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

MOHAMMED RAHMAN, individually, and on
behalf of other members of the general public
similarly situated,

Plaintiff,

v.

MOTT'S LLP, a Delaware limited liability
partnership; and DOES 1 through 10, inclusive,

Defendants.

No. CV 13-3482 SI

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Now before the Court is defendant Mott's LLP's motion for summary judgment, scheduled for hearing on October 17, 2014. Docket No. 68. Pursuant to Civil Local Rule 7-1(b), the Court determines that this matter is appropriate for resolution without oral argument and VACATES the hearing. For the reasons below, the Court **GRANTS** in part and **DENIES** in part Mott's motion to dismiss.

BACKGROUND

I. Procedural Background

This is a consumer class action. Defendant Mott's is the manufacturer of various food products containing the statement "No Sugar Added" on their labels and/or packaging. Docket No. 48, Second Amended Complaint ("SAC") ¶¶ 1-2, 6. Plaintiff Mohammed Rahman alleges that the use of the statement "No Sugar Added" on Mott's 100% Apple Juice does not comply with the applicable Food and Drug Administration ("FDA") regulations, specifically 21 C.F.R. § 101.60(c)(2). *Id.* ¶¶ 2, 8-12.

1 Plaintiff further alleges that defendant's failure to comply with the FDA regulations violates
2 California's Sherman Law ("Sherman Law"), California Health and Safety Code § 109875 et seq. *Id.*
3 ¶¶ 2, 13-16. Plaintiff alleges that he purchased Mott's Original 100% Apple Juice after reading and
4 relying on the product's "No Sugar Added" labeling and after observing that a competitor's 100% apple
5 juice did not contain a "No Sugar Added" claim. *Id.* ¶ 31. Plaintiff alleges that he would not have
6 purchased as much of the product as he did if it did not contain the "No Sugar Added" label. *Id.* ¶ 59.

7 On June 13, 2013, plaintiff filed a class action complaint in San Francisco County Superior Court
8 against defendants Mott's and Dr. Pepper Snapple Group, Inc. ("Dr. Pepper"). Docket No. 1-1, Compl.
9 ¶¶ 67-76. On July 26, 2013, defendants removed the action to this Court pursuant to 28 U.S.C.
10 § 1441(b), based on the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). Docket No. 1,
11 Notice of Removal. On August 30, 2013, plaintiff voluntarily dismissed Dr. Pepper. Docket No. 21.
12 On August 30, 2013, defendant Mott's filed a motion to dismiss, Docket No. 22, and on September 30,
13 2013, plaintiff filed a first amended complaint ("FAC"), mooted the motion to dismiss. Docket No. 29.
14 Defendant Mott's then moved to dismiss the FAC, Docket No. 31, and on January 29, 2014, the Court
15 granted the motion in part, with leave to amend. Docket No. 46.

16 On February 24, 2014, plaintiff filed a second amended class action complaint ("SAC"), alleging
17 causes of action for: (1) violation of California's Unfair Competition Law ("UCL"), California Business
18 and Professions Code § 17200 et seq; (2) violation of California's False Advertising Law ("FAL"),
19 California Business and Professions Code § 17500 et seq; (3) violation of California's Consumers Legal
20 Remedies Act ("CLRA"), California Civil Code § 1750 et seq; (4) negligent misrepresentation; and (5)
21 breach of quasi-contract. Docket No. 48, SAC. Mott's moved to dismiss the SAC, Docket. No. 49, and
22 on April 8, 2014, the Court denied the motion. Docket No. 54. Now before the Court is defendant's
23 motion for summary judgment. Docket No. 68.

