Thus, whether the preemption doctrine provides a viable defense depends entirely on the specifics of the labeling claim alleged to be false and misleading – and in some cases, where on the packaging the challenged claim is physically located.

For example, food labeling regulations distinguish between “principal display panels” – information like photographs, logos and general marketing terms like “all-natural” and "wholesome" that tend to appear on the front of food packaging – and the nutritional labeling, or nutrient content claims, that tend to appear on the back of food packaging. As a general matter, the nutritional content claims that occur on the "back of the label" are more closely regulated than information that appears on the "front of the label." Thus, whether the preemption defense will succeed in a particular case may depend on whether the challenged marketing statement is considered to be a general, "front of the label"-type claim about the product (like "all natural" or

17 21 U.S.C. § 301 et seq.
19 See 21 C.F.R. §§101.1; 101.3, 101.13-.18 (front panel); id. §§101.2; 101.4, 101.9, 101.12 (back panel).
"wholesome"-type marketing claims), which are less likely to be preempted\textsuperscript{20}, or a "nutrient content claim" (for example, about the specific calorie or fat content of the product), which is more likely to be preempted.\textsuperscript{21}

The federal preemption defense may also succeed in subject areas where the FDA is actively engaging in ongoing rule-making to define or regulate a particular product or ingredient. Within the first half of 2014, for example, a number of cases targeting manufacturers' practice of listing "evaporated cane juice" instead of sugar on their product labels were stayed or dismissed, because the FDA was engaged in active rule-making about the term "evaporated cane juice."\textsuperscript{22} during the same time period.

However, a food labeling lawsuit will not be found to be preempted simply because it involves a product or an ingredient that is or has been the general subject of a federal regulation or statute. The particular federal statute or regulation at issue must be analyzed closely to determine whether enforcement of state law claims or regulations would be inconsistent with the federal regulatory scheme.\textsuperscript{23}

\textbf{Class Certification Defenses}

Because more and more food labeling cases are surviving pleading challenges, the primary battleground in food labeling litigation today is at the class certification stage. Although


some classes have been certified, food companies have still been successful in the majority of cases in defeating class certification.

One of the most effective means to defeat class certification is to attack the viability of the plaintiffs' theory of damages. A number of courts have refused to certify classes (or have decertified classes) because plaintiffs have failed to prove a causal link between the alleged misconduct and the alleged damages. For example, in the In Re POM Wonderful LLC Marketing & Sales Practice Litigation, id., a federal district judge in the Central District of California decertified a class action against POM Wonderful, the maker of pomegranate juice, based upon the United States Supreme Court’s reasoning in Comcast Corp. v. Bahrend, which requires that in determining whether class certification is appropriate, plaintiffs must be able to show that the damages stem from the defendants’ actions that created the legal liability. The POM Wonderful court discussed the myriad factors that might affect a consumer’s decision to buy a bottle of juice — such as price, taste, nutritional information, or the effect of a television ad — and concluded it was impossible to determine whether or to what extent a particular health claim made by POM Wonderful (which did not actually appear on the label of the product) was the cause of the purchase. Accordingly, the Court found that plaintiffs had not established that the claims of the class representatives would be “typical” of other class members, or that the


“defendant’s action that created the legal liability” would be “common” to the class. Certification was therefore not warranted under the class action requirements set forth in Rule 23 of the Federal Rules of Civil Procedure.

Class certification motions have also been defeated in cases where plaintiffs are unable to calculate damages because the consumer has received at least some benefit from the product. In a class action filed against the J. M. Smucker Company, based upon its labeling claims touting its product as healthy (although it contained hydrogenated oils and corn syrup), a different federal judge in the Central District of California denied class certification because damages could not be accurately determined for the class.27 The Court ruled that because class members likely received some benefits from their food purchases, they were not entitled to full refunds of their purchase price. Moreover, because plaintiffs failed to present evidence on the difference between the true value of Smucker’s products and the market price, damages could not be accurately determined.28

Similar reasoning was applied in the POM Wonderful case. There, the motion to decertify the class was granted, in part, because plaintiffs could not articulate a viable period of damages. One theory, the “full refund model,” sought recovery of the full purchase price paid for the products. However, the POM Wonderful court noted that that model did not take into account the benefits plaintiffs received from purchasing the product — such as quenching their thirst, and other nutritional benefits — even if it were the case that the claimed health benefit representations were not true. Plaintiffs alternatively alleged a “price premium model” of damages, comparing the price of POM’s products to those of other refrigerated juices, and

28 Id., 2013 WL 1477400 at * 4.
sought the difference. The court also rejected that damages model, because it determined that unlike other markets, the market for refrigerated juices was not necessarily an “efficient” market, meaning that price differentials between the POM products and other products were attributable to factors other than challenged health benefit claims, and it was impossible to determine how much, if any, of the price premium was related to the benefit claims. As noted by the court, “rather than draw any link between [POM’s] actions and the price difference between the four-juice average benchmark price and the average [POM] prices, the [Price Premium model] simply calculates what the price difference was.”

Finally, courts may refuse to certify food labeling classes because the class is not readily ascertainable. Again, the POM Wonderful decision illustrates the principle. The court noted that there were millions of potential consumers who purchased the product at issue, but none of them were likely to have kept records of their purchases, and there was no way to distinguish between purchasers who bought the product based upon the challenged health claims and those who bought the products for other reasons. Accordingly, because the class was not “ascertainable,” the motion for decertification was granted.

These recent decisions illustrate the considerable hurdles that still confront plaintiffs seeking to certify classes in food labeling litigation. Food companies should focus on whether plaintiffs have truly satisfied their requirements to articulate a viable damages, and identify a literally ascertainable class, in seeking to avoid class certification.

30 Id. See also, Astiana v. Ben & Jerry’s Homemade, Inc., 2011 WL 2111796.
The Road Ahead

There is no indication that the surge in food labeling lawsuits will be waning any time soon. Food companies will always have an incentive to develop aggressive and effective marketing and advertising claims — because such claims move product off the shelves. And so long as labeling regulations and statutory definitions fail to keep pace with consumers' (and food industry competitors') expectations about what should and should not be disclosed on food labels, food labeling law will continue to be made through the courts. Food companies still possess a number of potentially viable defenses to labeling lawsuits, both at the pleading stage and in opposing class certification. Defendants have had particular success challenging plaintiffs' theories of damages. But unless and until the courts develop a sufficient and consistent body of case law delineating precisely what types of food marketing claims are and are not actionable, food companies should expect what looks to be a steady diet of food labeling litigation.
In these consolidated putative class actions, Plaintiffs Tatiana Von Slomski and Sylvia Trevino sue Defendant The Hain Celestial Group, Inc., alleging that Defendant falsely markets its teas as “100% Natural.” (Consolidated Class Action Complaint (“Complaint”), Dkt. No. 26.) Defendant has filed a Motion to Dismiss Consolidated Class Action Complaint (“Motion”). (Motion, Dkt. No. 27.)

After considering the parties’ arguments, the Court DENIES the Motion.

BACKGROUND

The following facts are taken primarily from the Plaintiffs’ Complaint, whose allegations the Court accepts as true for the purposes of a motion to dismiss. See Skilstaf, Inc., v. CVS Caremark Corp., 669 F.3d 1005, 1014 (9th Cir. 2012).

Defendant distributes teas under the brand Celestial Seasonings. (Compl. ¶ 1.) Ten of these teas—Sleepytime Herbal Tea, Sleepytime Kids Goodnight Grape, Green Tea Peach
Blossom, Green Tea Raspberry Gardens, Authentic Green Tea, Antioxidant Max Dragon Fruit, Green Tea Honey Lemon Ginseng, Antioxidant Max Blackberry Pomegranate, Antioxidant Max Blood Orange, and English Breakfast Black KCup—are at issue in this lawsuit. (Id.)

Defendant advertises the teas as “100% Natural,” including by placing a “100% Natural Teas” logo on the outer packaging of its teas. (Id. ¶ 19–21.) But, allegedly, each of the teas “has been found to contain significant levels of one or more” chemical insecticides, fungicides, and herbicides, which the Complaint refers to as “contaminants.” (Id. ¶¶ 11–12.) According to the Complaint, these pesticides are “man-made chemical[s]” that are “not naturally occurring.” (Id. ¶ 11.)

 Plaintiffs are consumers of Defendant’s teas. (Id. ¶¶ 7–8.) Plaintiffs were “willing to pay for the Products because of the representations that they were ’100% Natural’ and would not have purchased the Products, would not have paid for the Products, or would have purchased alternative products in the absence of the representations, or with the knowledge that the Products contained Contaminants.” (Id.)


**PRELIMINARY MATTERS**

To support their arguments, both parties request that the Court take judicial notice of various documents. The Court grants these requests, which are unopposed.
LEGAL STANDARD

A court should grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) when, “accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party,” a complaint fails to state a claim upon which relief can be granted. Skilstatf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1014 (9th Cir. 2012); see Fed. R. Civ. P. 12(b)(6). “[D]etailed factual allegations” aren’t required. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). But there must be “sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively . . . [and] plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.” Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). A court should not accept “threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.” Iqbal, 556 U.S. at 678.

Fraud claims must meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires enough specificity to give a defendant notice of the particular misconduct to be able to defend against the charge. Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001) (internal citations omitted). To satisfy this specificity requirement, “the who, what, when, where, and how” of the misconduct must be alleged. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997). Thus, factual allegations must include “the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.” Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007). Where the allegations in support of a claim fail to satisfy the heightened pleading requirements of Rule 9(b), the claim is subject to dismissal. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003).

ANALYSIS

Defendant moves to dismiss for failure to state a claim, for lack of standing, and under the
primary jurisdiction doctrine. The Court considers each set of arguments in turn.

I. FAILURE TO STATE A CLAIM

1.1 Whether Teas Contain Pesticides

Plaintiffs' key factual allegation is that the teas contain unnatural pesticides. Defendant argues that Plaintiffs have not sufficiently alleged this fact. The Court disagrees.

Plaintiffs allege that each of the teas contains "significant levels" of man-made, chemical pesticides, and Plaintiffs provide a list with specific descriptions of over twenty of the pesticides present in the teas. (Compl. ¶ 11.) Plaintiffs allege that Eurofins, "a highly regarded, accredited, and independent testing lab," published test results finding these pesticides in the teas. (Id.) These allegations, which the Court must accept as true in deciding a motion to dismiss, are sufficiently detailed "to give fair notice and to enable the opposing party to defend itself effectively . . . [and] plausibly suggest an entitlement to relief." Sturr, 652 F.3d at 1216.

Defendant's arguments to the contrary are not convincing. Defendant essentially asks the Court to disbelieve Plaintiffs' allegation that the teas contain pesticide residues, arguing that deficiencies in the evidence underlying that allegation make the allegation implausible. For example, Defendant argues that "the complaint is virtually devoid of any details about the purported testing of the teas," failing to answer such questions as "How many boxes of tea were tested for each variety?" and "How were the boxes handled prior to testing?" (Motion at 7–8.) But at the pleading stage, Plaintiffs are only required to allege facts suggesting an entitlement to relief, not allege in detail all evidence supporting those facts. The strength of this evidence is an issue for the factfinder. Viewing the allegations in the light most favorable to Plaintiffs, the Court concludes that it is plausible that the teas contain pesticides.
Defendant also repeatedly asserts that the study was published by “an admittedly biased short-seller that admits that it issued the report in hopes of driving down Hain Celestial’s stock price.” (See, e.g., Motion at 7.) For reasons the Court has just articulated, bias might weaken the evidentiary value of the study, but it does not sufficiently support dismissal at the pleading stage.

Next, Defendant argues that the Complaint alleges only that pesticide residues were found on dry tea leaves, not in the brewed tea that consumers actually drink. But taking the Complaint’s allegation that dry leaves contain residues as true, it is reasonable to infer that the brewed tea contains traces of pesticides as well. On a motion to dismiss, the Court is required to make these kinds of inferences in Plaintiff’s favor. See Skilstuff, 669 F.3d at 1014. The Court can consider any evidence of Defendant’s to the contrary on summary judgment or at trial.

Finally, Defendant argues that the allegations fail to meet Rule 9(b)’s particularity requirement, asserting that Plaintiff’s “did not conduct any independent factual investigation.” (Motion at 10.) But Rule 9(b)’s particularity requirement is not a test of the independence of a plaintiff’s factual investigation. Rather, Rule 9(b) requires allegations of the “the who, what, when, where, and how” of the misconduct. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997). Defendant has not explained how the allegations of the Complaint fail to meet that test.

The Court concludes that, for the purposes of a motion to dismiss, the Complaint sufficiently alleges that the teas contain pesticides.

1.2 Whether the Public Would Be Deceived by “100% Natural”

Defendant argues that the UCL, FAL, and CLRA claims should be dismissed because Plaintiff’s haven’t plausibly alleged that a reasonable consumer would likely be deceived by the “100% Natural” label. The “reasonable consumer test” applies to claims brought under UCL, FAL, or CLRA. Hill v. Roll Int’l Corp., 128 Cal. Rptr. 3d 109, 116 (Cal.
App. 2011). The question under the reasonable consumer test is whether an advertisement is “likely to deceive” a reasonable consumer. *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). This determination “will usually be a question of fact not appropriate for decision on demurrer.” *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008) (noting that it is “the rare situation” when dismissing these claims on the pleadings is appropriate).

This case is not one of the rare ones where the Court can find, based on the pleadings, that the labeling is unlikely to deceive a reasonable consumer. Plaintiffs allege that the teas are labeled as “100% Natural.” (Compl. ¶ 25.) They allege that the teas are not “100% Natural” because the teas contain pesticides consisting of “man-made chemicals” that are “not natural.” (Id. ¶¶ 11, 26–28.) And Plaintiffs allege that they purchased the teas because of the “100% Natural” label, but would not have purchased them if they knew they contained unnatural pesticides. (Id. ¶¶ 7–8.) Taking these allegations as true, and drawing all reasonable inferences in favor of Plaintiffs, the Complaint adequately alleges that the product label is likely to deceive a reasonable consumer. *Cf. Parker v. J.M. Smucker Co.*, 2013 WL 4516156, at *6 (N.D. Cal. Aug. 23, 2013) (concluding that whether an “All Natural” label would mislead reasonable consumers could not be resolved on a motion to dismiss).

In arguing otherwise, Defendant contends that Plaintiffs have not offered a definition of “natural.” But it is clear that, under the allegations of the Complaint, a food product is not “100% Natural” in the minds of consumers if the product contains unnatural chemicals. The Court doesn’t see why Plaintiffs need to allege a more specific definition.

Defendant also argues that it is implausible that a reasonable consumer would be misled. Defendant argues that unless a product is labeled “organic,” reasonable consumers would understand that the product may contain traces of pesticides. It may be that the evidence will support that theory. But, based on the allegations, it strikes the Court as plausible that the evidence will favor Plaintiffs. *See Starr*, 652 F.3d at 1216–17 (“Rule 8(a) simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence to
support the allegations.” (citing Twombly, 550 U.S. at 556) (internal quotation marks omitted). Defendant has not shown that it is implausible that reasonable consumers would perceive “100% Natural” products as pesticide-free.

1.3 Puffery

Defendant argues that all of Plaintiffs’ claims fail because the “100% Natural” label is puffery. “Generalized, vague and unspecific assertions” are “mere ‘puffery’ upon which a reasonable consumer could not rely.” *Glen Holly Entertainment, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1015 (9th Cir. 2003). While “misdescriptions of specific or absolute characteristics of a product are actionable,” “[a]dvertising which merely states in general terms that one product is superior is not actionable.” *Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990).

Based on the allegations in the Complaint, the Court cannot conclude that “100% Natural” is puffery. Defendant argues that the phrase is puffery because it is not capable of being proved false. But under Plaintiffs’ theory, if the product contains even traces of any man-made chemicals, then the product is not entirely natural. If that is what consumers understand the phrase to mean, then “100% Natural” can be proven false with evidence of those chemicals. See *Bohac v. Gen. Mills, Inc.*, 2014 WL 1266848, at *4 (N.D. Cal. Mar. 26, 2014) (concluding, based on the allegations, that a reasonable consumer would interpret “All Natural” representations as “specific factual claims upon which he or she could rely”). At this stage, the Court declines to hold that “100% Natural” is non-actionable puffery.

1.4 Conclusion

The Court concludes that Plaintiffs have stated claims under Rules 12(b)(6) and 9(b).

2. STANDING
Defendant argues that Plaintiffs lack standing to pursue their claims or, at the least, their standing is limited. The Court addresses each of these arguments.

2.1 Article III Injury Requirement

Defendant argues that Plaintiffs lack standing for failing to allege injury in fact. To satisfy Article III’s standing requirement, one of the things a plaintiff must show is that the plaintiff has suffered an “injury in fact” that is “concrete and particularized” and “actual or imminent.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.” Id. at 561 (internal quotation marks and alteration omitted). This standard from Lujan, rather than the general standards for assessing a failure to state a claim under Twombly and Iqbal, apply to determining standing at the pleading stage. Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) (“Twombly and Iqbal are ill-suited to application in the constitutional standing context . . .”).

Here, Plaintiffs have alleged economic injury, which is sufficient for constitutional standing. See Maya v. Centex Corp., 658 F.3d 1060, 1069 (9th Cir. 2011) (holding that allegations that plaintiffs paid more for their homes than the homes were worth because defendants failed to make disclosures required by law were sufficient for standing). Plaintiffs have alleged that they were “willing to pay for the Products because of the representations that they were ‘100% Natural’ and would not have purchased the Products, would not have paid for the Products, or would have purchased alternative products in the absence of the representations, or with the knowledge that the Products contained Contaminants.” (Compl. ¶¶ 7–8.) These allegations are enough to support standing under a theory of economic injury. See Jou v. Kimberly-Clark Corp., 2013 WL 6491158, at *3 (N.D. Cal. Dec. 10, 2013) (concluding that allegations that plaintiffs paid a premium for a product because of misrepresentations was sufficient for economic injury).
In arguing that injury is lacking, Defendant relies on *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025 (8th Cir. 2014). But that case is distinguishable. In *Wallace*, plaintiffs alleged that they paid a premium for hot dogs labeled as kosher, but that Defendant sold some packages of hot dogs that were not kosher. *Id.* at 1030. The Court held that it was speculative whether the plaintiffs purchased any non-kosher hot dogs, as the plaintiffs did not allege that “all or even most” of the packages were not kosher. *Id.* Here, however, Plaintiffs broadly allege that the teas contain pesticides, rather than merely alleging that some of the packages contain pesticides. *(See Compl. ¶ 1.)*

In assessing standing on a motion to dismiss, the Court must “presume that [these] general allegations embrace those specific facts that are necessary to support the claim.” *Lujan*, 504 U.S. at 561. Plaintiffs’ allegations are sufficient for standing.

### 2.2 Other Teas

Plaintiffs seek to represent a class of consumers who purchased ten different types of Defendant’s teas, which all allegedly contain the same “100% Natural” label and all allegedly contain pesticides. *(Compl. ¶¶ 1–3.)* Defendant argues that Plaintiffs only have standing to bring claims for the same teas that Plaintiffs purchased—Sleepytime Herbal Tea and Green Tea—and that Plaintiffs lack standing to challenge the other eight varieties of tea. Plaintiffs respond that the issue is one of class certification, not one of standing.