24
25 **II. Plaintiff's Mislabeling Allegations**

26 All of Rahman's statutory and common law claims are premised on his contention that, by
27 including "No Sugar Added" on the product label, Mott's 100% Apple Juice is mislabeled under
28 California's Sherman Law and FDA regulations. FAC ¶¶ 55, 63-64, 76-78, 85, 90. California's

1 Sherman Law broadly prohibits the misbranding of food. *Farm Raised Salmon Cases*, 42 Cal. 4th 1077,
2 1086 (2008) (citing Cal. Health & Safety Code § 110765). The Sherman Law incorporates all food
3 labeling regulations and any amendments to those regulations adopted pursuant to the Food, Drug, and
4 Cosmetic Act of 1938 (“FDCA”) as the food labeling regulations of California. *Id.* at 1087; Cal. Health
5 & Safety Code § 110100(a); *see also* Cal. Health & Safety Code §§ 110665, 110670. The relevant
6 FDCA labeling regulation, 21 C.F.R. § 101.60(c)(2), provides:

7 The terms “no added sugar,” “without added sugar,” or “no sugar added” may be used
8 only if:

9 (i) No amount of sugars, as defined in § 101.9(c)(6)(ii), or any other ingredient that
10 contains sugars that functionally substitute for added sugars is added during processing
11 or packaging; and

12 (ii) The product does not contain an ingredient containing added sugars such as jam,
13 jelly, or concentrated fruit juice; and

14 (iii) The sugars content has not been increased above the amount present in the
15 ingredients by some means such as the use of enzymes, except where the intended
16 functional effect of the process is not to increase the sugars content of a food, and a
17 functionally insignificant increase in sugars results; and

18 (iv) The food that it resembles and for which it substitutes normally contains added
19 sugars; and

20 (v) The product bears a statement that the food is not “low calorie” or “calorie reduced”
21 (unless the food meets the requirements for a “low” or “reduced calorie” food) and that
22 directs consumers’ attention to the nutrition panel for further information on sugar and
23 calorie content.

24 Plaintiff alleges that Mott’s fails to comply with section 101.60(c)(2)(v) because Mott’s 100%
25 Apple Juice does not state on its labels that it is not “low calorie” or “calorie reduced,” as defined by
26 21 C.F.R. §§ 101.60(b)(2)(i)(A) and 101.60(b)(4)(i). SAC ¶ 12. Plaintiff further alleges that Mott’s fails
27 to comply with section 101.60(c)(2)(vi) because Mott’s 100% Apple Juice does not resemble or
28 substitute for any foods that typically contain added sugars.¹ *Id.* ¶ 11.

¹Rahman asks the Court to take judicial notice of the fact that (1) Mott’s 100% Apple Juice “resembles and substitutes for” apple juice from concentrate, and (2) that apple juice from concentrate does not “normally contain added sugar.” Docket No. 78. The Court declines to take judicial notice of these facts because they are subject to “reasonable dispute,” Fed. R. Evid. 201(b), and in fact involve “central and disputed issues” in this case. *Cactus Corner LLC v. U.S. Dep’t of Agriculture*, 346 F. Supp. 2d 1075, 1098 (E.D. Cal. 2004), *citing U.S. v. Baker*, 641 F. 2d 1311, 1316 (9th Cir. 1981) (“A matter is not properly subject to judicial notice by the court if it involves a central and disputed issue.”).

1 Rahman alleges that because the labels of competing apple juices did not contain a “No Sugar
2 Added” statement, he concluded that this differentiated Mott’s 100% Apple Juice from the competition
3 as a less sugared, healthier product. *Id.* ¶¶ 31, 33, 35. Rahman alleges that if Mott’s 100% Apple Juice
4 had been labeled in accordance with FDA regulations, he would not have been misled as to its sugar
5 content, and as a result would have purchased smaller quantities of it. *Id.* ¶ 59.

6
7 **LEGAL STANDARD**

8 Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and
9 any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled
10 to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). The moving party bears the initial burden of
11 demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317,
12 323 (1986). The moving party, however, has no burden to disprove matters on which the non-moving
13 party will have the burden of proof at trial. The moving party need only demonstrate to the Court that
14 there is an absence of evidence to support the non-moving party’s case. *Id.* at 325.

15 Once the moving party has met its burden, the burden shifts to the non-moving party to “set out
16 ‘specific facts showing a genuine issue for trial.’” *Id.* at 324 (quoting then Fed. R. Civ. P. 56(e)). To
17 carry this burden, the non-moving party must “do more than simply show that there is some
18 metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,
19 475 U.S. 574, 586 (1986). “The mere existence of a scintilla of evidence . . . will be insufficient; there
20 must be evidence on which the jury could reasonably find for the [non-moving party].” *Anderson v.*
21 *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

22 In deciding a summary judgment motion, the Court must view the evidence in the light most
23 favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.* at 255.
24 “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from
25 the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment.” *Id.*
26 However, conclusory, speculative testimony in affidavits and moving papers is insufficient to raise
27 genuine issues of fact and defeat summary judgment. *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d
28 730, 738 (9th Cir. 1979). The evidence the parties present must be admissible. Fed. R. Civ. P. 56(c)).

1 **DISCUSSION**

2 Defendant moves for summary judgment on four grounds: (1) Rahman did not suffer damages
3 as a result of purchasing and consuming Mott’s 100% Apple Juice; (2) Rahman lacks Article III
4 standing to seek injunctive relief; (3) Rahman did not rely on the words “No Sugar Added” when
5 choosing to purchase and consume Mott’s 100% Apple Juice; (4) Rahman has failed to introduce
6 evidence showing that the words “No Sugar Added” on the label are misleading to a reasonable
7 consumer. Each argument is addressed in turn.

8
9 **I. Damages**

10 Mott's argues that Rahman's claims should be dismissed because he has failed to articulate a
11 theory of damages, and because in his testimony Rahman disclaimed any desire to receive monetary
12 relief in this lawsuit. Docket No. 68 at 7-12.

13 To establish statutory standing under the UCL, FAL, and CLRA, a plaintiff must demonstrate
14 that he has suffered monetary damages. Under the UCL, a litigant must have "suffered injury in fact and
15 . . . lost money or property as a result of the unfair competition" in order to have statutory standing. Cal.
16 Bus. & Prof. Code § 17204. The FAL requires that a litigant have "suffered injury in fact and has lost
17 money or property as a result of a violation of this chapter." Cal. Bus. & Prof. Code § 17535. The
18 CLRA confers standing on "[a]ny consumer who suffers any damage as a result of the . . . act, or
19 practice declared to be unlawful." Cal. Civ. Code § 1780; *Aron v. U-Haul Co. of California*, 143 Cal.
20 App. 4th 796, 802, (2006).

21 The California Supreme Court has explained that "[t]here are innumerable ways in which
22 economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction
23 more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future
24 property interest diminished; (3) be deprived of money or property to which he or she has a cognizable
25 claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise
26 have been unnecessary." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323 (2011). Specifically, in
27 *Kwikset* the California Supreme Court held that "a consumer who relies on a product label and
28 challenges a misrepresentation contained therein can satisfy the standing requirement of section 17204

1 by alleging . . . that he or she would not have bought the product but for the misrepresentation." *Id.* at
2 330; see also *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013) ("[W]hen a consumer
3 purchases merchandise on the basis of false price information, and when the consumer alleges that he
4 would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL
5 and FAL because he has suffered an economic injury.").

6 Rahman alleges that he suffered damages because the "No Sugar Added" statement caused him
7 to purchase more of the product than he otherwise would have. SAC ¶ 59. In response, Mott's argues
8 "[e]ven if that were true, simply buying more of a product that one 'enjoyed,' 'wanted,' and fully
9 consumed, see *id.* at 121:22-123:4, is not a valid theory of damages." Docket No. 68 at 9. This Court
10 previously rejected that argument:

11 . . . Plaintiff alleges that he would not have purchased as much of the product as he did
12 but for the misrepresentations. Thus, plaintiff alleges that he entered into more
13 transactions and parted with more money than he would have absent the
14 misrepresentations. "That increment, the extra money paid, is economic injury and
15 affords the consumer standing to sue." *Kwikset*, 51 Cal. 4th at 330. Accordingly,
16 plaintiff's allegations are sufficient to plead economic injury, and the Court denies
17 defendant's motion to dismiss these claims for failure to adequately allege injury and
18 damages.