Courts have gone both ways on this issue. For example, in *Mlejnecky v. Olympus Imaging America Inc.*, the court held that a named plaintiff did not have standing to sue for defects in the Stylus 850 camera, even though the Stylus 850 had the same underlying defect as the Stylus 1030 camera that plaintiff did own. 2011 WL 1497096, at *4 (E.D. Cal. 2011). In *Donohue v. Apple, Inc.*, the court disagreed with the analysis in *Mlejnecky*, concluding instead that whether plaintiffs could represent purchasers of different iPhone models with the same defect was a class certification question. 871 F. Supp. 2d 913, 922 (N.D. Cal. 2012); *see also Constance Sims v. Kia Motors America, Inc.*, SACV 13-1791 AG
In the circumstances of this case, the issue strikes the Court as one better dealt with at the class certification stage. It may be that differences between the tea varieties and their labels are material and substantial enough that Plaintiffs cannot represent consumers of all of them. But these are questions of adequacy, typicality, or predominance of common issues, issues better resolved at the class certification stage. See Donohue, 871 F. Supp. at 922.

The Court declines to limit Plaintiffs’ class allegations at this time.

2.3 Representations on Defendant’s Website

The Complaint alleges that, in addition to the labels on the teas, Defendant’s website also features representations that the teas are natural. (Compl. ¶ 22.) Defendant argues that Plaintiffs “lack standing to pursue claims related to statements on Hain Celestial’s website because they do not claim to have relied upon . . . these statements.” (Motion at 13.) The Court agrees that Plaintiffs haven’t alleged that they relied on the representations on the website. But that doesn’t result in the dismissal of any claims. Plaintiffs adequately allege reliance on the representations on the product label and have standing to pursue their claims based on those representations.

3. PRIMARY JURISDICTION DOCTRINE

Defendant argues that, in the alternative, the Court should dismiss the case under the “primary jurisdiction doctrine” to permit the FDA to consider Plaintiffs’ claims. Plaintiffs oppose referring their claims to the FDA under this doctrine.

“The primary jurisdiction doctrine is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility
should be performed by the relevant agency rather than the courts.”” Davel Commc’ns, Inc., v. Qwest Corp., 460 F.3d 1075, 1086 (9th Cir. 2006) (quoting Syntek Semiconductor Co. v. Microchip Tech. Inc., 307 F.3d 775, 780 (9th Cir. 2002)). “The doctrine is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are ‘within the special competence of an administrative body.”’ Id. (internal quotations omitted). If a district court determines that the doctrine applies, it “refers” the issue to the relevant agency, which “means that the court either stays proceedings or dismisses the case without prejudice, so that the parties may seek an administrative ruling.” Clark v. Time Warner Cable, 523 F.3d 1110, 1115 (9th Cir. 2008).

Under the circumstances of these case, the Court declines to dismiss the case under the primary jurisdiction doctrine. On January 6, 2014, the FDA declined several referrals from other district courts considering similar issues. (See FDA Letter, Dkt. No. 31 Ex. 1.) In those cases, the district courts were considering whether labels like “Natural” and “100% Natural” were misleading when the products contained corn grown from genetically modified seeds. (Id. at 1.) The agency noted that it had competing priorities, and that “even if [it] were to embark on a public process to define ‘natural’ in the context of food labeling, there is no assurance that [it] would revoke, amend, or add to the current policy, or develop any definition at all.” (Id. at 2.) Given the FDA’s lack of interest in providing further guidance on the use of the word “natural” in food labeling, staying or dismissing the case to permit the FDA to so would likely be futile. Janney v. Mills, 944 F. Supp. 2d 806, 815 (N.D. Cal. 2013) (declining to apply the primary jurisdiction doctrine because the FDA has “repeatedly declin[ed] to promulgate regulations governing the use of ‘natural’ as it applies to food products,” so staying or dismissing the case to permit FDA action would “likely prove futile”).

The Court DENIES the request to dismiss the case under the primary jurisdiction doctrine.

DISPOSITION
The Court DENIES the Motion to Dismiss. The Court reaches this results after reviewing all arguments in the parties' papers. Any arguments not specifically addressed were either unpersuasive, not adequately developed, or not necessary to reach given the Court's holdings.
Before the Court is Plaintiff Chad Brazil’s (“Brazil”) Motion for Class Certification. ECF No. 96 (“Mot.”). Dole Packaged Foods, LLC’s (“Dole”) opposes the Motion, ECF No. 104-4 (“Opp.”), and Brazil replied, ECF No. 117 (“Reply”). Having considered the submissions of the parties, the relevant law, the record in this case, and the arguments at the May 29, 2014 hearing, the Court hereby GRANTS IN PART and DENIES IN PART Brazil’s Motion for Class Certification.1

1 The Court also GRANTS the parties’ respective motions to seal. See ECF Nos. 104 (Dole’s Administrative Motion to Seal its Opposition to Motion for Class Certification), 116 (Brazil’s Administrative Motion to Seal its Reply in Support of its Motion for Class Certification). The sealing requests are narrowly tailored to confidential business information, and are thus sealable under Civ. L. R. 79-5 and Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006). See also Phillips ex rel. Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1210-11 (9th Cir. 2002) (requiring a “particularized showing,” such that “specific prejudice or harm will result” if the information is disclosed); Beckman Indus., Inc. v. Int’l Ins. Co., 966 F.2d 470, 476 (9th Cir. 1992) (“Broad allegations of harm, unsubstantiated by specific examples of articulated reasoning” will not suffice).
I. BACKGROUND

A. Factual Background

Defendants are “leading producers of retail food products” who sell their products “through
grocery and other retail stores throughout the United States.” ECF No. 60, Second Amended
Complaint (“SAC”) ¶ 18. Defendant Dole Packaged Foods, L.L.C, is a California limited liability
corporation with its principal place of business in Westlake Village, California. SAC ¶¶ 16-17.
Brazil alleges that “[a]ll of the misconduct alleged [in the SAC] was contrived in, implemented in,
and has a shared nexus with California.” SAC ¶ 19. Brazil is a California consumer who “cares
about the nutritional content of food and seeks to maintain a healthy diet.” SAC ¶¶ 15, 193. From
April 2008 to the present, Brazil has spent over $25.00 on Defendant’s food products, which he
contends are “misbranded” in violation of federal and state law. SAC ¶¶ 5, 193. Specifically, Brazil
alleges that he purchased the following eight food products: (1) Dole Frozen Wildly Nutritious
Signature Blends—Mixed Berries (12 oz. Bag); (2) Dole Frozen Wildly Nutritious Signature
Blends—Mixed Fruit (12 oz. bag); (3) Dole Frozen Blueberries (12 oz. bag); (4) Dole Frozen
Blueberries (3 oz. plastic cups); (5) Dole Mixed Fruit in 100% Fruit Juice (4 oz. cups); (6) Dole
Fruit Smoothie Shakers—Strawberry Banana (4 oz.); (7) Dole Mixed Fruit in Cherry Gel (4.3 oz.
plastic cups); (8) Dole Tropical Fruit in Light Syrup & Passion Fruit Juice (15.25 oz. can). SAC
¶ 2. Brazil refers to these products collectively as the “Purchased Products.” Id. The SAC also
alleges claims based on thirty additional products that Brazil did not purchase, but which are,
Brazil claims, substantially similar to those that he did, in that they “(i) make the same label
representations . . . as the Purchased Products and (ii) violate the same regulations of the Sherman
Brazil refers to this group of products as the “Substantially Similar Products.” SAC ¶ 3.
Brazil alleges that Defendants make numerous representations concerning their products on
the products’ labels that are unlawful, as well as false and misleading, under federal and California
law. SAC ¶¶ 8-14. Specifically, Brazil challenges Defendants’ claims that certain of their products
are “all natural.” SAC ¶ 30 (identifying which of the Purchased Products make All Natural

Claims); ¶ 201 (identifying which of the Substantially Similar Products make All Natural Claims).

According to Brazil, regulations issued by the Food and Drug Administration (FDA) dictate that Defendants may not claim that a product is “all natural,” if it contains “unnatural ingredients such as added color, [or] synthetic and artificial substances.” SAC ¶ 31; see also 21 C.F.R. § 101.22 (setting forth the circumstances under which added colors and artificial flavors must be disclosed on a package’s label). Defendants’ products are mislabeled, Brazil alleges, because they contain ingredients that preclude the use of the term “natural.” SAC ¶ 37-39; see also ¶ 125 (label on Dole Frozen Wildly Nutritious Signature Blends—Mixed Fruit unlawfully “uses the phrase ‘All Natural Fruit’ even though this product contains the following artificial ingredients: ascorbic acid, citric acid, malic acid and added flavors”).

Brazil now seeks class certification as to only ten products asserted in the SAC (referred to herein as the “identified products”): (1) Tropical Fruit (can), (2) Mixed Fruit (cup), (3) Diced Peaches, (4) Diced Apples, (5) Diced Pears, (6) Mandarin Oranges, (7) Pineapple Tidbits, (8) Red Grapefruit Sunrise, (9) Tropical Fruit (cup), (10) Mixed Fruit (bag). Brazil contends that all ten of these products contain the label statement “All Natural Fruit,” which Brazil alleges is misleading because all ten products contain both ascorbic acid (commonly known as Vitamin C) and citric acid, allegedly synthetic ingredients.

B. Procedural Background

Brazil filed an Original Complaint against Defendants on April 11, 2012. ECF No. 1. Defendants filed a Motion to Dismiss on July 2, 2012. ECF No. 16. Rather than responding to Defendants’ Motion to Dismiss, Brazil filed a First Amended Complaint on July 23, 2012. ECF No. 25. The Court then denied Defendants’ Motion to Dismiss the Original Complaint as moot. ECF No. 28.

On August 13, 2012, Defendants filed a Motion to Dismiss the First Amended Complaint or, in the Alternative, Motion to Strike, ECF No. 29, which the Court granted in part and denied in part on March 25, 2013, ECF No. 59. The Court granted leave to amend, and, accordingly, Brazil filed the SAC on April 12, 2013. ECF No. 60. In response to the SAC, Defendants filed a Motion
to Dismiss and Motion to Strike on April 29, 2013. ECF No. 62. The Court granted in part and
denied in part Dole’s Motion to Dismiss the SAC on September 23, 2013. The parties also
stipulated to the dismissal of the Dole Frozen Blueberries (3 oz. plastic cups) product and all
Smoothie Shakers products (Mixed Berry, Peach Mango, Strawberry, or Strawberry Banana
flavors) after Brazil testified at his deposition that he had never purchased any of those products.
ECF No. 88. In addition, the stipulation dismissed Defendant Dole Food Company, Inc. from the
case. Id. Brazil filed the instant motion for class certification on January 31, 2014, ECF No. 96
(“Mot.”), Dole filed its opposition on March 6, 2014, ECF No. 104-4 (“Opp’n”), and Brazil filed a
reply on March 27, 2014, ECF No. 117 (“Reply”). Dole also filed separate motions to strike the
Declarations of Julie Caswell and Edward Scarbrough. ECF Nos. 111-112. 2

II. LEGAL STANDARD

Federal Rule of Civil Procedure 23, which governs class certification, has two sets of
distinct requirements that Plaintiffs must meet before the Court may certify a class. Plaintiffs must
meet all of the requirements of Rule 23(a) and must satisfy at least one of the prongs of Rule 23(b).

Under Rule 23(a), the Court may certify a class only where “(1) the class is so numerous
that joinder of all members is impracticable; (2) there are questions of law or fact common to the
class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of
the class; and (4) the representative parties will fairly and adequately protect the interests of the
class.” Fed. R. Civ. P. 23(a). Courts refer to these four requirements, which must be satisfied to
maintain a class action, as “numerosity, commonality, typicality and adequacy of representation.”

Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012). Further, courts have implied an
additional requirement under Rule 23(a): that the class to be certified be ascertainable. See Marcus
v. BMW of North America, LLC, 687 F.3d 583, 592–93 (3d Cir. 2012); Herrera v. LCS Fin. Servs.

2 The court does not rely in this order on the declarations of Julie Caswell or Edward Scarbrough,
so Dole’s motions to strike those declarations are DENIED AS MOOT. See ECF No. 111 (Motion
to Strike Caswell Decl.); Dkt. No. 112 (Motion to Strike Scarbrough Decl.).
In addition to meeting the requirements of Rule 23(a), the Court must also find that
Plaintiffs have satisfied “through evidentiary proof” one of the three subsections of Rule 23(b).

Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013). The Court can certify a Rule 23(b)(1)
class when Plaintiffs make a showing that there would be a risk of substantial prejudice or
inconsistent adjudications if there were separate adjudications. Fed. R. Civ. P. 23(b)(1). The Court
can certify a Rule 23(b)(2) class if “the party opposing the class has acted or refused to act on
grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory
relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Finally, the Court
can certify a Rule 23(b)(3) class if the Court finds that “questions of law or fact common to class
members predominate over any questions affecting only individual members, and that a class
action is superior to other available methods for fairly and efficiently adjudicating the

“[A] court’s class-certification analysis must be ‘rigorous’ and may ‘entail some overlap
with the merits of the plaintiff’s underlying claim.’” Amgen Inc. v. Conn. Ret. Plans and Trust
Funds, 133 S. Ct. 1184, 1194 (2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541,
2551 (2011)); see also Mazza, 666 F.3d at 588 (“Before certifying a class, the trial court must
conduct a ‘rigorous analysis’ to determine whether the party seeking certification has met the
prerequisites of Rule 23.”) (quoting Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186,
amended by 273 F.3d 1266 (9th Cir. 2001)). Nevertheless, “Rule 23 grants courts no license to
engage in free-ranging merits inquiries at the certification stage.” Amgen, 133 S. Ct. at 1194–95.
“Merits questions may be considered to the extent—but only to the extent—that they are relevant
to determining whether the Rule 23 prerequisites for class certification are satisfied.” Id. at 1195.
Within the framework of Rule 23, the Court ultimately has broad discretion over whether to certify
a class. Zinser, 253 F.3d at 1186.

III. DISCUSSION

Having originally alleged claims with respect to 38 products and 7 label statements in the
SAC, Brazil now seeks class certification only as to 10 products and only the “All Natural Fruit”

Dole claims that Brazil has abandoned his claims as to the other products and label statements identified in the SAC for which Brazil does not move for class certification. Dole thus asks the Court to dismiss these claims with prejudice. Brazil does not respond to Dole’s request to dismiss these claims with prejudice. Brazil could have moved to certify a broader class that includes all the Dole products and label statements identified in the SAC, but chose not to. The Court therefore finds that Brazil has abandoned the claims for which he did not seek class certification. See Jenkins v. County of Riverside, 398 F.3d 1093, 1095 n. 4 (9th Cir. 2005) (plaintiff abandoned two claims by not raising them in opposition to the County’s motion for summary judgment).

Moreover, Brazil previously asked the Court to sever the case, a request the Court denied on September 26, 2013. ECF No. 84 at 5:3-7. Dismissal without prejudice as advocated by Brazil would effectively moot the Court’s previous denial of Brazil’s request to sever the case. If the Court dismissed without prejudice, Brazil could file another case alleging the dismissed causes of action. Therefore, the Court dismisses all claims for which Brazil does not seek class certification with prejudice. Jenkins, 398 F.3d at 1095 n. 4; see also McCarthy v. Kleindienst, 741 F.2d 1406, 1412 (D.C. Cir. 1984) (holding that “[f]undamental fairness, as well as the orderly administration of justice requires that defendants haled into court not remain indefinitely uncertain as to the bedrock litigation fact of the number of individuals or parties to whom they may ultimately be held liable for money damages” and that Rule 23(c)(1) “foster[s] the interests of judicial efficiency, as well as the interests of the parties, by encouraging courts to proceed to the merits of a controversy as soon as practicable”).

Dole attacks Brazil’s ability to satisfy several of the elements required for class certification. Consequently, the Court will address each element required for class certification in turn.

A. Ascertainability

“As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists.”
Sethavanish v. ZonePerfect Nutrition Co., No. 12-2907, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014). A class is ascertainable if the class is defined with “objective criteria” and if it is “administratively feasible to determine whether a particular individual is a member of the class.” See Wolph v. Acer America Corp., No. 09-1314, 2012 WL 993531, at *1–2 (N.D. Cal. Mar. 23, 2012) (certifying a class where “the identity and contact information for a significant portion of these individuals can be obtained from the warranty registration information and through Acer’s customer service databases”); see also Hofstetter v. Chase Home Finance, LLC, No. 10-01313, 2011 WL 1225900, at *14 (N.D. Cal. Mar. 31, 2011) (certifying class where “defendants’ business records should be sufficient to determine the class membership status of any given individual.”);


Brazil has precisely defined the class based on objective criteria: purchase of the identified Dole fruit products within the class period. The class definition “simply identifies purchasers of Defendant’s products that included the allegedly material misrepresentations.” Astiana v. Kashi Co., 291 F.R.D. 493, 500 (S.D. Cal. 2013) (finding a class of customers who purchased Kashi products labeled as containing “Nothing Artificial” during the class period to be ascertainable and rejecting argument that because “Defendant does not have records of consumer purchases, and potential class members will likely lack proof of their purchases, . . . the Court will have no feasible mechanism for identifying class members”). Likewise, “[b]ecause the alleged misrepresentations appeared on the actual packages of the products purchased, there is no concern that the class includes individuals who were not exposed to the misrepresentation.” Id. In the Ninth Circuit, “this is enough to satisfy Rule 23(a)’s implied ascertainability requirement.” Forcellati v. Hyland’s, Inc., No. 12-1983, 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014) (certifying class of consumers who purchased “Defendants’ children's cold or flu products within a prescribed time
frame”); see also McCravy v. The Elations Co., LLC, No. 13-242, 2014 WL 1779243, at *7-9 (C.D. Cal. Jan. 13, 2014) (class ascertainable where “the class definition clearly define[d] the characteristics of a class member by providing a description of the allegedly offending product and the eligible dates of purchase’’); Guido v. L’Oreal, USA, Inc., No. 11-1067, 2013 WL 3353857, at *18 (C.D. Cal. July 1, 2013) (finding class ascertainable where “the requirement for membership in the class [was] whether a consumer purchased a product after a particular date’’).

Dole makes two arguments that the proposed class is not ascertainable. First, Dole argues that all of Dole’s ingredient suppliers use only natural processes to obtain ascorbic acid and citric acid. The parties agree that there are two ways to make ascorbic acid and citric acid: chemical synthesis and fermentation. ECF No. 104-18, Montville Decl. ¶¶ 5, 9. Because Dole’s labels do not identify which method was used to create the ascorbic acid and citric acid in its products, Dole contends that ascertainability is lacking.