19 Docket No. 54 at 9.

20 Rahman has testified that after seeing the "No Sugar Added" statement he began to increase his
21 purchases of Mott's 100% Apple Juice. Docket No. 68-3 at 210, 212. More specifically, he testified that
22 he was buying two to three bottles of Mott's 100% Apple Juice every two weeks, but began purchasing
23 three to four bottles every two weeks upon noticing the "No Sugar Added" statement on the label. *Id.*
24 at 213-15. Rahman further testified that he typically paid between three to five dollars per bottle. *Id.* at
25 166. Testimony from the plaintiff as to how much he spent on the product is competent evidence of
26 damages; he need not furnish sales receipts or other extrinsic evidence. See *Ogden v. Bumble Bee Foods,*
27 LLC, 5:12-CV-01828-LHK, 2014 WL 27527 at *13 (N.D. Cal. Jan. 2, 2014). Rahman has provided an
28 estimate of how much he spent on Mott's 100% Apple Juice (three to five dollars per bottle), as well as
the incremental increase in his expenditures that are attributable to the allegedly misleading labeling

1 (approximately one additional bottle every two weeks). This evidence is sufficient to establish damages
2 for purposes of statutory standing under the UCL, CLRA, and FAL.²

3
4 **II. Article III Standing for Injunctive Relief**

5 Mott's argues that Rahman lacks Article III standing to seek injunctive relief. Docket No. 68 at
6 12-15. Rahman alleges, at SAC ¶ 32, that he has developed a liking for and interest in Mott's Apple
7 Juice and accordingly "intends to purchase Mott's 100% Apple Juice in the future, but only in reduced
8 amounts consistent with his dietary restrictions."³

9 As discussed above, the UCL, CLRA, and FAL require a plaintiff to show he has suffered injury
10 and incurred damages in order to confer statutory standing (Section I. Damages, *supra*). Passed by the
11 voters in 2004, Proposition 64 put these standing requirements in place in order to curtail frivolous
12 lawsuits under California's unfair competition laws. "The California voters identified the gateway for
13 these abuses as the unaffected plaintiff, which was often the sham creation of attorneys, and expressed
14 their intent to prohibit private attorneys from filing lawsuits for unfair competition where they have no
15 client who has been injured in fact under the standing requirements of the United States Constitution."
16 *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1138-39 (C.D. Cal. 2005) (internal citations
17 omitted). Prop 64 was also aimed at preventing individual citizens from bringing suits on behalf of the
18 public at large, and thus declares that "only the California Attorney General and local public officials
19 [are] authorized to file and prosecute actions on behalf of the general public." Prop. 64 §1(f); *Profant v.*
20 *Have Trunk Will Travel*, CV 11-05339-RGK OPX, 2011 WL 6034370 at * 2 (C.D. Cal. Nov. 29, 2011)
21 ("To the extent Plaintiffs attempt to bring their claims on behalf of the public, their claims are barred by
22 Proposition 64."); *see also Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 228
23 (2006).

24 In the wake of Prop 64, in order to have statutory standing to complain about unlawful or
25 deceptive behavior under the UCL, CLRA, and FAL, a plaintiff must demonstrate some causal nexus

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27 ² The Court finds unpersuasive Mott's argument that summary judgment should be granted
28 because Rahman testified that the only thing he wants "out of the lawsuit [is] for Mott's to change their
labeling," and that he does not personally "want" any money from Mott's. Docket No. 68-3 at 119.

³ Plaintiff alleges that he has "Type 2 Diabetes." SAC, ¶ 29.