The class does not lack ascertainability just because ascorbic acid and citric acid can be made using two different processes. Rather, it is clear from Dole’s own evidence that Dole uses similar processes to produce all of its ascorbic acid and citric acid. Dr. Hany Farag, Dole’s Vice President of Quality & Regulatory Affairs, states in his declaration that he is “confident that all of the citric and ascorbic acid used by Dole is made in a similar way.” ECF No. 104-13, Farag Decl. ¶ 11. Moreover, Dole submits certifications from two of Dole’s suppliers stating that they use only fermentation to produce their ascorbic and citric acid. See ECF No. 104-14-104-15, Farag Decl. Ex. A-B. Dole also submits a certification from a third supplier, which states in full: “We hereby certify that our product citric acid anhydrous is natural.” ECF No. 104-16. While this third certification is admittedly ambiguous, Dole’s own explanation that all of the citric and ascorbic acid used by Dole is made in a similar way is sufficient to defeat Dole’s ascertainability argument. Thus, all of Dole’s customers received ascorbic acid and citric acid that was made in a similar way, and no ascertainability problem exists.³

³ Dole’s citation to Astiana v. Ben & Jerry’s Homemade, Inc., 2014 WL 60097 (N.D. Cal. Jan. 7, 2014), is unavailing. In Astiana, the defendant sourced its accused cocoa from as many as 15 different suppliers. Evidence indicated that the suppliers used different ingredients in their manufacturing processes, with some using synthetic ingredients and others using non-synthetic
Second, Dole contends that the proposed class is not ascertainable because no company
records exist to identify purchasers or which products they bought. Opp’n at 6. Dole’s concern is
that class members will not have actual proof that they belong in the class. Dole bases its argument
largely on Sethavanish, 2014 WL 580696, at *5, which found persuasive the Third Circuit’s
reasoning in Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013). In Carrera, the Third Circuit
found that a putative class of purchasers of the defendant’s diet supplement was not ascertainable
because there was insufficient evidence to show that retailer records could be used to identify class
members. Carrera, 727 F.3d at 308-09. The Third Circuit rejected plaintiff’s proposal to use
affidavits submitted by putative class members because this process deprived the defendant of the
opportunity to challenge class membership. Id. at 309. Additionally, the Third Circuit held that
“there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims,”
and that absent class members could then argue that they are not bound by a judgment because the
named plaintiff did not adequately represent them. Id. at 310.

“While [Carrera] may now be the law in the Third Circuit, it is not currently the law in the
Ninth Circuit.” McCrary, 2014 WL 1779243, at *8. “In this Circuit, it is enough that the class
definition describes a set of common characteristics sufficient to allow a prospective plaintiff to
identify himself or herself as having a right to recover based on the description.” Id. (internal
quotation marks omitted); see also Astiana, 291 F.R.D. at 500 (“As long as the class definition is
sufficiently definite to identify putative class members, the challenges entailed in the
administration of this class are not so burdensome as to defeat certification.” (internal quotation
marks and alteration omitted)).

Where courts have denied class certification because the proposed class was not
ascertainable, identification of class members posed far greater difficulties than it is likely to pose
in this case. See, e.g., Xavier, 787 F. Supp. 2d at 1090 (proposed class unascertainable where class
definition included persons who had smoked a certain number of Marlboro cigarettes potentially
over a period of decades because (1) manufacturer lacked data on individual smokers, (2) plaintiffs
ingredients. Id. at *3. Here, Dole affirmatively asserts that all of its suppliers use only the
fermentation process for obtaining ascorbic acid and citric acid.
merely offered broad demographic data on smoking, (3) smoking habits were likely to change over such a long time period, and (4) asking individual class members to submit affidavits attesting to their belief that they had smoked 146,000 Marlboro cigarettes asked too much of potential class members’ memories). In Astiana v. Ben & Jerry’s Homemade, Inc., Judge Hamilton found unascertainable a plaintiff’s proposed class of those who had purchased Ben & Jerry’s ice cream that contained alkalized cocoa processed with a synthetic ingredient. No. 10-4387, 2014 WL 60097, at *3 (N.D. Cal. Jan. 7, 2014). In Ben & Jerry’s, however, only one of the defendant’s fifteen suppliers had used a synthetic ingredient, and the plaintiff could provide no method of identifying which consumers had purchased ice cream from that supplier. Id. The proposed class in this case is distinguishable. Unlike in Ben & Jerry’s, here all purchasers of the identified Dole products are included in the class definition, and all identified Dole products bore the same alleged misstatements. The class period here is also far shorter than in Xavier, and inviting plaintiffs to submit affidavits attesting to their belief that they have purchased one of a list of Dole fruit products in the past several years is much likelier to elicit reliable affidavits than asking potential class members to recall whether they had smoked 146,000 of a certain cigarette over the course of several decades. See Xavier, 787 F. Supp. 2d at 1090 (“Swearing ‘I smoked 146,000 Marlboro cigarettes’ is categorically different from swearing ‘I have been to Paris, France,’ or ‘I am Jewish,’ or even ‘I was within ten miles of the toxic explosion on the day it happened.’”).

Put simply, in the Ninth Circuit “[t]here is no requirement that the identity of the class members . . . be known at the time of certification.” Ries, 287 F.R.D. at 535 (alteration in original). Rather, “parameters for membership in the class [must be] set by objective criteria,” such that it is “administratively feasible to determine whether a particular individual is a member of the class.” Wolph, 2012 WL 993531, at *1-2. Because Brazil’s proposed class is sufficiently definite to identify putative class members, the Court finds the proposed class sufficiently ascertainable.

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4 Four judges dissented from the Third Circuit’s denial of rehearing en banc in Carrera. That dissent agrees with this lower burden of ascertainability, particularly in light of the fact that the ascertainability requirement is rooted in common law and is not compelled by the text of Rule 23.
B. Rule 23(a) Requirements

Dole challenges Brazil’s ability to satisfy the four requirements for class certification under Rule 23(a), and the Court addresses each in turn

1. Numerosity

Dole does not contest numerosity. Because Dole has sold, at minimum, thousands of units of each product at issue in this litigation, ECF No. 101-3, Exhibit N, 12/12/13 Spare Depo. Tr. 166:2-14, joinder of all class members is “impracticable.” Fed. R. Civ. P. 23(a)(1); Jordan v. County of Los Angeles, 669 F.2d 1311, 1319 (9th Cir. 1982), vacated on other grounds, 459 U.S. 810 (1982).

2. Commonality

“Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” which “does not mean merely that they have all suffered a violation of the same provision of law.” Dukes, 131 S. Ct. at 2551. The “claims must depend on a common contention” and “[t]hat common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” Id. Commonality is satisfied by “the existence of shared legal issues with divergent factual predicates” or a “common core of salient facts coupled with disparate legal remedies within the class.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019-20 (9th Cir. 1998). All questions of fact and law need not be common to satisfy the rule. Id. Rather, in deciding whether plaintiffs share a common question with the prospective class, the named plaintiffs must share at least one question of fact or law with the prospective class. Rodriguez v. Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010) (citation omitted); see Mazza, 666 F.3d at 589 (“[C]ommonality only requires a single significant question of law or fact.”).

Dole contends that Brazil’s class claims fail the commonality requirement under Rule 23(a)(2). Dole first argues that materiality varies from consumer to consumer, and thus is not a common question. The law is to the contrary. Brazil’s UCL, FAL, and CLRA claims depend on whether the labels at issue are unlawful, unfair, deceptive, or misleading to reasonable consumers.
See Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999) (noting that the UCL prohibits conduct that is unfair, deceptive, or unlawful). A plaintiff can establish that a misrepresentation is material and thus violative of the consumer protection laws at issue in this case by showing that “a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.” In re Steroid Hormone Prod. Cases, 181 Cal. App. 4th 145, 157 (2010) (noting also that “materiality is generally a question of fact unless the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it”). Whether Dole’s label statements constitute material misrepresentations does not depend on the subjective motivations of individual purchasers, and the particular mix of motivations that compelled each class member to purchase the products in the first place is irrelevant. See Ries, 287 F.R.D. at 537 (“[V]ariation among class members in their motivation for purchasing the product, the factual circumstances behind their purchase, or the price that they paid does not defeat the relatively ‘minimal’ showing required to establish commonality.”); see also Mazza, 666 F.3d at 589 (noting plaintiff bears “limited burden” to demonstrate single common question of law or fact); Hanlon, 150 F.3d at 1019-22; In re Ferrero Litigation, 278 F.R.D. 552, 558 (S.D. Cal. 2011) (finding commonality where claims were based on “common advertising campaign”). Materiality is therefore a question common to the class, the resolution of which “will resolve an issue that is central to the validity of each of the claims in one stroke.” Dukes, 131 S. Ct. at 2545. Because “an inference of reliance arises if a material false representation was made to persons whose acts thereafter were consistent with reliance upon the representation,” should Brazil prevail in proving that Dole’s label misstatements were material, he will have established a presumption of reliance as to the entire class as well. Occidental Land, Inc. v. Super. Ct., 18 Cal. 3d. 355, 363 (1976); see also In re Tobacco II Cases, 46 Cal. 4th 298, 326-28 (2009).

Second, and relatedly, Dole argues that the allegedly deceptive labeling statements are not specifically regulated and, therefore, are not material under Kwikset. 51 Cal. 4th at 329.

Specifically, Defendant contends that the only prohibitions that might bear on the label statements...
at issue are “non-binding FDA policy statements.” Opp’n at 8. At this stage, the Court need not
decide whether the label statements at issue are material as a matter of law. Rather, the Court only
need find that materiality of the label statements is a question common to the class.

Finally, Dole argues that the “All Natural” label statements are not susceptible to common
proof because “All Natural” has no common definition. Dole relies on Astiana, 291 F.R.D. at 507-
09, in which the court denied class certification of a broad class in favor of certifying a narrower
class because the court found that “All Natural” had no common meaning as to the broad class.

Astiana itself relies on In re Vioxx Class Cases, 180 Cal. App. 4th 116, 129 (2009). In Vioxx, the
court found that “if the issue of materiality or reliance is a matter that would vary from consumer to
consumer, the issue is not subject to common proof, and the action is properly not certified as a
class action.” Vioxx, 180 Cal. App. 4th at 129; see also Stearns v. Ticketmaster Corp., 655 F.3d
1013, 1022-23 (9th Cir. 2011) (“If the misrepresentation or omission is not material as to all class
members, the issue of reliance ‘would vary from consumer to consumer’ and the class should not
be certified.”). In Vioxx, which was based on alleged misrepresentations regarding the pain relief
drug Vioxx, the court determined that “the decision to prescribe Vioxx is an individual decision
made by a physician in reliance on many different factors, which vary from patient to patient.” Id.
at 133. Additionally, there was evidence that “some patients would rather assume the known risk of
taking Vioxx in exchange for pain relief, thereby mandating an individual inquiry into patient
desires.” Id. (internal quotation marks omitted). In that context, even though materiality is an
objective standard, the individualized nature of prescribing a drug precluded materiality from being
a question common to the class.

Similarly, cases consistent with Vioxx generally concern representations that differ for each
4th 830, 846-47 (2009), the court denied class certification because the defendant, which sold
insurance policies, made different statements and presentations to each customer. As such, no set
of statements was common to the class. See also Fairbanks v. Farmers New World Life Ins. Co.,
197 Cal. App. 4th 544, 562-65 (2011) (discussing and following Kaldenbach). Another example is
In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Products Liab. Litig., No. 09-2100, 2012 WL 865041, at *20 (S.D. Ill. Mar. 13, 2012), which followed Vioxx and held that “because YAZ is a prescription medication, the question of uniformity must consider representations made to each putative class member and her prescribing physician.” Id.

Unlike Vioxx, this case presents specific alleged misrepresentations common to the class: Dole’s “All Natural” label statements. Dole did not make individualized representations to proposed class members, nor did proposed class members likely rely on the advice of a doctor or any other professional. Therefore, the objective inquiry into whether “a reasonable consumer would attach importance” to Dole’s label statements is a question common to the class. Hinojos v. Kohl’s Corp., 718 F.3d 1098, 1107 (9th Cir. 2013).

Likewise, Astiana itself, upon which Dole explicitly relies, is distinguishable. The plaintiffs in Astiana sought certification of a much broader class than Brazil seeks here. In Astiana, “Plaintiffs challenge[d] over 90 different products labeled ‘All Natural,’ with different ingredients and different advertising campaigns, and which consequently inspire[d] different calculations in the minds of prospective customers.” Astiana, 291 F.R.D. at 508. No such problem exists here. Brazil only challenges 10 products labeled “All Natural Fruit” based only on their inclusion of ascorbic acid and citric acid. Dole does not assert that differences in its products’ labels cause prospective consumers to understand the representations differently. The court in Astiana was also concerned that proposed class members’ understanding of “All Natural” may differ based on the ingredient alleged to be unnatural. Id. Here, Dole does not contend that proposed class members’ interpretation of “All Natural Fruit” differs between ascorbic acid and citric acid. In the end, the Astiana court granted class certification of a narrower class of “Kashi products containing calcium pantothenate, pyridoxine hydrochloride, and/or hexane-processed soy ingredients but labeled ‘All Natural.’” Id. at 509. The definition of “All Natural” was sufficiently common for those three ingredients such that the narrower class definition raised questions sufficiently common to the class to pass Rule 23(a)(2)’s commonality requirement. Similarly here, Brazil’s proposed class challenges 10 products based on only two ingredients. Whether the label statement “All Natural
3. Typicality

Under Rule 23(a)(3), the representative party must have claims or defenses that are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendants' liability." *Rodriguez*, 591 F.3d at 1124 (citations omitted). This requirement is "permissive and requires only that the representative's claims are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Reasonably coextensive claims with absent class members will satisfy the typicality requirement, but the class must be limited to "those fairly encompassed by the named plaintiff's claims." *Dukes* at 131 S. Ct. at 2550. "[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Hanlon*, 976 F.2d at 508 (citations omitted). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Id.*

Dole argues that Brazil's claims are atypical because the class includes buyers of seven products he did not purchase. The Court is not persuaded. Brazil alleges that he purchased three of the ten products for which Brazil seeks to certify a class: Tropical Fruit - can, Mixed Fruit - cups, and Mixed Fruit - bag. See SAC ¶¶ 125, 153, 176. All products included in the proposed class definition have "All Natural Fruit" label statements and contain ascorbic acid and citric acid. Brazil's legal theory is identical for all claims: Brazil alleges that Dole's placement of its "All Natural Fruit" statement on the identified products was unlawful or misleading because the identified products contain ascorbic acid and citric acid. See Mot. at 1. Therefore, "other members have the same or similar injury, ... the action is based on conduct which is not unique to the

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5 Dole makes the same argument that individual class members may interpret "All Natural Fruit" differently under the Rule 23(b)(3) predominance inquiry. For the same reasons as stated above, the Court finds that common questions predominate despite the possibility that class members may have varying definitions of "All Natural Fruit."
named plaintiffs, and . . . other class members have been injured by the same course of conduct.”

Hanor, 976 F.2d at 508.

Furthermore, the Court has already addressed at length the issue of whether Brazil has “the same or similar injury” as class members that bought other products in the context of standing on Dole’s Motion to Dismiss the SAC. See ECF No. 76, at 12-14. In its order on Dole’s motion to dismiss, the Court held that when “a plaintiff claims that he was misled by the improper use of the term ‘all natural’ on Dole Mixed Fruit in Cherry Gel, SAC ¶ 162, the injury he suffers as a result of that misrepresentation is not meaningfully distinguishable from the injury suffered by an individual who is misled by the use of the term ‘all natural’ on Dole Mixed Fruit in Black Cherry or Peach Gel, SAC ¶ 201.” Id. at 13. Although both of the products the Court used as examples are excluded from the proposed class definition, the point remains the same. The injury Brazil allegedly suffered from Dole’s allegedly unlawful or deceptive label statements on the three products Brazil purchased is not meaningfully distinguishable from the injury other class members suffered from purchasing the other three identified products, which have identical label statements and identical allegedly unnatural ingredients.

Dole bases its typicality challenge on Judge Davila’s decision in Major v. Ocean Spray Cranberries, Inc., 5:12-CV-03067 EJD, 2013 WL 2558125, at *4 (N.D. Cal. June 10, 2013). However, the Major case involved unique facts that justified the court’s finding that typicality was lacking in that case. In Major, the proposed class was “broad and indefinite,” as it “would have included any of Defendant’s products represented to contain no artificial colors, flavors or preservatives but which contained artificial colors, flavors or preservatives.” Id. The plaintiff in Major attempted to include entire product lines based on a single purchase, and the plaintiff “fail[ed] to link any of those products to any alleged misbranding issue” related to the plaintiff’s purchase. Id. Furthermore, the Major court observed “that the labels and nutrition claims on each of Defendant’s products may be unique to that product itself.” Id. The plaintiff purchased a pomegranate blueberry drink and alleged misrepresentations based on label language making specific claims about blueberries. Yet the plaintiff sought to certify a class that would include
products having label statements making no claims about blueberries. As the *Major* court explained, “[t]he evidence needed to prove Plaintiff's claim that the Diet Sparkling Pomegranate Blueberry drink contained false or misleading labeling is not probative of the claims of unnamed class members who purchased products within the ‘Sparkling’ line that did not contain blueberries.” *Id.*

In the instant case, all products included in the proposed class definition, including the product Brazil purchased, have “All Natural Fruit” label statements and contain ascorbic acid and citric acid. Therefore, rather than raising the problems encountered in *Major*, this case is much more similar to the multiple cases in this Circuit in which courts have found the typicality requirement met, even when the representative plaintiff did not purchase every identified product. *See*, *e.g.*, *Astiana*, 291 F.R.D. at 502-03; *Ries*, 287 F.R.D. at 539-40; *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 377-78 (N.D. Cal. 2010). The Court thus finds that Brazil's claims are typical of the proposed class.

4. Adequacy of Representation

Rule 23(a)(4) permits class certification only if the “representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In the Ninth Circuit, to test the adequacy of a class representative, courts ask two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Staton*, 327 F.3d at 957 (citing *Hanlon*, 150 F.3d at 1020).

Dole does not dispute that Brazil and his counsel will fairly and adequately protect the interests of the class. The Court finds that Brazil has no conflicts of interest with other class members. In addition, the Court holds that Brazil will vigorously prosecute this action, as he has previously served as a class representative for another class that was certified. *See Brazil v. Dell Inc.*, No. 07-01700 RMW, 2010 WL 5387831 (N.D. Cal. Dec. 21, 2010). Finally, the Court agrees with Brazil that plaintiff’s counsel are well qualified for appointment as class counsel by virtue of their experience with other similar cases. The adequacy requirement is satisfied.
C. Rule 23(b)(2) Requirements

To certify a (b)(2) class, the Court must find that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Ordinarily, it follows that there is no need “to undertake a case-specific inquiry into whether class issues must predominate or whether class action is the superior method of adjudicating the dispute” under the other subsections of Rule 23(b). Dukes, 131 S. Ct. at 2558. Rather, “[p]redominance and superiority are self-evident.” Id. “Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive.” Ellis, 657 F.3d at 986 (quoting Zinser v. Accufx Res. Inst., Inc., 253 F.3d 1180, 1195 (9th Cir. 2001)). This case exemplifies the kind of action that may be appropriate for certification under Rule 23(b)(2), at least insofar as Brazil requests injunctive relief prohibiting defendants from engaging in their allegedly unlawful or deceptive labeling practices. See Dukes, 603 F.3d at 571. Those requests can be satisfied with “indivisible” equitable relief that benefits all class members at once, as the Rule suggests.

Dole argues that the Court should not certify a Rule 23(b)(2) class because Brazil’s monetary damages are not “incidental to the injunctive or declaratory relief,” as required by Dukes. Dukes, 131 S. Ct. at 2557. However, Dukes dealt with a proposed class that sought equitable monetary relief under Rule 23(b)(2) in addition to an injunction. Id. The Supreme Court in Dukes held that the proposed Rule 23(b)(2) class could not be certified because the plaintiffs’ large claims for equitable monetary relief under the Rule 23(b)(2) class were not incidental to the injunctive relief sought. Id. In contrast, here Brazil’s monetary class claims will proceed under Rule 23(b)(3), which includes strict predominance and superiority requirements for class certification, and which has notice and opt-out requirements designed to facilitate the award of monetary damages to individual class members. See id. at 2559. Therefore, certification of the Rule 23(b)(2) class is granted for the purposes of declaratory and injunctive relief, but denied to the extent Brazil seeks monetary damages, which are more properly brought under Rule 23(b)(3). See Ries, 287 F.R.D. at
540-42, later decertified on adequacy grounds, Ries v. Arizona Beverages USA LLC, No. 10-01139
RS, 2013 WL 1287416, at *8 (N.D. Cal. Mar. 28, 2013) (certifying a Rule 23(b)(2) class in a
similar case only for the purposes of declaratory and injunctive relief).

Dole also asserts that Brazil no longer has standing because he “stopped buying Dole
products six months ago.” Opp’n at 24. As this Court recently addressed, “[s]everal courts in this
district have held in similar cases that to establish standing, a plaintiff must allege that he intends to
purchase the products at issue in the future.” Werdebaugh v. Blue Diamond Growers, No. 12-CV-

In Werdebaugh, the Court declined to certify an injunctive class because the Plaintiff did not
supply any testimony that he would purchase any of the identified products in the future. Here,
however, Brazil has testified that, while he “certainly would be more skeptical of what is stated on
packaged items,” he would still be willing to buy a Dole product now. ECF No. 106-1, Vetesi Decl.
Ex. 1, at 174:17-175:6. Brazil also acknowledged in his deposition that he continues to have brand
loyalty to Dole. Id. (“Q. Okay. So now would you still have brand loyalty to Dole? A. I would say
that probably, yeah.”). The Court therefore finds that Brazil continues to have standing to assert his
23(b)(2) class claims. Accordingly, the Court certifies an injunctive class under 23(b)(2).

D. Rule 23(b)(3) Requirements

For a class action to be certified under Rule 23(b)(3), the class representative must show
that “the questions of law or fact common to the members of the class predominate over any
questions affecting only individual members and that a class action is superior to other available
methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3)
(emphasis added). The Court first addresses predominance before turning to superiority.

1. Predominance

Brazil seeks to certify a nationwide class alleging California state law claims. Under Rule
23(b)(3), Brazil must show “that the questions of law or fact common to class members
predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3).
"The Rule 23(b)(3) predominance inquiry" is meant to "test whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Anchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). The Ninth Circuit has held that "there is clear justification for handling the dispute on a representative rather than an individual basis" if "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication . . ." Hanlon, 150 F.3d at 1022. In ruling on a motion for class certification based on Rule 23(b)(3), the district court must conduct a rigorous analysis to determine whether the class representatives have satisfied both the predominance and superiority requirements. See Zinser, 253 F.3d at 1186.

Dole raises three types of predominance arguments. The first—that the term "All Natural" has no common meaning—is identical to Dole's commonality argument regarding the same term. This argument fails to defeat Brazil's showing that common questions predominate, as required by Rule 23(b)(3), for the same reasons set forth above regarding commonality under Rule 23(a)(2).

Therefore, for the reasons stated in the commonality section above, the Court concludes that common questions will predominate on all liability questions, including issues of materiality and reliance. The Court need not decide whether the misrepresentations were in fact material. The Court merely concludes that these liability questions are common to all class members.

The Court focuses its discussion in this section on Dole's remaining predominance contentions. The Court first discusses choice-of-law issues involved in certifying a nationwide class before turning to Dole's predominance challenges to Brazil's proposed damages models.

a. Nationwide Class Allegations

Dole argues that were the Court to certify the proposed class under Rule 23(b)(3), individual issues would predominate as the Court would be obliged to apply the laws of 50 different states. Opp'n at 25. The Court agrees, and concludes that because the proposed nationwide class fails the predominance requirement under Rule 23(b)(3), certification of such a class would be improper.
In a CAFA diversity action, this Court applies California's choice of law rules. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Bruno*, 280 F.R.D. at 538 n.7. "Under California’s choice of law rules, the class action proponent bears the initial burden to show that California has significant contact or significant aggregation of contacts to the claims of each class member." *Mazza*, 666 F.3d at 589. "Once the class action proponent makes this showing, the burden shifts to the other side to demonstrate that foreign law, rather than California law, should apply to class claims." *Id.* at 590.

"[C]onduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not 'slight and casual' establishes a 'significant aggregation of contacts, creating state interests.'" *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 (9th Cir. 2013) (citations omitted). Dole does not dispute that California has sufficient contacts, and the Court in its latest motion to dismiss order assumed that Brazil had met this basic constitutional requirement.

Moreover, California has a constitutionally sufficient aggregation of contacts to the claims of each putative class member in this case because Dole’s corporate headquarters and a significant portion of the proposed class members are located in California. See *Mazza*, 666 F.3d at 590. Accordingly, the Court finds that Brazil has met his initial burden. "California has a constitutionally significant aggregation of contacts to the claims of each putative class member in this case," and application of California law here poses no constitutional concerns. *Mazza*, 666 F.3d at 591; see also *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605 (1987) (concluding application of California law was constitutionally permissible where defendant’s principal offices were in California and the allegedly fraudulent misrepresentations emanated from California); *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D. 531, 538 (N.D. Cal. 2009) (location of the defendant’s headquarters is also a relevant factor in significant contact or aggregation of contacts analyses).

Because the Court is satisfied that California has sufficient contacts with the proposed class claims, the burden is on Dole to show "that foreign law, rather than California law, should apply." *Mazza*, 666 F.3d at 590. California law may be applied on a class wide basis only if "the interests
of other states are not found to outweigh California’s interest in having its law applied.” *Id.* (quoting *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 921 (2001)). To determine whether the interests of other states outweigh California’s interest, courts administer the following three-step government interest test. The court must first determine whether the law of the other states is materially different from California law. *Mazza*, 666 F.3d at 590. Second, if there are differences, the court determines whether the other state has an interest in having its law applied. *Id.* at 591-92. Third, if another state has an interest, the court determines which state’s interest would be most impaired if its policy were subordinated to the law of another state. *Id.* at 593. In *Mazza*, the Ninth Circuit vacated a district court’s certification of a nationwide class based on the same California consumer protection laws at issue here—the UCL, FAL, and CLRA. *Id.* at 594. The facts and claims here closely parallel those in *Mazza*, and consequently so does the Court’s analysis.

Dole has met its burden on the first step of California’s choice-of-law analysis, as Brazil brings claims under the same California consumer protection statutes as the plaintiffs in *Mazza*: the UCL, FAL, and CLRA. This case presents the same material differences between California’s consumer protection regime and that of other states that dissuaded the Ninth Circuit from applying California law to other states, see *Mazza*, 666 F.3d at 591, including: (1) injury requirements, (2) deception requirements, (3) scienter, (4) reliance, (5) pre-filing notice requirements, (6) statutes of limitation, (7) restrictions on consumer protection class actions, and (8) remedies.

As for the second step, the Court finds that the other 49 states each have an interest in applying their own law. As the Ninth Circuit explained in *Mazza*, “each foreign state has an interest in applying its law to transactions within its borders,” which means that “if California law were applied to [a nationwide class], foreign states would be impaired in their ability to calibrate liability to foster commerce.” 666 F.3d at 593. This reflects the “principle of federalism that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders.” *Id.* at 591 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003)).
Here, the purported nationwide class here consists of members from 50 states: Brazil alleges that consumers from each of the 50 states were subjected to misleading and unlawful representations on which they relied in purchasing Dole fruit products. Dole denies that its products are misleading or unlawful. Given the parties' respective positions, all 50 states have an interest in having their own laws applied to the consumer transactions that took place within their borders. *Gianino v. Alacer*, 846 F. Supp. 2d. 1096, 1102 (C.D. Cal. 2012). Each state has "an interest in being able to delineate the appropriate standard of liability and the scope of recovery based on its understanding of the balance between the interests of individuals and corporate entities operating within its territory." *Frezza v. Google Inc.*, No. 12-237, 2013 WL 1736788, at *7 (N.D. Cal. Apr. 22, 2013).

At the final step, where the states have conflicting policies, the Court must determine which state's interest would be more impaired if its policy was subordinated to the policy of the other state. *See Mazza*, 666 F.3d at 593-94. This last step of the analysis does not permit the Court to weigh the conflicting state interests to determine which conflicting state law manifests the "better" or "worthier" social policy. *Id.* (citing *McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 97 (2010)). Rather, "the Court must recognize the importance of federalism and every state's right to protect its consumers and promote those businesses within its borders." *Gianino*, 846 F. Supp. 2d. at 1103.

Here, for the reasons stated below, for purchases made outside California, the Court finds that other states' interests would be more impaired by applying California law than would California's interests by applying other states' laws.

California undoubtedly has a significant interest in applying its own consumer protection laws to transactions within California. Dole is headquartered in Westlake Village, California, sells many products in this state, and likely made the corporate decisions regarding packaging, labeling, and marketing of Dole products in California. However, California's interest in applying its law to nonresidents who purchased Dole products in other states is more attenuated. *See Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).
California courts recognize that the predominant interest in "regulating or affecting conduct within its borders" lies with the state which is "the place of the wrong." Hernandez v. Burger, 102 Cal. App. 3d 795, 801–02 (1980). The place of the wrong is the geographic location where the misrepresentations were communicated to the consumer. See McCann, 48 Cal. 4th at 94 n.12. For nonresident consumers of Dole products, the place of the wrong is not California, but rather the state in which each consumer resides. See Mazza, 666 F.3d at 593-94 ("[T]he last events necessary for liability as to the foreign class members—communication of the advertisements to the claimants and their reliance thereon in purchasing vehicles—took place in the various foreign states, not in California.").

Dole’s liability accrued when Brazil and class members purchased Dole fruit products containing the allegedly deceptive and misleading label statements. Thus "the place of the wrong" in this case is the point of purchase by each class member—in other words, in each of the 50 states. Each state has an interest in “protecting their consumers from in-state injuries caused by a California corporation doing business within their borders and in delineating the scope of recovery for the consumers under their own laws.” Gianino, 846 F. Supp. 2d at 1103. Plaintiff has identified no countervailing California interest that outweighs the other states’ interest in effecting their policy choices, and the Ninth Circuit has held that under such circumstances, “California’s interest in applying its law to residents of foreign states is attenuated.” Mazza, 666 F.3d at 594.

Accordingly, the Court concludes that each other state would be impaired in its ability to protect consumers within its borders if California law were to be applied to all claims of the nationwide class. Each nonresident class member’s claims should be governed by and decided under the consumer protection laws of the states in which the various class members reside and in which the transactions took place. Because adjudication of the nationwide claims will require application of the laws of 50 states, common questions of law would not predominate for the proposed nationwide class, as is required by Rule 23(b)(3). Significantly different legal issues will arise out of the claims of class members from the various states, and these different legal issues

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eclipse any common issues of law that exist. Certification of the nationwide class under California law therefore would be improper.

In his reply, Brazil alternatively requests certification of a California-only class. Reply at 15. If the class is comprised entirely of California consumers, only California law need be applied. For such a class, common issues would predominate over individual ones. Certification would be proper if all other requirements for class certification are met. Accordingly, the Court narrows the proposed class to exclusively California consumers.

b. Damages under the UCL, FAL, and CLRA

A Plaintiff that seeks certification under Rule 23(b)(3) must present a damages model that is consistent with its liability case. See Comcast, 133 S. Ct. at 1433 (rejecting class certification where damages model accounted for four possible theories of antitrust injury when district court had limited case to single theory of antitrust impact). Plaintiff’s damages “model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [the defendant’s conduct]. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).” Id. (internal citations and quotations omitted).

Comcast has been interpreted as “reiterat[ing] a fundamental focus of the Rule 23 analysis: The damages must be capable of determination by tracing the damages to the plaintiff’s theory of liability. So long as the damages can be determined and attributed to a plaintiff’s theory of liability, damage calculations for individual class members do not defeat certification.” Lindell v. Synthes USA, No. 11-02053, 2014 WL 841738, at *14 (E.D. Cal. Mar. 4, 2014). According to the Ninth Circuit, “plaintiffs must be able to show that their damages stemmed from the defendant’s actions that created the legal liability.” Leyva v. Medline Indus., Inc., 716 F.3d 510, 514 (9th Cir. 2013).

Here, the Court first considers what damages are recoverable as a result of Dole’s alleged mislabeling and then assesses whether Brazil has presented a damages model capable of isolating those damages.
The UCL, FAL and CLRA authorize a trial court to grant restitution to private litigants asserting claims under those statutes. *Colgan v. Leatherman Tool Grp., Inc.,* 135 Cal. App. 4th 663, 694 (2006). Restitutionary relief is an equitable remedy, and its purpose is “to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.” *Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal. 4th 1134, 1149 (2003); see also *Cortez v. Purolator Air Filtration Products Co.,* 23 Cal. 4th 163, 177 (2000).

The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received. *Colgan,* 135 Cal. App. 4th at 700 (rejecting restitutionary award for products “Made in U.S.A.” where expert “did not attempt to quantify either the dollar value of the consumer impact or the advantage realized by [the defendant]”). This calculation contemplates the production of evidence that attaches a dollar value to the “consumer impact or advantage” caused by the unlawful business practices. *Id.* Restitution can then be determined 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. See, e.g., *Ben & Jerry’s Homemade, 2014 WL 60097,* at *12–13 (rejecting class certification for “all natural” ice cream labels based in part on insufficient proof of damages). Accordingly, Brazil must present a damages methodology that can determine the price premium attributable to Dole’s use of the “All Natural Fruit” label statements.

Brazil’s damages expert, Dr. Oral Capps, presents three damages models: (1) a Full Refund Model, (2) a Price Premium Model, and (3) a Regression Model. The Court addresses each in turn.

### i. Full Refund Model

Dr. Capps first proposes refunding the entire purchase or “register” price of the challenged product. Declaration of Oral Capps (“Capps Decl.”), ECF No. 101-9, ¶¶ 10-12. This is not the proper measure of damages. As discussed above, “[t]he difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution.” *Vioxx,* 180 Cal. App. 4th at 131; see also *Werdebaugh,* 2014 WL 2191901, at *22; *Ogden v. Bumble Bee Foods, LLC,* No. 12-01828, 2014 WL 27527, at *13 (N.D. Cal. Jan. 2, 2014) (“[A] claim for restitution
requires that Ogden also present evidence of the difference in value between what she spent and what she received.”). Dr. Capps’s full refund model is deficient because it is based on the assumption that consumers receive no benefit whatsoever from purchasing the identified products. This cannot be the case, as consumers received benefits in the form of calories, nutrition, vitamins, and minerals. See In re POM Wonderful LLC, No. 10-2199, 2014 WL 1225184, at *3 (C.D. Cal. Mar. 25, 2014) (rejecting a full refund model because consumers benefited from consumption of the defendant’s products). Class members may not “retain some unexpected boon, yet obtain the windfall of a full refund and profit from a restitutionary award.” Id. Because the California consumer protection statutes upon which Brazil brought this case authorize the recovery only of whatever price premium is attributable to Dole’s use of the allegedly misleading label statements, Dr. Capps’ Full Refund Model is inconsistent with Plaintiff’s liability case and must be rejected.\(^6\)

**ii. Price Premium Model**

Dr. Capps next proposes a Price Premium Model. Capps Decl. ¶ 13-17. Under this approach, Dr. Capps compares the price of the identified Dole products to the price of allegedly comparable products that do not have the “All Natural” label statements and calculates the entire price difference as restitution for Dole’s alleged misrepresentations. Id. ¶ 14.

However, the Price Premium Model runs afoul of Comcast. Dr. Capps has no way of linking the price difference, if any, to the allegedly unlawful or deceptive label statements or controlling for other reasons why allegedly comparable products may have different prices.

“Rather than answer the critical question why that price difference exist[s], or to what extent it [is] the result of [Dole’s] actions, [Dr. Capps] instead assumed that 100% of that price difference [is] attributable to [Dole’s] alleged misrepresentations.” POM, 2014 WL 1225184, at *5.

Brazil’s deposition testimony also casts doubt on the Price Premium Model. Brazil himself attributes factors other than the allegedly deceptive label statements, such as brand name, to the allegedly higher prices of the identified Dole products. ECF No. 106-1, Vetesi Decl. Ex. A, Brazil

\(^6\) Dr. Capps also proposes an identical disgorgement model. This is rejected for the same reasons as the Full Refund Model. See Ogden, 2014 WL 27527, at *13; Werdebaugh, 2014 WL 2191901, at *22, n.9.
Dep. at 218:6-10 ("Q. Okay. So you don't believe that you paid a premium based on the language
that you circled earlier today? A. Do I think they charged me more because it was all natural, I
don't believe that that was the case."); id. at 217:12-218:6 ("it is my expectation that I would pay
more for a named brand . . . than I would for a generic brand."). Brazil also acknowledges that he
has brand loyalty to Dole, that he still may buy Dole products even after discovering the alleged
misrepresentations, and that, for him, price was not an important factor. Id. at 174:17-175:6; id. at
216:16-23.

Furthermore, there is additional evidence in the record that, to the extent that there is any
price difference between the identified Dole products and allegedly comparable products, the price
difference can be explained by factors other than the alleged label misrepresentations. For example,
Dole’s Vice President of Marketing, David Spare, testifies that “[w]hile private label products are
competitors, Dole does not consider them to be comparable products because Dole uses top quality
fruit and has high specifications for fruit attributes, such as the number of broken fruit pieces, the
fruit texture, and the color of the fruit. The private label products, by contrast, emphasize low price
over quality.” ECF No. 104-6, Spare Decl. ¶ 5. In addition, comparing a specific Dole product to
an allegedly comparable Safeway Kitchen product, Mr. Spare states that “the Safeway Kitchen
Mandarin Oranges product is packed in water, while Dole’s Mandarin Oranges are packed in 100%
juice.” Id. ¶ 6. This difference is significant because “[i]t is more expensive . . . to use juice instead
of water or syrup.” Id. ¶ 7.

The Price Premium Model’s inability to account for any differences between the identified
Dole products and Dr. Capps’ chosen comparable products, or for any factors that may cause
consumers to prefer the identified Dole products over other identical products—such as brand
loyalty or quality differences between brand and generic products—renders the Price Premium
Model insufficient under Comcast. As Judge Dean Pregerson summarized in the POM case, “the
Price Premium model simply calculates what the price difference [is]. This damages ‘model’ does
not comport with Comcast’s requirement that class-wide damages be tied to a legal theory, nor can
this court conduct the required ‘rigorous analysis’ where there is nothing of substance to analyze.”
POM, 2014 WL 1225184, at *5. Therefore, because the Price Premium Model does not offer a
class-wide measure of damages that is tied to the proper legal theory, the Price Premium Model
does not comply with the predominance requirement of Rule 23(b)(3). Comcast, 133 S. Ct. at 1430.

iii. Regression Model

Dr. Capps’ final proposed damages model is an “econometric or regression analysis,” ("the
Regression Model"). Capps Decl. ¶ 18. "Regression analysis involves the relationship between a
variable to be explained, known as the ‘dependent variable,’ such as the quantity demanded of a
particular good or the price of a particular good, and additional variables that are thought to
produce or to be associated with the dependent variable, known as the ‘explanatory’ or
‘independent’ variables... Regression analysis may be useful in determining whether a particular
effect is present as well as in measuring the magnitude of a particular effect.” Id. ¶ 19. Dr. Capps
explains: “It is well documented in the economics literature that commonly recognized factors are
associated with sales, the dependent variable in the regression analyses, namely price of the
product, prices of competing and complementary products, income, advertising, seasonality, and
regional differences... By controlling for these factors and considering differences in sales of
Dole fruit products before and after the labeling of the language ‘All Natural Fruit,’ a quantitative
measure of damages in this litigation may be provided.” Id. ¶ 20. In other words, Dr. Capps
proposes to determine Dole’s gains from its alleged misrepresentations by examining sales of the
identified products before and after Dole placed the alleged misrepresentations on its product
labels, using regression analysis to control for other variables that could otherwise explain changes
in Dole’s sales.

As outlined above, Comcast requires that “any model supporting a plaintiff’s damages case
must be consistent with its liability case.” Comcast, 133 S. Ct. at 1433 (quotation omitted). More
specifically, Comcast states that the plaintiff’s damages “model purporting to serve as evidence of
damages in this class action must measure only those damages attributable to [the defendant’s
conduct].” Id. “Calculations need not be exact,” id., and courts within this district have interpreted
Comcast as “not articulat[ing] any requirement that a damage calculation be performed at the class
level.”
certification stage,” In re Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, 2013 WL
5429718, at *22 (N.D. Cal. June 20, 2013), report and recommendation adopted, MDL No. 1917,
2013 WL 5391159 (N.D. Cal. Sept. 24, 2013). Nevertheless, the plaintiff must provide enough
detail for the court to determine that the plaintiff’s damages model is “consistent with its liability
case,” Comcast, 133 S. Ct. at 1433; see also Chavez, 268 F.R.D. at 379 (“At class certification,
plaintiff must present a likely method for determining class damages, though it is not necessary to
show that his method will work with certainty at this time.” (internal quotation marks omitted)).

The Court finds that Dr. Capps’ Regression Model sufficiently ties damages to Dole’s
alleged liability under Comcast. Dr. Capps’ Regression Model isolates the effect of the alleged
misrepresentation by controlling for all other factors that may affect the price of Dole’s fruit cups
and the volume of Dole’s sales. For example, and significantly, the Regression Model compares
data on identical Dole products: the product before the label statement was introduced, and the
same product after its label included the alleged misrepresentation. See Capps Decl. ¶¶ 20, 21. This
distinguishes the Regression Model from the damages model rejected in POM, 2014 WL 1225184,
at *5, and the Price Premium Model found insufficient here, because the Regression Model ensures
that factors like brand loyalty and product quality remain constant. The Regression Model also
controls for variables such as Dole’s advertising expenditures, the prices of competing and
complementary products, the disposable income of consumers, and population. Id. ¶ 21. Therefore,
as Comcast contemplates, Dr. Capps’ Regression Model traces damages to Dole’s alleged liability
by accounting for several factors other than the alleged misbranding that might influence changes
in price or sales.

Dole cites two previous cases in which Dr. Capps’ proposed methodologies were rejected.
(D.D.C. 2010). However, both cases are distinguishable.

In Ogden, this Court found summary judgment proper with respect to plaintiffs’ damages
claims because rather than calculating damages, Dr. Capps had only “stated that he could provide
such an estimate and offered a general description of several methods he might use to do so.”
Ogden, 2014 WL 27527, at *13. The Court concluded that Dr. Capps’ “description of methodology [was] not evidence of the proper amount of restitution in [that] case.” Id. The Court’s grant of summary judgment to the defendants in Ogden was based on the fact that discovery had closed and the plaintiff had neither “explain[ed] her failure to provide any evidence of the actual amount of restitution to which she [was] entitled, nor [requested] further discovery” on the issue. Id.

Here, Dole argues that the Court should deny class certification because Dr. Capps has not yet run his regressions. Opp’n at 17-19. Brazil counters that Dole has not provided the necessary discovery for Dr. Capps to finish his analysis. As an initial matter, Ogden is distinguishable because discovery has yet to close in this case. See ECF No. 78, at 2 (setting fact and expert discovery cut-offs of July 10, 2014). Furthermore, Dole did not produce the discovery necessary for Dr. Capps’ analysis before class certification was briefed between January 31, 2014 and March 27, 2014. Dole’s statements in the parties’ March 7, 2014 Discovery Dispute Joint Report #1 (“DDJR #1”) to Magistrate Judge Lloyd are revealing. As Dole stated in that filing:

The issue is timing. Producing sensitive financial data and documents before a class has been certified is premature, as this information pertains solely to damages. Plaintiff effectively admits as much, because he filed his motion for class certification without such information, so it cannot have been relevant to class issues. That motion for class certification is set for hearing on April 17, 2014.

That said, given the other impending dates (e.g., expert discovery cutoff), Dole offered to produce non-privileged financial data and documents after the April 17, 2014 class certification hearing. This would provide Plaintiff with adequate time to review and analyze the documents prior to the June 13, 2014 Opening Expert Report deadline. Plaintiff declined that offer.

ECF No. 113. at 2. 7 Id. at 3. Dole cannot use damages discovery as both a sword and a shield. In its DDJR #1, Dole claims that it need not produce discovery relevant to damages before class certification because the discovery is not relevant to class certification. Yet, Dole opposes class certification on the basis that Dr. Capps has not performed his regression analysis. According to Brazil, Dr. Capps cannot perform his regression analysis without the discovery Dole refused to

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7 Dole also contested the relevance of producing the 2004-2007 labels for the identified products, which Brazil contends are relevant to Dr. Capps’ damages calculation. Magistrate Judge Lloyd found that as to the labels, “even given the relatively low threshold for relevance at the discovery stage, Brazil fail[ed] to make an adequate showing” because his assertions of relevance were “entirely conclusory.” ECF No. 123, at 3.
produce. On April 1, 2014, Magistrate Judge Lloyd compelled the production of such discovery by April 7, 2014, after class certification had been fully briefed. Consequently, the Court cannot credit Dole’s arguments that Dr. Capps’ analysis is insufficient under Comcast when Dole itself contributed to Dr. Capps’ failure to complete his regression analysis. Nor can the Court accept Dole’s contention that Comcast requires Dr. Capps to complete his regression analysis when Dole argued the opposite to Magistrate Judge Lloyd.

As to the Kottaras case cited by Dole, the court in Kottaras rejected Dr. Capps’ proposed method of showing “monetary loss attributable to the anti-competitive aspect of the merger between” two supermarket chains. 281 F.R.D at 22. The court initially noted that the plaintiff was not required to “offer evidence as to the amount of damages at [the class certification] stage;” but rather she only needed to “show that the fact of damage [could] be proven using common evidence.” Id.

Subjecting Dr. Capps’ proposed regression analysis to “rigorous analysis,” the Kottaras court rejected the proposed model because: (1) while it may have been sufficient to calculate what losses consumers suffered as a result of the merger, the model failed “to take into account any benefits customers may have received thereby”; and (2) the proposed model was “not sufficiently developed to meet Plaintiff’s burden of showing that common questions predominate over individual ones, as required by Rule 23(b)(3).” Id. at 24, 26. The court quoted a case from this district for the proposition that courts are “increasingly skeptical of plaintiffs’ experts who offer only generalized and theoretical opinions that a particular methodology may serve this purpose without also submitting a functioning model that is tailored to market facts in the case at hand.” Id. at 27–27 (citing In re Graphics Processing Units Antitrust Litigation, 253 F.R.D. 478, 492 (N.D. Cal. 2008)).

For reasons already discussed, Kottaras is distinguishable. Dr. Capps’ regression would control for other factors (such as price, seasonality, and regional differences) that could explain changes in Dole’s sales figures that may otherwise erroneously be attributed to Dole’s label statements. Moreover, the Regression Model compares data on identical Dole products—the
product before the label statement was introduced, and the same product after its label included the
alleged misrepresentation. See Capps Decl. ¶ 20, 21. Dr. Capps’ proposed model in Kottaras
accounted for the adverse price impacts of a supermarket merger but completely omitted any
measurement of the benefits of such a merger. Kottaras, 281 F.R.D. at 23-24. By contrast, the
regression model here contemplates factors other than the alleged misbranding that might influence
market price, including “expenditures associated with the advertising and promotion” of the
products at issue, prices of complementary products, disposable personal income of consumers,

Dole attacks the methodological rigor of the Regression Model on only one basis. Dole
argues that the Regression Model raises individual issues because, according to Dole, the model
will be unable to account for price differences based on the nature and location of the outlet in
which they are sold, or the availability of discounts. Opp’n at 22. Because of these variations, Dole
contends, different consumers allegedly suffered different amounts of damages. However, Dole
does not explain how these regional price differences would impact the actual measure of damages
in the Regression Model: price changes within regions that correspond to the introduction and/or
removal of the allegedly misleading label statements. For example, if a Dole fruit cup costs $4.00
in San Francisco and $3.00 in Sacramento, this $1.00 unit disparity does not necessarily influence
how the price would change as a result of amending the product’s label to claim that the fruit cup is
“All Natural.” If both prices increase by $0.10, purchasers in San Francisco and Sacramento have
both suffered the same amount in damages, $0.10. Even if the price increase is proportional, the
price change will still result in largely similar damages to both purchasers: if prices increase by
5%, the purchaser in San Francisco will pay $0.20 more per fruit cup, and the purchaser in
Sacramento $0.15. Regardless, damages can be tied to the liability theory and calculated on a
classwide basis.

Furthermore, to the extent that Dole objects to regional price disparities, and not differences
in price changes, Dr. Capps’ Regression Model controls for any such regional differences to ensure
that the resulting damages figures only cover the benefit Dole received from its label statements.
Capps Decl. ¶ 21. Comcast establishes that “[c]alculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff’s damages case must be consistent with its liability case.” Comcast, 133 S. Ct. at 1433 (citation and quotation omitted). Dr. Capps’ Regression Model comports with this requirement. Even if there are regional differences as Dole contends, the Regression Model is sufficiently precise under Comcast and the model’s ability to control for other factors that could affect Dole’s sales ensures that Dr. Capps’ damages figures are tied only to Dole’s liability. Therefore, because Brazil has advanced a damages methodology that is capable of “tracing the damages to the plaintiff’s theory of liability,” Brazil has successfully shown that questions common to the class predominate. Lindell, 2014 WL 841738, at *14.

Accordingly, because Brazil’s proposed damages model provides a means of showing damages on a classwide basis through common proof, the Court concludes that Brazil has satisfied the Rule 23(b)(3) requirement that common issues predominate over individual ones.

2. Superiority

A class action brought under Rule 23(b)(3) must be “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). To make this determination the Court considers: (1) the class members’ interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).

The superiority requirement tests whether “classwide litigation of common issues will reduce litigation costs and promote greater efficiency.” Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). “If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually a class action is not superior.” Zinser, 253 F.3d at 1192.

Dole does not dispute that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Here, the value of each individual claim is likely
small, such that the only practical way for this case to proceed is as a class action. Moreover, neither party has raised any issues related to efficiency, and the Court finds that this dispute is more efficiently resolved as a class action. Accordingly, the superiority requirement to certify a Rule 23(b)(3) class is met.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff’s Motion for Class Certification. Brazil has satisfied the requirements of Rules 23(a), 23(b)(2), and 23(b)(3).

The Court therefore CERTIFIES the following class under Rule 23(b)(2): “All persons in the United States who, from April 11, 2008, until the date of notice, purchased a Dole fruit product bearing the front panel label statement ‘All Natural Fruit’ but which contained citric acid and ascorbic acid. Excluded from the class are (1) Dole and its subsidiaries and affiliates, (2) governmental entities, and (3) the Court to which this case is assigned and its staff.”

The Court also CERTIFIES the following class under Rule 23(b)(3): “All persons in California who, from April 11, 2008, until the date of notice, purchased a Dole fruit product bearing the front panel label statement ‘All Natural Fruit’ but which contained citric acid and ascorbic acid. Excluded from the class are (1) Dole and its subsidiaries and affiliates, (2) governmental entities, (3) the Court to which this case is assigned and its staff, and (4) All persons who make a timely election to be excluded from the Class.” The Court DENIES Plaintiff’s Motion for Class Certification of a nationwide 23(b)(3) class.

The Court APPOINTS Plaintiff Chad Brazil as the class representative, and Pratt & Associates, Charles Barrett, P.C., and Barrett Law Group, P.A. as class counsel.

The Court DISMISSES with prejudice the Dole products and label statements identified in the SAC for which Brazil did not move for class certification.

Within 14 days of the date of this Order, Brazil shall file an amended complaint that amends the class definitions to comport with the Court’s certified class definitions, and deletes the dismissed Dole products and label statements. Plaintiffs may not make any other substantive change to the complaint, unless Defendant stipulates to the change.
IT IS SO ORDERED.

Dated: May 30, 2014

LUCY H. KOH
United States District Judge
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JUDITH JANNEY, et al.,

Plaintiffs,

v.

GENERAL MILLS,

Defendant.

No. C 12-3919 PJH

ORDER GRANTING MOTION TO
DISMISS IN PART AND DENYING
IT IN PART

Defendant's motion to dismiss the first amended complaint came on for hearing
before this court on May 1, 2013. Plaintiffs appeared by their counsel Stephen Gardner,
and defendant appeared by its counsel Charles C. Sipos and David T. Biderman. Having
read the parties' papers and carefully considered their arguments and the relevant legal
authority, the court hereby GRANTS the motion in part and DENIES it in part.

BACKGROUND

In this proposed class action, plaintiffs allege that the product packaging and
advertising of certain Nature Valley® products manufactured and sold by defendant
General Mills is deceptive because the products, which contain the sweeteners high
fructose corn syrup ("HFCS"), high maltose corn syrup ("HMCS"), and/or maltodextrin and
rice maltodextrin ("Maltodextrin"), are labeled "natural."1 Plaintiffs claim that these
substances are "highly processed" and are therefore not "natural."

In the first amended complaint ("FAC"), plaintiffs assert four causes of action – a
claim under the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code
§ 1750(a)(5), (a)(7); a claim of unfair competition under California Business & Professions
§§

1 This includes the use of the phrases "100% Natural," "All Natural," and "Natural" on
the product label or in its marketing.
Code § 17200 ("UCL"); a claim of false advertising under California Business & Professions Code § 17500 ("FAL"); and a claim of unjust enrichment.

Plaintiffs allege that the term "natural" applies only to products that contain no artificial or synthetic ingredients and that consist entirely of ingredients that are only minimally processed. Plaintiffs assert, however, that General Mills deceptively uses the term "natural" to describe products "containing ingredients that have been fundamentally altered from their natural state and cannot be considered 'minimally processed,'" and that the use of "natural" to describe such products "creates customer confusion and is deceptive." FAC ¶ 3.

Plaintiffs contend that the term "natural" is "pervasive and prominent on the packaging and advertising" of Nature Valley® products, and that General Mills "reinforces" the image of its products as all-natural on the Nature Valley® website, and through social media accounts on Twitter, Facebook, Flickr, and YouTube. FAC ¶ 4. Indeed, plaintiffs assert, the name Nature Valley® itself "directly conjures up images of naturalness." FAC ¶ 5. For example, they claim that the Nature Valley® website, which "features images of forests, mountains, and seaside landscapes," links Nature Valley® with "the concept of natural." FAC ¶ 23. They contend that by representing that Nature Valley® products are "natural," General Mills "seeks to capitalize on consumers' preference for all-natural foods and the association between such foods and a wholesome way of life." FAC ¶ 27.

Plaintiffs assert that they bought certain varieties of Nature Valley® Chewy Trail Mix Granola Bars, Sweet & Salty Nut Granola Bars, and Granola Thins, relying on the claims that they are "natural." Plaintiffs were "attracted to these products because they prefer to consume all-natural foods for reasons of health, safety, and environmental preservation[,] and they "believe that all-natural foods contain only ingredients that occur in nature or are minimally processed, and they would not include HFCS, HMCS, and Maltodextrin among such ingredients." As a result, the Nature Valley® Chewy Trail Mix Granola Bars, Sweet & Salty Nut Granola Bars, and Granola Thins, with their "deceptive 'Natural' claims," have no value to them. FAC ¶ 47. They contend that they stopped buying the Nature Valley®
products when they discovered they were not “all natural.” FAC ¶¶ 51, 57.

General Mills now seeks an order dismissing the FAC pursuant to Federal Rules of Civil Procedure 12(h)(3) and 12(b)(6), arguing that the court lacks subject matter jurisdiction over the case, and that plaintiffs have failed to plead fraud with particularity.

**DISCUSSION**

A. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires that a complaint include a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Fed. R. Civ. P. 8(a)(2).*

Nevertheless, however, legally conclusory statements, not supported by actual factual allegations, need not be accepted. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The allegations in the complaint “must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and quotations omitted). A motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. *See id.* at 558-59. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted).

In addition, in actions alleging fraud, “the circumstances constituting fraud or mistake shall be stated with particularity.” *Fed. R. Civ. P. 9(b).* That is, Rule 9(b) requires that falsity be pled with specificity, including an account of the “time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (citations
omitted); see also Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993).

Consequently, "[a]ctions of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)).

Moreover, the plaintiff must do more than simply allege the neutral facts necessary to identify the transaction; he must also explain why the disputed statement was untrue or misleading at the time it was made. Yourish v. California Amplifier, 191 F.3d 983, 992-93 (9th Cir. 1999).

B. Defendant's Motion

General Mills makes two main arguments – that the claims should be dismissed under the "primary jurisdiction doctrine," and that the claims fail to allege fraud with particularity as required by Rule 9(b).

1. Dismissal under the primary jurisdiction doctrine

Under the primary jurisdiction doctrine, courts may determine that the initial decision-making responsibility should be made by the relevant federal agency rather than the courts. Syntek Semiconductor v. Microchip Tech., 307 F.3d 778, 780 (9th Cir. 2002); see also Reiter v. Cooper, 507 U.S. 258, 268 (1993). General Mills contends that the court should dismiss the entire action because any decision regarding the meaning and use of the label "natural" should be made by the United States Food and Drug Administration ("FDA").

The primary jurisdiction doctrine is a prudential, rather than a jurisdictional, limitation, as the court has discretion to retain jurisdiction (which it would not if the doctrine were jurisdictional). See Reiter, 507 U.S. at 268-69; see also Davel Commc'ns, Inc. v. Qwest Corp., 460 F.3d 1075, 1091 (9th Cir. 2006) (where primary jurisdiction lies with an agency, the court may stay the case pending administrative action or dismiss it without prejudice). Application of the doctrine does not imply that the court lacks subject-matter jurisdiction, but rather that the case "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency."

Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1172 (9th Cir. 2002); see
also Syntek, 307 F.3d at 780.

In determining whether to invoke the primary jurisdiction doctrine, courts generally consider whether there is (1) a need to resolve an issue (2) that has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration. Clark v. Time Warner Cable, 523 F.3d 1110, 1114-15 (9th Cir. 2008); see also Syntek, 307 F.3d at 781 (relevant factors are whether agency determination lies at the heart of task assigned to agency by Congress; whether agency expertise is required to unravel intricate technical facts; whether the agency determination would materially aid the court).

General Mills argues that the question whether food products are "natural" is best left to the FDA’s regulatory authority, and that application of the factors listed above confirms that dismissal on primary jurisdiction grounds is proper here. General Mills asserts that plaintiffs’ claims expressly require the court to decide whether “natural” on food labeling is false or misleading; that food labeling is an issue that Congress has placed within the primary jurisdiction of the FDA; that food labels are indisputably subject to comprehensive regulatory authority by the FDA (and that under that authority, the FDA has adopted a “policy” for the use of “natural,” which it enforces through administrative action); and that the FDA’s enforcement of its “natural” policy for food labeling is an issue that requires the agency’s expertise and uniformity in administration.

“Natural” is not defined in the federal Food, Drug and Cosmetic Act, and, notwithstanding repeated requests, the FDA has expressly declined to define “natural” in any regulation or formal policy statement. In 1991, the FDA solicited comments on a potential rule adopting a definition for the term “natural,” noting that the use of “natural” on food labels “is of considerable interest to consumers and industry.” However, two years later, the FDA concluded that while “the ambiguity surrounding the use of this term . . . could be abated” if the term were adequately defined, the agency would have to carefully consider many facets of the issue if it undertook a rulemaking to define “natural,” which it
was unwilling to do because of "resource limitations and other agency priorities."  See 58 Fed. Reg. 2302-01 at *2407 (Jan. 6, 1993).

In 2002, the Center for Science in the Public Interest asked the FDA to take action against Ben & Jerry's, an ice cream producer that labeled its products "all natural." The FDA's response was that defining "natural" was "not among the FDA's current enforcement priorities." In 2006, the Sugar Association petitioned the FDA to define "natural," and FDA likewise declined to do so. In 2010, a number of U.S. District Courts issued six-month stays of pending litigation over the use of "natural" in beverages containing high-fructose corn syrup, in the hopes that FDA would formally define "natural." Nevertheless, the FDA declined to do so.

When questions over the use of "natural" arise, the FDA occasionally refers to a statement made in the January 6, 1993, guidance regarding labeling. At that time, the FDA stated that it would "maintain its current policy . . . not to restrict the use of the term 'natural' except for added color, synthetic substances, and flavors[;]" and that it would "maintain its policy regarding the use of 'natural,' as meaning that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food." 58 Fed. Reg. 2302-01 at *2407.

With only this informal policy statement on which to rely as the definition for "natural," the FDA has taken little action against companies for improperly using the term. The FDA has issued a number of "Warning Letters" to companies who have used the term "natural" in labels for food products that contain various preservatives. General Mills claims that these letters show that the FDA routinely makes considered, expert judgments about what products and food labels warrant administrative action for non-compliance with its informal policy.

For example, in an August 16, 2001 Warning Letter to Oak Tree Farm Dairy, the FDA stated:

The term "all natural" on the "OAKTREE ALL NATURAL LEMONADE" label is inappropriate because the product contains potassium sorbate. Although FDA has not established a regulatory definition for "natural," we discussed its
use in the preamble to the food labeling final regulations (58 Federal Register 2407, January 6, 1993, copy enclosed). FDA's policy regarding the use of "natural," means nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food. The same comment applies to use of the terms "100 % NATURAL" and "ALL NATURAL" on the "OAKTREE REAL BREWED ICED TEA" label because it contains citric acid.

In an August 29, 2001 Warning Letter to Hirzel Canning Company regarding its canned tomato products, the FDA stated:

[The Dei Fratelli® "CHOPPED TOMATOES ONIONS & GARLIC" and "CHOPPED MEXICAN TOMATOES & JALAPENOS" labels bear the term "ALL NATURAL," but according to the ingredient statements, calcium chloride and citric acid are added to the products. We have not established a regulatory definition for the term "natural," however; we discussed its use in the preamble to the food labeling final regulations (58 Federal Register 2407, January 6, 1993).] FDA's policy regarding the use [of] "natural," means that nothing artificial or synthetic has been included in, or as been added to, a food that would not normally be expected to be in the food. Therefore, the addition of calcium chloride and citric acid to these products preclude use of the term "natural" to describe this product.

As yet another example, in a November 16, 2011 Warning Letter to Alexia Foods, the FDA stated:

Your Alexia brand Roasted Red Potatoes & Baby Portabella Mushrooms product is misbranded within the meaning of section 403(a)(1) of the Act [21 U.S.C. 343(a)(1)], which states that a food shall be deemed to be misbranded if its labeling is false or misleading in any particular. The phrase "All Natural" appears at the top of the principal display panel on the label. FDA considers use of the term "natural" on a food label to be truthful and non-misleading when "nothing artificial or synthetic . . . has been included in, or has been added to, a food that would not normally be expected to be in the food." [58 FR 2302, 2407, January 6, 1993].

Your Alexia brand Roasted Red Potatoes & Baby Portabella Mushrooms product contains disodium dihydrogen pyrophosphate, which is a synthetic chemical preservative. Because your products contain this synthetic ingredient, the use of the claim "All Natural" on this product label is false and misleading, and therefore your product is misbranded under section 403(a)(1) of the Act.

We note that your Alexia brand products market a number of food products with the "All Natural" statement on the label. We recommend that you review all of your product labels to be consistent with our policy to avoid additional misbranding of your food products.

In Pom Wonderful LLC v. Coca-Cola Co., 679 F.3d 1170 (9th Cir. 2012), the Ninth Circuit commented (in a somewhat different context), "If the FDA believes that more should be done to prevent deception, or that [a manufacturer's] labels mislead consumers, it can
act." Id. at 1177. General Mills contends that the same reasoning is applicable here, and asserts that as the Warning Letters demonstrate, the FDA does act to enforce its "policy." General Mills argues that for the court to usurp the agency's role and decide for itself whether any such action is appropriate "would risk undercutting the FDA's expert judgments and authority." See id.

General Mills acknowledges that some courts have declined to apply the primary jurisdiction doctrine to food labeling claims concerning the use of the term "natural" because the FDA has not elevated its informal "policy" into a formal regulation. In particular, General Mills cites Lockwood v. Conagra Foods, Inc., 597 F.Supp. 2d 1028, 1035 (N.D. Cal. 2009) (declining to apply primary jurisdiction doctrine in false advertising case concerning use of the term "natural" for food label); and Wright v. General Mills, Inc., 2009 WL 3247148 at *4 (S.D. Cal. Sept. 30, 2009) (same). However, General Mills argues, these decisions predate the Ninth Circuit's decision in Pom Wonderful, which held that deference to the agency is proper even if no formal regulation has been promulgated. See id., 679 F.3d at 1177).2

Plaintiffs disagree with General Mills' assertion that the FDA has issued repeat and consistent "guidance" on the subject of what is "natural" in food products, and contend that in fact, the FDA has explicitly and repeatedly refused to define the term "natural," and that current FDA guidance regarding the term is applicable only to added colors and flavors in foods (citing 21 C.F.R. § 101.22 - Food Labeling: Nutrition Content Claims). They contend that the fact that the FDA has not promulgated a single regulation defining "natural" in the context of food products -- notwithstanding significant consumer and industry interest for more than 20 years, as well as a number of specific requests that it do so -- means that a dismissal or stay under the primary jurisdiction doctrine would have no effect on the FDA's position.

In any event, plaintiffs argue, they are not asking the court to define “natural,” but rather to decide a question of state law – whether General Mills’ marketing of its Nature Valley® products as “natural” could mislead reasonable consumers. Plaintiffs concede that the FDA has extensively regulated food labeling, but argue that cases involving whether or not food labels are misleading do not necessarily entail technical questions or require agency expertise, and that for that reason the court in this case should not invoke the primary jurisdiction doctrine.

The question is a close one, but on balance the court finds that the motion must be DENIED, at least at this stage of the litigation. In Pom Wonderful, the Ninth Circuit found that when a plaintiff’s cause of action requires a court to decide an issue committed to the FDA’s expertise, dismissal in deference to that agency is the proper result – even if no formal regulation has been adopted. Id., 679 F.3d at 1177. Thus, in Astiana v. Hain Celestial, __ F.Supp. 2d __, 2012 WL 5873585 (N.D. Cal. Nov. 19, 2012), this court relied on Pom Wonderful to dismiss on primary jurisdiction grounds a complaint that alleged that the use of the word “natural” on cosmetic products was false and misleading. See id., 2012 WL 5873585 at *2.

General Mills argues that these cases demonstrate that dismissal of the FAC on primary jurisdiction grounds is proper under the Syntek factors. The court agrees that the Syntek factors favor the resolution of this issue by the FDA. The question whether specific food ingredients can be included in food products that are labeled “natural” implicates the regulatory authority of the FDA – the agency charged by Congress with regulating food safety and food products labeling, among other things. See 21 U.S.C. § 343 (statute implementing extensive regulatory regime for food labels for purposes of determining whether food is misbranded). Enforcement of a policy regarding the labeling of food products as “natural” requires application of the FDA’s expertise and uniformity in administration.

It is true that the issuance of the informal “policy,” or its citation by the FDA when it chooses to do so, suggests that the FDA does have a position of sorts – unlike the situation
in Astiana, where the FDA had issued no guidance whatsoever, even informal policy statements, regarding the use of the term "natural" on cosmetics packaging. Nevertheless, in repeatedly declining to promulgate regulations governing the use of "natural" as it applies to food products, the FDA has signaled a relative lack of interest in devoting its limited resources to what it evidently considers a minor issue, or in establishing some "uniformity in administration" with regard to the use of "natural" in food labels. Accordingly, any referral to the FDA would likely prove futile. Thus, the court finds little reason to stay or dismiss the case to allow the FDA the opportunity to take action, even if the other factors are present.

2. Failure to state a claim

General Mills also argues that the FAC should be dismissed for failure to plead fraud with particularity, as required by Rule 9(b). With regard to the five specifically identified products (the "Named Products") – Nature Valley® Chewy Trail Mix Dark Chocolate & Nut Granola Bars; Nature Valley® Chewy Trail Mix Fruit & Nut Granola Bars; Nature Valley® Sweet & Salty Nut Cashew Granola Bars; Nature Valley® Dark Chocolate Granola Thins; and Nature Valley® Peanut Butter Granola Thins – and the allegations that the packaging for these products includes false representations that the products are "100% Natural" and "100% Delicious," and that the granola bars are the "official granola bar" of the PGA Tour and the U.S. ski team, General Mills argues that the FAC fails to comply with Rule 9(b) because it does not allege which products each plaintiff purchased, or on which of the cited statements each plaintiff relied.

General Mills also contends that the FAC fails to allege particularized facts regarding representations made in four sources of advertising apart from the product packaging – the Nature Valley® website, Flickr photostream, Facebook page, and YouTube channel; and also fails to identify any misrepresentation with respect to products other than the five "Named Products."

General Mills argues that the FAC does not allege facts showing that the four online sources of advertising include any representations that any Nature Valley® products are "natural," or that any plaintiff relied on any representations in those sources. Rather,
General Mills contends, the FAC vaguely asserts only that the four sources are "linked with the concept of natural" because they feature, e.g., images of forests, mountains, and seascapes; photographs of people in natural settings such as deserts, forests, lakes, beaches or mountains; photographs of wildlife, plants, lakes, clouds; or videos of mountain bikers riding on forest or desert trails and pausing to admire scenic vistas while snacking on granola bars. See FAC ¶¶ 23-26.

General Mills contends that in a deceptive advertising case, Rule 9(b) requires that the plaintiff or plaintiffs identify specific advertisements and promotional materials; allege when the plaintiff or plaintiffs were exposed to the materials; and explain how such materials were false or misleading. General Mills argues that the FAC does not meet this standard with regard to the online advertising, as it does not allege that plaintiffs relied on specific materials (which also means that plaintiffs do not have standing to assert the UCL claims); does not allege when plaintiffs were exposed to the materials, or that they were exposed to them at all; and does not even allege that the four online sources included any representations that Nature Valley® products are "natural" – just that they include images such as "photographs featuring people in natural settings," and "photographs of nature." See, e.g., FAC ¶¶ 24, 25

In addition, General Mills asserts, while the FAC describes only the representations regarding these five Named Products, plaintiffs also purport to bring their claims with respect to unidentified Nature Valley® products that are described as "natural" by General Mills and "contain ingredients that have been fundamentally altered from their natural state and cannot be considered minimally processed." FAC ¶ 2 n.3. Yet, General Mills argues, the FAC does not identify any such "other" products or allege that plaintiffs purchased any products other than the Named Products.

General Mills argues further that the FAC identifies only three ingredients it claims are not "natural" – HFCS, HMCS, and Maltodextrin – but acknowledges that even under the FAC's definition of "natural," not all Nature Valley® products are deceptively described as "natural." See, e.g., FAC ¶ 10 (“many” Nature Valley® products contain highly processed
ingredients such as HFCS, HMCS, and Maltodextrin); FAC ¶ 29 (HFCS, HMCS, and Maltodextrin appear in "certain varieties of" Nature Valley® granola bars and granola thins); FAC ¶ 28 (General Mills represents Nature Valley® products as "Natural," but "many of them are not"); FAC ¶ 39 ("certain varieties" of granola bars are labeled "Natural" but contain HFCS, HMCS, and Maltodextrin).

In opposition, plaintiffs assert that claims under California’s UCL or FAL do not include fraud as an element, and therefore generally do not need to be pled with particularity. Plaintiffs also contend that they are not relying on a unified fraudulent course of conduct, and that for that reason they need only satisfy the notice pleading standards of Rule 8.

Nevertheless, plaintiffs argue, if the court determines that some of the allegations in the FAC are subject to Rule 9(b), those allegations are nonetheless sufficient to give General Mills notice of the particular misconduct that is alleged to constitute the fraud charged so that they can defend against it. Here, plaintiffs assert, they have adequately alleged a fraud claim, by alleging what is false and misleading about General Mills’ statements (products are "All Natural"), and why the statements are false (products contain HFCS, HMCS, and Maltodextrin), and that this is enough to satisfy the Rule 9(b) pleading requirements.

As for whether the FAC adequately alleges plaintiffs’ reliance on the allegedly deceptive statements, plaintiffs argue that the “plain language” of the FAC and the photographs reproduced in the FAC showing the fronts of the packaging of the Nature Valley® products and the Nature Valley® website “allege the very statements [p]laintiffs saw and relied on prior to purchasing those Products.” They assert that the FAC says that "all Products” labeled “100% Natural” that also contain non-natural ingredients are “misleading” to plaintiffs and any other “reasonable consumers,” and that this allegation is sufficient to meet both Rule 8 and Rule 9(b).

The court finds that the motion must be GRANTED and DENIED in part. Claims that sound in fraud are subject to Rule 9(b). Kearns v. Ford Motor Co., 567 F.3d 1120, 1125
(9th Cir. 2009). Claims that allege facts that necessarily constitute fraud – a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages – must also satisfy Rule 9(b)’s pleading requirements because they sound in fraud. See Vess, 317 F.3d at 1105. That is, regardless of whether fraud is a necessary element of a claim, where a plaintiff alleges a uniform fraudulent course of conduct, and relies on that course of conduct as the basis for the claims, the complaint must meet the requirements of Rule 9(b). Id. at 1103. In addition, where the claim is that the defendant made false statements for financial gain, the complaint is grounded in fraud. Kearns, 567 F.3d at 1125.

The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale . . . of goods or services to any consumer." Cal. Civ. Code § 1770. The UCL prohibits "unlawful, unfair or fraudulent business act[s] or practice[s]" and "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. As a result, depending on the facts alleged, the heightened pleading requirements of Rule 9(b) may apply to claims arising under CLRA and UCL. See Kearns, 567 F.3d at 1125.

Here, the FAC alleges that General Mills “deceptively describes certain products as being ‘Natural’ when, in fact, they are not.” FAC ¶ 3. It defines the term “deceptive” as including conduct that is deceptive, unfair, misleading, unlawful, fraudulent, and untrue. FAC ¶ 1 n.1. The allegation that General Mills misrepresents its products as “natural” is central to each of plaintiffs’ claims. See, e.g., FAC ¶ 73-75 (CLRA claim), ¶ 80-81 (UCL claim), ¶ 84 (FAL claim), and ¶ 86 (unjust enrichment).

The basis of plaintiffs’ claims is that General Mills has falsely represented that its Nature Valley® products are “All Natural” or “100% Natural,” despite knowing that they contain processed sweeteners, and that plaintiffs bought the products because they believed they were “natural.” Moreover, just as in Kearns, 567 F.3d at 1125, plaintiffs claim that General Mills intentionally misrepresents its products for financial gain. FAC ¶ 9. Plaintiffs also assert that General Mills represents that its products are “natural” with knowledge of falsity and with intent to induce reliance. See FAC ¶¶ 27, 39-58, 59-61.
When claims under the CLRA, UCL, and FAL are based on a manufacturer's alleged misrepresentations about a product's characteristics, those claims sound in fraud and Rule 9(b) applies. *Morrison v. TriVita, Inc.*, 2013 WL 1148070 at *5 (S.D. Cal. March 19, 2013); *Pirozzi v. Apple Inc.*, ___ F.Supp. 2d ___, 2012 WL 6652453 at *6 (N.D. Cal. Dec. 20, 2012); see also *Kearns*, 567 F.3d at 1127. Thus, because plaintiffs' claims are "grounded in" fraud, they are subject to the strict pleading requirements of Rule 9(b).

To the extent that the FAC alleges that the use of the terms "Natural" or "100% Natural" on the packaging or advertising for the five Named Products was deceptive because those products contain HFCS, HMCS, and/or Maltodextrin as ingredients, the court finds for purposes of this Rule 12(b)(6) motion that the FAC alleges false representations – one element of a claim of fraud – as required under Rule 9(b).

In addition, the FAC alleges that during the class period, plaintiff Judith Janney purchased Nature Valley® Chewy Trail Mix Dark Chocolate & Nut Granola Bars and Nature Valley® Peanut Butter Granola Thins; and that plaintiff Amy McKendrick purchased Nature Valley® Chewy Trail Mix Fruit & Nut Granola Bars, Nature Valley® Sweet & Salty Nut Cashew Granola Bars, and Nature Valley® Dark Chocolate and Peanut Butter Granola Thins. FAC ¶¶ 16, 17. Both plaintiffs are alleged to have purchased "certain varieties" of Nature Valley® Granola Bars and Granola Thins "relying on the claims that they are "Natural."

Elsewhere in the FAC, plaintiffs allege that General Mills represents that Nature Valley® products are "natural" in order to "capitalize on" – or make money from – customers' preference for "all-natural foods." FAC ¶ 27. Thus, as to this limited portion of the claims – the named plaintiffs' purchasing of the five Named Products – the court finds that the pleading is sufficient to satisfy Rule 9(b), and the motion is DENIED on that basis.

However, the FAC does not plead fraud with particularity with regard to two areas – the online marketing sources (the Nature Valley® website, Facebook, Flickr, YouTube, plus presumably Twitter, which is pled in the FAC but which General Mills does not mention); and the "unidentified products."
In a deceptive advertising case, Rule 9(b) requires that the plaintiff(s) identify specific advertisements and promotional materials; allege when the plaintiff(s) were exposed to the materials; and explain how such materials were false or misleading. See Von Koenig v. Snapple Beverage Corp., 2011 WL 43577 at *3 (E.D. Cal. Jan. 6, 2011); see also Kearns, 567 F.3d at 1126 (claims dismissed where plaintiff failed to specify which advertisements or sales materials he saw or when he was exposed to them).

Plaintiffs' position appears to be that the presence of the term “100% Natural” on the physical product labels is sufficient to support all of their claims, no matter how vaguely articulated. However, they have not addressed the fact that the FAC fails to identify with particularity (or at all) any misrepresentations made in the online sources. The FAC does not specify what the exact false or misleading statements are, why the statements are false or misleading, where exactly the statements are located, or which statements plaintiffs relied on. Thus, to the extent that plaintiffs' claims rely on alleged representations made on the Nature Valley® website, Flickr photostream, Facebook page, and YouTube channel, they must be dismissed for failure to allege fraud with particularity.3

As for the assertions regarding the "unidentified products" – the products other than the Named Products specifically identified in the FAC – plaintiffs claim that whether they purchased other types of products is immaterial to the allegations at issue or the court's inquiry. The court disagrees. A plaintiff alleging that product labels or packaging contain misrepresentations must make specific allegations regarding each product, and attaching only a selection of labels will not suffice under Rule 9(b). See Ries v. Hornell Brewing Co., 2011 WL 1299286 at *4 (N.D. Cal. Apr. 4, 2011); Von Koenig, 713 F. Supp. 2d at 1078.

In order to plead fraud with particularity, plaintiffs must specify the exact misleading statements, and to the extent that they are claiming that products they have not identified were falsely designated or advertised, those claims are not plausible. Plaintiffs' vague

3 Moreover, the allegation that an "image of nature" can be viewed as deceptively describing the ingredients in granola bars is entirely implausible, and therefore inadequate to state a claim under any of the causes of action pled in the FAC – much less, to state a claim for fraud.
description of the products they contend are at issue (apart from the Named Products) leaves General Mills (and the court) to guess which of its products (and which statements about those products) General Mills will be required to defend in this case.

**CONCLUSION**

In accordance with the foregoing, the motion to dismiss or stay the action based on the primary jurisdiction doctrine is DENIED. The motion to dismiss the FAC for failure to allege fraud with particularity is GRANTED in part and DENIED in part. The dismissal is with leave to amend. Any amended complaint must be filed no later than June 7, 2013. Defendant's response to the third amended complaint shall be filed no later than 21 days thereafter.

**IT IS SO ORDERED.**

Dated: May 10, 2013

[Signature]

PHYLLIS J. HAMILTON
United States District Judge
INTRODUCTION

Plaintiffs Judith Janney and Amy McKendrick bring this putative class action against defendant General Mills, Inc., asserting that the use of the term “Natural” on General Mills’s “Nature Valley” products (the “products”) is deceptive and misleading because of the presence of high fructose corn syrup (“HFCS”), high maltose corn syrup (“HMCS”), and maltodextrin.

General Mills moves to stay the proceedings based on the argument that the United States Food and Drug Administration (“FDA”) has primary jurisdiction over the term “natural” and two judges, including one in this district, have stayed their cases pending a response to a referral to the FDA the question of whether products with bioengineered ingredients may be labeled “natural.”

General Mills also argues that the Court should exercise its inherent authority to stay this case.

After considering the parties’ briefs and argument, and for the reasons below, General Mills’s Motion to Stay is DENIED.

BACKGROUND

The Complaint alleges the following:

Plaintiff Judith Janney “purchased Nature Valley Chewy Trail Mix Dark Chocolate & Nut Granola Bars and Nature Valley Peanut Butter Granola Thins” repeatedly for two years or more,
with her last purchase occurring in March 2012. Second Amended Compl. ("SAC") (Dkt. No. 59)

¶ 16, 44 & 45. Plaintiff Amy McKendrick "purchased Nature Valley Chewy Trail Mix Fruit &
Nut Granola Bars, Nature Valley Sweet & Salty Nut Cashew Granola Bars, and Nature Valley
Dark Chocolate and Peanut Butter Granola Thins," with her last purchase occurring in February or
March 2012. Id. ¶¶ 17 & 50. They relied "on the claims that they are 'Natural.'" Id. ¶ 42. The
plaintiffs "would not have bought the [products] if they had known that they were not in fact
natural products." Id. ¶ 23.

The products "contain the highly processed sugar substitute HFCS, HMCS, and the
texturizer Maltodextrin." Id. ¶ 24. "HFCS and HMCS are sweeteners created from cornstarch, as
opposed to sugar (sucrose), which is produced from sugar cane or beets," and "[m]altodextrin is a
texturizer used in processed foods and is created from starch as well." Id. ¶¶ 26 & 27. Because
producing these ingredients "requires multiple processing steps in an industrial environment,
which transform starches into substances that are not found in nature, they cannot be described as
'Natural.'" Id. ¶ 27.

The "Natural" claim appears in varying forms on the fronts and backs of the products’
boxes, as well as on the granola bars’ individual packaging. Id. ¶¶ 35-41. Despite a letter from
the plaintiffs to General Mills detailing their concerns, General Mills "has failed to change its
practice of including HMCS and Maltodextrin in products with 'Natural' claims."

¶ 58. "Plaintiffs were attracted to the [products] because they prefer to consume all-natural
foods for reasons of health, safety, and environmental preservation." Id. ¶ 42. Additionally,
because of her diabetic daughter, Janney "seeks out healthier food and food that is all natural," and
McKendrick purchases all natural products for her daughter because she finds that "an all-natural
diet seems to help alleviate her daughter’s behavioral issues," such as attention deficit
hyperactivity disorder. Id. ¶¶ 43 & 47. Because the plaintiffs "believe that all-natural foods
contain only ingredients that occur in nature or are minimally processed," these products, "with
their deceptive 'Natural' claims, have no value to the Plaintiffs." Id. ¶ 42.

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1 In 2010, General Mills claimed that it would phase out its use of HFCS in its products within a
year. The plaintiffs do not indicate if General Mills has, in fact, done this. SAC ¶ 56.
PROCEDURAL HISTORY

The plaintiffs bring this putative class action on behalf of “all persons in California who bought the [products] that contained HFCS, HMCS, and Maltodextrin and were labeled ‘Natural’ during the period beginning four years prior to the date the original complaint was filed until the date of class certification.” Id. ¶ 59. They bring the following causes of action: (1) violation of the California Consumers Legal Remedies Act, CAL. CIV. CODE §§ 1750 et seq.; (2) violation of the California Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200 et seq.; (3) violation of the California False Advertising Law, CAL. BUS. & PROF. CODE §§ 17500 et seq.; and (4) unjust enrichment.

On May 10, 2013, the Honorable Phyllis Hamilton granted in part and denied in part General Mills’s Motion to Dismiss the plaintiffs’ First Amended Complaint. Dkt. No. 56. In considering the motion, Judge Hamilton refused to invoke the primary jurisdiction doctrine and cited the FDA’s longstanding refusal to promulgate regulations governing the use of the term “natural” and its “relative lack of interest in devoting its limited resources to what it evidently considers a minor issue” in concluding that any referral to the FDA “would likely prove futile.”


DISCUSSION

I. THE PRIMARY JURISDICTION DOCTRINE DOES NOT APPLY.


"The [primary jurisdiction] doctrine is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are within the special competence of an administrative body." Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1370 (9th Cir. 1985) (quotation marks omitted). "The doctrine does not, however, require that all claims within an agency's purview be decided by the agency." Davel Commc'ns, Inc. v. Qwest Corp., 460 F.3d 1075, 1086 (9th Cir. 2006) (citation and quotation marks omitted).

The Ninth Circuit has applied four non-exclusive factors identified in United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987), to determine whether the doctrine applies.

"Under this test, the doctrine applies where there is '(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.'" Davel Commc'ns, 460 F.3d at 1086 (quoting Gen. Dynamics Corp., 828 F.2d at 1362).

Invocation of the doctrine is appropriate where a case "requires resolution of an issue of first impression" or when the issue is not "within the conventional experience of judges." Brown

2 This section is substantially similar to the Discussion in the Court's Order Denying Motion to Stay in Bohac v. General Mills, Inc., No. 12-cv-5280.
v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1172 (9th Cir. 2002) (citing Nat’l
Commc’ns Ass’n v. AT&T Corp., 46 F.3d 220, 222 (2d Cir. 1995)); see also Clark v. Time Warner
Cable, 523 F.3d 1110, 1114 (9th Cir. 2008) (“the doctrine is a ‘prudential’ one, under which a
court determines that an otherwise cognizable claim implicates technical and policy questions that
should be addressed in the first instance by the agency with regulatory authority over the relevant
industry rather than by the judicial branch”) (emphasis added). A court may decline to hear a case
if it determines that the doctrine applies. Id. at 1088.

While issues related to food labeling are undoubtedly within the expertise of the FDA, this
case does not involve a situation in which the Court should abstain from deciding the questions
before it. Deciding what “natural” means is not “an issue of first impression” or one that has not
been addressed “in the first instance” by the FDA. Brown, 277 F.3d at 1172; Clark, 523 F.3d at
1114. As General Mills itself concedes, “the FDA has adopted a policy for use [of] the word
‘natural’ on food labels, one that it enforces through administrative action.” Br. (Dkt. No. 66) at
12. It quotes the FDA as stating that “natural” means “that nothing artificial or synthetic . . . has
been included in, or has been added to, a food that would not normally be expected to be in the
food.” Br. 9-10 (internal quotation marks omitted). Given the amount of attention that the FDA
has apparently directed towards the issue before the Court, “there is no such risk of undercutting
the FDA’s judgment and authority by virtue of making independent determinations on issues upon
which there are no FDA rules or regulations (or even informal policy statements).”’ Brazil, 2013
WL 1209955, at *10 (citation and quotation marks omitted).

Determining whether a term is false or misleading is within the province of the courts.

“[A]llegations of deceptive labeling do not require the expertise of the FDA to be resolved in the
courts, as every day courts decide whether conduct is misleading.” Jones, 912 F. Supp. 2d at 898-
99 (citations and internal quotation marks omitted). This case primarily requires asking whether a
“reasonable consumer” would be misled by the challenged statements—what a “reasonable
consumer” thinks does not involve answering technical questions or scientific expertise. See
Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1124 (N.D. Cal. 2010) (“plaintiffs advance
a relatively straightforward claim: they assert that defendant has violated FDA regulations and
marketed a product that could mislead a reasonable consumer. As courts faced with state-law challenges in the food labeling arena have reasoned, this is a question courts are well-equipped to handle.”) (citation and quotation marks omitted). Of course, the FDA’s views are “relevant to the issue of whether these labels could be deceptive or misleading to a reasonable consumer,” *Ivie*, 2013 WL 685372, at *12, but they are not the sole or dispositive factor. The questions to be decided here are squarely within “the conventional experience of judges.” *Brown*, 277 F.3d at 1172.

The *General Dynamics* factors do not help General Mills. “Without question, the FDA has extensively regulated food labeling in the context of a labyrinthine regulatory scheme.” *Chacanaca*, 752 F. Supp. 2d at 1124. Answering the questions of whether the food labeling in question is false or misleading, however, does not require the FDA’s expertise and “uniformity in administration” by the FDA does not weigh in favor of abstaining. *Davel Commc’ns*, 460 F.3d at 1086. As Judge Hamilton’s earlier Order in this case concluded, “the FDA has signaled a relative lack of interest in devoting its limited resources to what it evidently considers a minor issue, or in establishing some ‘uniformity in administration’ with regard to the use of ‘natural’ in food labels.” *Janney*, 2013 WL 1962360, at *7; see also *Jones*, 912 F. Supp. 2d at 898 (“The FDA’s inaction with respect to the term ‘natural’ implies that the FDA does not believe that the term ‘natural’ requires ‘uniformity in administration.’”).

The Ninth Circuit has made clear that not “all claims within an agency’s purview [must] be decided by the agency.” *Davel Commc’ns*, 460 F.3d at 1086. Janney’s “claims do not necessarily implicate primary jurisdiction, and the FDA has shown virtually no interest in regulating” the term “natural.” *Cf. Chavez v. Nestle USA, Inc.*, 511 Fed. App’x 606, 607 (9th Cir. 2013) (discussing primary jurisdiction doctrine as applied to DHA). After considering these factors, and because this case is neither an issue of first impression for the FDA nor a particularly complicated issue

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3 General Mills argues that deferring to the FDA will not be futile this time because two cases involving the term “natural” have now been stayed on primary jurisdiction grounds. Given the litany of cases in this area over the years, however, the Court is skeptical that the FDA will develop a policy regarding the term “natural” anytime soon, especially since it has considered the matter for over two decades but still has not provided further guidance. *See Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1033 (N.D. Cal. 2009) (Breyer, J.).
inappropriate for a court to address, the Court declines to invoke the primary jurisdiction doctrine as many other courts addressing the same or similar issues have declined to do.

General Mills argues that deciding this issue “without the FDA’s input, would risk usurping the FDA’s interpretive authority and undermining, through private litigation, the FDA’s considered judgments.” Br. 5 (quoting Cox v. Gruma Corp., No. 12-cv-6502, 2013 WL 3828800 (N.D. Cal. July 11, 2013) (internal quotation marks and brackets omitted). The Court notes that the Cox referral involves “the question of whether and under what circumstances food products containing ingredients produced using bioengineered seed may or may not be labeled ‘Natural’ or ‘All Natural’ or ‘100% Natural’.” 2013 WL 3828800, at *2 (emphasis added). In other words, the referral is limited to the issue of whether genetically modified organisms are natural, which are not the same ingredients at issue here—the FDA is not being asked to broadly define the term “natural.” Thus, it is unclear why the Court must await the FDA’s opinion on that question. In any event, as General Mills itself admits, “the FDA has adopted a policy for use [of] the word ‘natural’ on food labels, one that it enforces through administrative action.” Br. 12. As discussed above, the issues presented are not ones of first impression for the FDA—the Court is not wading into uncharted waters. Deciding this case does not mean that the Court shows no deference to the agency; on the contrary, the views expressed by the agency thus far, even if informal, would likely be highly relevant to the Court’s determinations. Thus, the Court would not “risk usurping the FDA’s interpretive authority and undermining, though private litigation, the FDA’s considered judgments” by hearing this case.

Astiana v. Hain Celestial Group, Inc., 2012 WL 5873585 (N.D. Cal. Nov. 19, 2012)—a case about the use of the term “natural” in cosmetics—is distinguishable from the facts at hand. As one judge in this district explained, Astiana “is inapposite because, unlike cosmetics, the FDA has provided informal policy guidance stating the minimum standards for using the term “natural” with respect to food products . . . .” Kosta, 2012 WL 5873585, at *9. Indeed, in declining to invoke the primary jurisdiction doctrine in her order in this case, Judge Hamilton—the judge in Astiana—explained that “the issuance of the informal ‘policy’ [concerning the term ‘natural’ with regard to food], or its citation by the FDA when it chooses to do so, suggests that the FDA does
have a position of sorts—unlike the situation in Astiana, where the FDA had issued no guidance
whatsoever, even informal policy statements, regarding the use of the term ‘natural’ on cosmetics
packaging.” Jamney, 2013 WL 1962360, at *7. Given the FDA’s guidance on food labeling to
date, there is little risk of improperly invading the FDA’s primary jurisdiction by hearing this case.

II. THE COURT DECLINES TO EXERCISE ITS DISCRETION TO STAY.

General Mills argues that the Court should exercise its inherent discretion to stay the case.

A district court has broad discretion to stay proceedings pending before it “to control the
disposition of the causes on its docket with economy of time and effort for itself, for counsel, and
exercise of judgment, which must weigh competing interests and maintain an even balance.” Id. at
254-55. “Among these competing interests are the possible damage which may result from the
granting of a stay, the hardship or inequity which a party may suffer in being required to go
forward, and the orderly course of justice measured in terms of the simplifying or complicating of
issues, proof, and questions of law which could be expected to result from a stay.” CMAX, Inc. v.
Hall, 300 F.2d 265, 269 (9th Cir. 1962).

These factors do not weigh in favor of a stay. General Mills argues that a three-month stay
is modest and will not harm any party, but for the same reason, any harm from proceeding
(primarily, the cost of beginning discovery) is also relatively modest. Outweighing that is the
likelihood that the FDA will not respond to the referral in Cox in a meaningful way, given both the
FDA’s history of how it has addressed this issue and the multiplicity of other issues that command
the FDA’s attention. Accordingly, the orderly course of justice will be harmed by a stay: the
likely outcome is that in three months, either General Mills will return to seek a further stay from
the Court or three months of case development will have been delayed. Federal Rule of Civil
Procedure 1 emphasizes the importance of the “just, speedy, and inexpensive determination of
every action and proceeding,” and a stay in this case is more likely to delay justice, slow the
resolution of the matter, and make this litigation more expensive in the long run than simply
moving forward with it. No one knows how the FDA will respond, if it responds at all, so the
initial discovery sought by the plaintiffs might be relevant regardless. Balancing the potential cost
to General Mills of commencing discovery against the delay caused by a stay and the likelihood that the FDA will not definitively and timely resolve the question presented to it, as Judge Hamilton thoroughly discussed in her Order, the Court declines to exercise its discretion to stay this case.

CONCLUSION

For the reasons above, General Mills's Motion to Stay is DENIED.

IT IS SO ORDERED.

Dated: October 10, 2013

WILLIAM H. ORRICK
United States District Judge
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JUDITH JANNEY, et al.,
Plaintiffs,
v.
GENERAL MILLS,
Defendant.

ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS
Re: Dkt. No. 85

Plaintiffs Judith Janney and Amy McKendrick bring this putative California class action against defendant General Mills, Inc., asserting that the terms “Natural” and “100% Natural” on General Mills’s “Nature Valley” products (the “products”) are deceptive and misleading because of the presence of high fructose corn syrup (“HFCS”), high maltose corn syrup (“HMCS”), and maltodextrin. Second Amended Complaint (“SAC”) ¶¶ 1, 24, 36-41. To resolve General Mills’s motion for judgment on the pleadings under Federal Rule of civil Procedure 12(c), I must resolve whether the plaintiffs’ claims that they were deceived by the terms “Natural” and “100% Natural” meets the “reasonable consumer” standard. Because the plaintiffs have plausibly alleged that General Mills’s representations about its products are factual and not merely puffery, on most issues I DENY the motion to dismiss. For the reasons described later, I will GRANT the motion with respect to the unjust enrichment claim.

FACTUAL BACKGROUND

Dark Chocolate and Peanut Butter Granola Thins,” with her last purchase occurring in February or March 2012. *Id. ¶¶ 17 & 50. They relied “on the claims that they are ‘Natural.’” *Id. ¶ 42. The plaintiffs “would not have bought the [products] if they had known that they were not in fact natural products.” *Id. ¶ 23.

The products “contain the highly processed sugar substitute HFCS, HMCS, and the texturizer Maltodextrin.” *Id. ¶ 24. “HFCS and HMCS are sweeteners created from cornstarch, as opposed to sugar (sucrose), which is produced from sugar cane or beets,” and “[m]altodextrin is a texturizer used in processed foods and is created from starch as well.” *Id. ¶¶ 26 & 27. Because producing these ingredients “requires multiple processing steps in an industrial environment, which transform starches into substances that are not found in nature, they cannot be described as ‘Natural.’” *Id. ¶ 27.

The “Natural” and “100% Natural” claim appears on the fronts and backs of the products’ boxes, as well as on the granola bars’ individual packaging. *Id. ¶¶ 35-41. Despite a letter from the plaintiffs to General Mills detailing their concerns, General Mills “has failed to change its practice of including HMCS and Maltodextrin in products with ‘Natural’ claims.” *Id. ¶ 58.

“Plaintiffs were attracted to the [products] because they prefer to consume all-natural foods for reasons of health, safety, and environmental preservation.” *Id. ¶ 42. Additionally, because of her diabetic daughter, Janney “seeks out healthier food and food that is all natural,” and McKendrick purchases all natural products for her daughter because she finds that “an all-natural diet seems to help alleviate her daughter’s behavioral issues,” such as attention deficit hyperactivity disorder. *Id. ¶¶ 43 & 47. Because the plaintiffs “believe that all-natural foods contain only ingredients that occur in nature or are minimally processed,” these products, “with their deceptive ‘Natural’ claims, have no value to the Plaintiffs.” *Id. ¶ 42.

The plaintiffs bring this putative class action on behalf of “all persons in California who bought the [products] that contained HFCS, HMCS, and Maltodextrin and were labeled ‘Natural’ during the period beginning four years prior to the date the original complaint was filed until the date of class certification.” *Id. ¶ 59. They bring the following causes of action: (1) violation of the California Consumer Legal Remedies Act (“CLRA”), CAL. CIV. CODE §§ 1750 et seq.; (2)

PROCEDURAL HISTORY


LEGAL STANDARD

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) utilizes the same standard as motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Either motion may be granted only when it is clear that “no relief could be granted under any set of facts that could be proven consistent with the allegations.” McGlinchy v. Shull Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988) (citations omitted). Dismissal may be based on either the lack of a cognizable legal theory or absence of sufficient facts alleged under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F. 2d 530, 534 (9th. Cir. 1984).

A complaint must allege facts to state a claim for relief that is plausible on its face. See Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). A claim has “facial plausibility” when the party seeking relief “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. Although the Court must accept as true the well-pled facts in a complaint, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to

DISCUSSION

I. THE PLAINTIFFS HAVE SUFFICIENTLY PLEADED THAT THEIR CLAIMS MEET THE REASONABLE CONSUMER STANDARD

A. A Reasonable Consumer Could Plausibly Be Deceived By The Products’ “100% Natural” Labeling

General Mills asserts that judgment should be entered on the SAC against plaintiffs because their claims do not meet the “reasonable consumer” standard, which governs claims under California’s UCL, FAL, and CLRA. Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995) (“[T]he false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer.”) (citation omitted). Under the reasonable consumer standard, a plaintiff must “show that ‘members of the public are likely to be deceived.’” Freeman, 68 F.3d at 289 (quoting Bank of West v. Superior Court, 2 Cal.4th 1254, 1267 (1992)).

“Advertisements that amount to ‘mere’ puffery are not actionable because no reasonable consumer relies on puffery. Factual representations, however, are actionable.” Stickrath v. Globalstar, Inc., 527 F. Supp. 2d 992, 998 (N.D. Cal. 2007) (citations omitted).

Whether a business practice is deceptive is generally a question of fact not amenable to determination on a motion to dismiss. Id. However, in certain situations a court may assess, as a matter of law, the plausibility of alleged violations of the UCL, FAL, and CLRA. See, e.g., Werbel ex rel. v. Pepsico, Inc., No. 09-cv-04456 SBA, 2010 WL 2673860, at *3 (N.D. Cal. July 2, 2010) (plaintiff failed to establish that a reasonable consumer would likely be deceived into believing that cereal named “Crunch Berries” derived nutritional value from fruit).

This is not the rare situation in which granting a motion to dismiss is appropriate. The front of the Nature Valley products’ packaging prominently displays the term “100% Natural” that could lead a reasonable consumer to believe that the products contain only natural ingredients. These words are reinforced by the word “Natural” on the products’ boxes and individual wrappers. Together, these representations could easily be interpreted by consumers as a claim that all of the
ingredients in the products are natural, which appears to be false because they allegedly contain
the unnatural ingredients high fructose corn syrup, high maltose corn syrup, and maltodextrin.
Taking these allegations as true and construing them in the light most favorable to the plaintiffs,
the SAC adequately alleges that the representations on the products' labeling could plausibly
deceive a reasonable consumer.

Courts have found similar claims challenging the terms “all natural” and “natural” to be
sufficient basis for a cause of action under California’s consumer protection laws. See Williams v.
Gerber Products Co., 552 F.3d 934, 939 (9th Cir. 2008) (“the statement that Fruit Juice Snacks
was made with ‘fruit juice and other all natural ingredients’ could easily be interpreted by
consumers as a claim that all the ingredients in the product were natural, which appears to be
false.”); Von Koenig v. Snapple Beverage Corp., 713 F. Supp. 2d 1066, 1080 (“plaintiffs allege
that they were deceived by the labeling of defendant’s drink products as ‘All Natural’ because
they did not believe that the products would contain HFCS [high fructose corn syrup] . . .
plaintiffs have stated a plausible claim that a reasonable consumer would be deceived by
(N.D. Cal. Dec. 10, 2013) (finding that the words “pure & natural,” could lead a reasonable
consumer to believe that the product is free of non-natural ingredients when it actually
contains polypropylene and sodium polyacrylate); Wilson v. Frito-Lay N. Am., Inc., No. 12-cv-
1586 SC, 2013 WL 1320468, at *12-13 (N.D. Cal. Apr. 1, 2013) (“[T]he Court finds that
Plaintiffs have adequately pled that a reasonable consumer could interpret a bag of chips claiming
to have been ‘Made with ALL NATURAL Ingredients' to consist exclusively of natural
ingredients, contrary to the reality described in the nutrition box.”); Astiana v. Ben & Jerry’s
(denying motion to dismiss similar claims regarding “all natural” bean dip that contains transfats);
4, 2009) (denying defendant’s motion to dismiss the plaintiff’s UCL, FAL, and CLRA claims
where the plaintiff alleged that a reasonable consumer would find the “All Natural” labeling on the
defendant’s drink products, which contained high fructose corn syrup, deceptive).
Accordingly, I cannot conclude as a matter of law in the context of a Rule 12(b)(6) motion
that no reasonable consumer would not be deceived by the “100% Natural” and “Natural”
representations on Nature Valley products’ labels.

B. The Terms “100% Natural” and “All Natural” are Not Mere Puffery

General Mills’s primary contention is that a claim based on the words “Natural” or “100%
Natural” is not actionable because Janney and McKenrick and the plaintiffs in two other related
cases in this district, Bohac v. General Mills, Inc., No. 12-cv-5280, and Rojas v. General Mills,
Inc., No. 12-cv-5099, have “individualized and subjective definitions of the term ‘natural’” which
“depend[] on their own individual and idiosyncratic expectations for the products.” Mtn. 9.1

General Mills asks the Court to look beyond the four corners of the complaint and dismiss
it based on allegations made by other plaintiffs in other actions. This is not permitted. General
Mills is limited to facts alleged in the complaint and to matters that may be judicially noticed. It
has not asked that I judicially notice the complaints in Rojas and Bohac. See Dkt. No. 86, General
Mills’ Request for Judicial Notice. More significantly, it cites no support for its assumption that
plaintiffs in related cases must assert the same theories of liability. To the extent General Mills
that multiple plaintiffs’ lack of a uniform definition of “natural” requires dismissal on a Rule
12(b)(6) motion, that argument is rejected since Astiana was decided on a class certification
motion based on evidence produced in that case beyond the pleadings. The only allegations at
issue here are those set forth by the plaintiffs in the SAC.

General Mills cites several cases in support of its argument that “subjective statements are
non-actionable under California’s consumer protection laws.” See Mtn. 9 (citing Carrea v.
Dreyer’s Grand Ice Cream, Inc., 475 F. App’x 113, 115 (9th Cir. 2012) (“original” and “classic”
non-actionable); Edmundson v. The Procter & Gamble Co., 2013 WL 435434, at *1 (9th Cir.

1 The plaintiff in Bohac asserts that the use of the term “natural” on the products is misleading
because of the presence of GMOs as well as 11 other ingredients such as sodium bicarbonate, soy
lecithin, high fructose corn syrup, and maltodextrin. Bohac Amended Class Action Complaint ¶¶
23-47. The plaintiff in Rojas exclusively targets GMOs and alleges that Nature valley products
are not “natural” because they contain ingredients that are GMO-based. Rojas Second Amended
Complaint ¶¶ 12, 39, 62-64.
2013) (“patented blade coating for incredible comfort” non-actionable’); *Viggiano v. Hansen*

*Natural Corp.*, No. 12-cv-10747 MMM, 2013 WL 2005430, at *11 n.42 (C.D. Cal. May 13, 2013) (“premium all-natural flavors” non-actionable); *Elias v. Hewlett Packard Co.*, No. 12-cv-00421-LHK, 2013 WL 3187319, at *10 (N.D. Cal. Jun. 21, 2013) (“ultra-reliable” and “packed with power,” nonactionable); *Fraker v. KFC Corp.*, 2006 U.S. Dist. LEXIS 79049, at *9-11 (S.D. Cal. Oct. 19, 2006) (“highest quality ingredients,” “balanced diet plan,” and “part of a sensible diet” non-actionable’). In each of these cases, the courts found that the challenged misrepresentations were the type of “generalized, vague, and unspecified assertions” that constitute “mere puffery” and “upon which a reasonable consumer could not rely.” *Glen Holly Entertainment, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1015 (9th Cir. 2003). See, e.g., *Viggiano*, 944 F. Supp. 2d at 894 (“The term ‘premium,’ … is mere puffery; it has no concrete, discernable meaning in the diet soda context’); *Carrea*, 475 F. App’x at 115 (“It is implausible that a reasonable consumer would interpret ‘Original Sundae Cone,’ ‘Original Vanilla,’ and ‘Classic,’ to imply that Drumstick is more wholesome or nutritious than competing products … the presence of ‘original’ or ‘classic’ ingredients alone does not plausibly imply that a product is more nutritious than other desserts. In addition, no reasonable consumer is likely to think that ‘Original Vanilla’ refers to a natural ingredient … .”).

The Court may determine as a matter of law whether a statement is puffery. *Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) (“District courts often resolve whether a statement is puffery when considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and we can think of no sound reason why they should not do so.”). Courts analyzing whether a statement constitutes puffery examine whether the statements are general assertions that say nothing about the specific characteristics or components of the products or whether they are specific factual assertions. “The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions. Advertising which merely states in general terms that one product is superior is not actionable. However, misdescriptions of specific or absolute characteristics of a product are actionable.” *Cook, Perkiss & Liehe, Inc.*, 911 F.2d at 246
(citing Smith-Victor Corp. v. Sylvania Elec. Products, Inc., 242 F. Supp. 302, 308-09 (N.D. Ill. 1965) (advertiser’s statement that its lamps were “far brighter than any lamp ever before offered for home movies” was ruled puffery. However, when the advertiser quantified numerically the alleged superior brightness with statements such as “35,000 candle power and 10-hour life,” the court found a potential Lanham Act claim)).

Here, the alleged misrepresentations of “100% NATURAL” and “Natural” are not merely general in nature. The statements convey the affirmative and specific factual representation that the products are made entirely of natural ingredients. This is consistent with the plaintiffs’ claim that they read the label representations to mean that the products contain no artificial or synthetic ingredients. General Mills contends that its marketing is non-actionable puffery because “a reasonable consumer would be aware that Nature Valley granola bars are not ‘found in nature’ and are processed in an industrial environment.” General Mills’ misunderstands Janney’s and McKendrick’s allegations, which assert that consumers would likely be misled in believing that “natural” means the products have no artificial or synthetic ingredients—not that granola bars “are fruits of the earth.” Zou, 2013 WL 6491158, at *8 (dismissing similar argument that “reasonable consumers know” that the term ‘natural’ ‘is not a literal description of the Products, since diapers and wipes do not spring directly from the ground or grow on trees.”). As discussed above, several courts have found the terms “all natural” and “natural” to be potentially deceptive and actionable statements when used in products that contain GMOs and highly processed ingredients. It is plausible that a reasonable consumer would interpret these statements as specific factual claims upon which he or she could rely.

General Mills also asserts that “Natural” is mere puffery because the Federal Trade Commission (“FTC”) has declined to provide “general guidance” on the use of that term. See 75 Fed. Reg. 63552 (2010). As the FTC explained, it did not provide guidance because it lacked “consumer perception evidence indicating how consumers understand the term ‘natural.’” Id. In addition, the FTC noted that “natural may be used in numerous contexts and may convey different meanings depending on that context.” Id. But far from deeming “natural” mere non-actionable puffery, the FTC statement goes on to explicitly warn marketers that the use of “natural” may be
deceptive:

Marketers that are using terms such as natural must ensure that they can substantiate whatever claims they are conveying to reasonable consumers. If reasonable consumers could interpret a natural claim as representing that a product contains no artificial ingredients, then the marketer must be able to substantiate that fact. Similarly, if, in a given context, a natural claim is perceived by reasonable consumers as a general environmental benefit claim or as a comparative claim (e.g., that the product is superior to a product with synthetic ingredients), then the marketer must be able to substantiate that claim and all attendant reasonably implied claims.

Id.

Defendant’s reliance on Pelayo v. Nestle USA, Inc., 2013 WL 5764644 (C.D. Cal. Oct. 25, 2013) is also unpersuasive. The plaintiff in Pelayo alleged that the term “all natural” on Buitoni’s products was false and misleading because they contained at least two ingredients that were unnatural. The court found that the plaintiff failed to state a claim under the UCL and CLRA because she offered “several conflicting definitions” of the term “natural.” Id. at *4. As the court explained:

Plaintiff offers the Webster’s Dictionary definition of “natural,” meaning “produced or existing in nature” and “not artificial or manufactured.” However, even Plaintiff admits that this definition clearly does not apply to the Buitoni Pastas because they are a product manufactured in mass, and the reasonable consumer is aware that Buitoni Pastas are not “springing fully-formed from Ravioli trees and Tortellini bushes.”

The other definitions of “natural” offered by Plaintiff are equally implausible. In another attempt to define “natural,” Plaintiff alleges that none of the ingredients in a “natural” product are “artificial” as that term is defined by the Food and Drug Administration (“FDA”). See 21 C.F.R. § 101.22(a)(1). With respect to Buitoni Pastas, Plaintiff alleges that xanthan gum, soy lecithin, sodium citrate, maltodextrin, sodium phosphate, disodium phosphates, and ferrous sulfate (collectively, the “Challenged Ingredients”) are “unnatural, artificial and/or synthetic ingredients.” However, Plaintiff fails to allege that any of the Challenged Ingredients in Buitoni Pastas are “artificial” as defined by the FDA. In addition, the FDA definition of “artificial” applies only to flavor additives, and Plaintiff also fails to allege that any of the Challenged Ingredients in Buitoni Pastas are present in the product specifically as an added “flavor.” Therefore, this definition of “natural” is clearly not applicable in this case.

In her final failed attempt to offer a plausible definition, Plaintiff alleges that none of the ingredients in a “natural” product are “synthetic” as that term is defined by the National Organic Program (“NOP”), which regulates products labeled as “organic.” However, because Buitoni Pastas are not labeled as “organic,” the definition of “synthetic” under the NOP does not apply
Id. at *4-5 (citations omitted).

In contrast, the plaintiffs here have offered one definition of “natural.” See SAC ¶ 3 (“The term ‘Natural’ only applies to those products that contain no artificial or synthetic ingredients and consist entirely of ingredients that are only minimally processed.”); Opp. 2 (same). General Mills does not assert that this definition of “natural” is inapplicable or contradicted by federal regulation. Therefore, Pelayo is distinguishable on the facts. Furthermore, I decline to follow the analysis in Pelayo and find persuasive the decisions cited above where courts found the words “all natural” and “natural” to be actionable. As one judge in this district who declined to follow Pelayo wrote, Pelayo’s holding “is at odds with basic logic, contradicts the FTC statement on which it relies, and appears in conflict with the holdings of many other courts, including the Ninth Circuit.” Jou, 2013 WL 6491158, at *8 (N.D. Cal. Dec. 10, 2013).

C. General Mills May Not Rely on the Products’ Ingredient List to Correct Labeling Misrepresentations

General Mills contends that the ingredients list on the product packaging clears up any possible misconception by identifying which ingredients in the products are not natural. Mtn. 12-16. Specifically, General Mills contends that “any ambiguity about what ingredients were in the products is dispelled by a review of the labels themselves.” Mtn. 14.

The Ninth Circuit has already rejected the argument that “reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.” Williams, 552 F.3d at 939-40 (“We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.”). Judges in this district have applied Williams in rejecting the argument that the “natural” representations on the front of the packaging must be viewed in combination with the back of the packaging to resolve any “ambiguity.” See Wilson, 2013 WL 1320468, at *12–13 (“the Court finds that Plaintiffs have adequately pled that a reasonable consumer could interpret a
bag of chips claiming to have been ‘Made with ALL NATURAL Ingredients’ to consist
exclusively of natural ingredients, contrary to the reality described in the nutrition box. Even
though the nutrition box could resolve any ambiguity, the Court cannot conclude . . . that no
reasonable consumer would be deceived by the ‘Made with ALL NATURAL Ingredients’
labels.”) (citations omitted); Jou, 2013 WL 6491158, at *8-9 (“Defendant cannot rely on
disclosures on the back or side panels of the packaging to contend that any misrepresentation on
the front of the packaging is excused.”). As I have already explained, Janney and McKendrick
have alleged facts that plausibly suggest that a reasonable consumer would be misled into
believing that the terms “100% NATURAL” and “all natural” mean that the products contain no
non-natural ingredients. General Mills cannot rely on the ingredients list to cure that alleged
misrepresentation.

Further, the other cases on which General Mills relies to distinguish Williams are
inapposite. See Hairston v. S. Beach Beverage Co., Inc., 12-cv-1429-JFW, 2012 WL 1893818, at
*5 (C.D. Cal. May 18, 2012), (finding Williams distinguishable where the phrase “all natural with
vitamins” was consistent with the ingredient label, because label did “not simply state that it is ‘all
natural’ without elaboration or explanation. Instead, the ‘all natural’ language is immediately
followed by the additional statement ‘with vitamins’ or ‘with B vitamins.’”); Gitson v. Trader
consumer could not be misled that soy milk offered the same qualities as cow’s milk because the
label stated LACTOSE & DAIRY FREE on its front and back); Simpson v. Kroger Corp., 219
Cal. App. 4th 1352 (2013) (labels describing products as “butter” and “spreadable butter” not
misleading where top of product packaging clearly stated “WITH CANOLA OIL”); Kane v.
dismissed allegation that “all natural” statement was misleading because yogurts are colored
artificially using fruit or vegetable juice concentrate because label discloses that defendant added
“fruit or vegetable juice concentrate [for color]”).

In each of those cases, the challenged misrepresentations are explicitly disclaimed or
modified by other words in the same general location on the label. The Nature Valley products’
labels, however, do not contain any language disclaiming or qualifying the “100% NATURAL” and “all natural” misrepresentations. They do not indicate that some of the ingredients are not natural. And, contrary to General Mills’ assertion, I fail to see how the ingredients list necessarily informs the consumer that the products include non-natural ingredients. At the pleading stage, I will not conclude as a matter of law that a reasonable consumer should be expected to know that the ingredients high fructose corn syrup, high maltose corn syrup, and maltodextrin are not natural. The mere presence of these ingredients in the ingredients list does not clearly refute the explicit message that reasonable consumers may take from the rest of the packaging: that the products are made with only natural ingredients. Lam v. Gen. Mills, Inc., 859 F. Supp. 2d 1097, 1105 (N.D. Cal. 2012) (consumer is not required to look to ingredients list to determine true contents of the product).

Accordingly, I DENY General Mills’s motion to dismiss with respect to the plaintiffs’ UCL, CLRA, and FAL claims.

II. UNJUST ENRICHMENT

General Mills moves to dismiss the plaintiffs' Fourth Cause of Action for Unjust Enrichment. Mtn. 18 n.5. California does not recognize “unjust enrichment” as a separate cause of action. See Ang, 2013 WL 5407039, at *11 (citing cases). Therefore I DISMISS this claim with prejudice.

CONCLUSION

General Mills’s motion for judgment on the pleadings is DENIED as to the plaintiffs’ First, Second, and Third Causes of Action for violations of the CLRA, UCL, and FAL. The motion is GRANTED without leave to amend as to plaintiffs’ Fourth Cause of Action for unjust enrichment. General Mills shall answer the SAC within 20 days.

IT IS SO ORDERED.

Dated: March 26, 2014

WILLIAM H. ORRICK
United States District Judge