1 between the unlawful or deceptive act and damages incurred by the plaintiff. *Meyer v. Sprint Spectrum*
2 *L.P.*, 45 Cal. 4th 634, 641(2009) (“Thus, the statute provides that in order to bring a CLRA action, not
3 only must a consumer be exposed to an unlawful practice, but some kind of damage must result.”).
4 Rahman’s attempt to rely on past injury to provide statutory standing for injunctive relief (without
5 showing a likelihood of future harm) is inconsistent with Prop 64’s prohibition on the ability of
6 individuals to file lawsuits “on behalf of the public.” However, even if the UCL, CLRA, and FAL can
7 be read to confer statutory standing for injunctive relief on a plaintiff, suing in state court, who suffers
8 no risk of future harm, this federal Court, as a court of limited jurisdiction, must ensure strict compliance
9 with the requirements of Article III. *Lee v. Am. Nat. Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) (“a
10 plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be
11 foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite
12 injury.”).

13 To have standing to obtain injunctive relief, a plaintiff must allege that a “real or immediate
14 threat” exists that he will be wronged again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *see*
15 *also Chapman v. Pier 1 Imps. (U.S.), Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (“[T]o establish standing
16 to pursue injunctive relief, . . . [plaintiff] must demonstrate a ‘real and immediate threat of repeated
17 injury’ in the future.”). The “threatened injury must be certainly impending to constitute injury in fact,
18 and allegations of possible future injury are not sufficient.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct.
19 1138 (2013) (internal citations omitted). The alleged threat cannot be “conjectural” or “hypothetical.”
20 *Lyons*, 461 U.S. at 101-02. “Past exposure to illegal conduct does not in itself show a present case or
21 controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”
22 *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

23 Courts in this circuit have taken different approaches to standing analysis in cases involving
24 alleged violations of California’s unfair competition laws by purveyors of food and other consumer
25 products. Some courts have held, on public policy grounds, that a plaintiff need not even allege that he
26 intends to purchase the mislabeled product in the future in order to have standing for injunctive relief.
27 *Henderson v. Gruma Corp.*, CV 10-04173 AHM AJWX, 2011 WL 1362188 at * 8 (C.D. Cal. Apr. 11,
28 2011). (“While Plaintiffs may not purchase the same Gruma products as they purchased during the class

1 period, because they are now aware of the true content of the products, to prevent them from bringing
2 suit on behalf of a class in federal court would surely thwart the objective of California's consumer
3 protection laws.”).

4 Other courts have taken the position that a plaintiff must allege an intent to purchase the
5 challenged product in the future in order to have standing for injunctive relief. *See Jou v. Kimberly-Clark*
6 *Corp.*, 2013 U.S. Dist. LEXIS 173216, at *13 (N.D. Cal. Dec. 10, 2013) (rejecting “Plaintiffs’ contention
7 that it is unnecessary for them to maintain any interest in purchasing the products in the future” in order
8 to establish Article III standing for injunctive relief); *see also Ries v Arizona Beverages USA LLC*, 287
9 F.R.D. 523, 533-34 (N.D. Cal. 2012) (finding that plaintiffs had standing to pursue injunctive relief
10 where they alleged that they intended to purchase the products in the future).

11 Finally, some courts have held that the plaintiff’s knowledge of the allegedly unlawful or
12 misleading conduct precludes standing for injunctive relief under Article III. *Morgan v. Wallaby Yogurt*
13 *Co.*, 13-CV-00296-WHO, 2014 WL 1017879 at * 6 (N.D. Cal. Mar. 13, 2014) (“Here, I am limited to
14 only granting damages since the plaintiffs now know what evaporated cane juice is and have
15 unambiguously stated that they would not have purchased the product had they known it contained added
16 sugar. They cannot plausibly allege that they would purchase the challenged products in the future if they
17 were properly labeled.”); *Garrison v. Whole Foods Mkt. Grp., Inc.*, 13-CV-05222-VC, 2014 WL
18 2451290 at * 5 (N.D. Cal. June 2, 2014) (“The named plaintiffs in this case allege that had they known
19 the Whole Foods products they purchased contained SAPP, they would not have purchased them. Now
20 they know. There is therefore no danger that they will be misled in the future.”); *Ham v. Hain Celestial*
21 *Grp., Inc.*, 14-CV-02044-WHO, 2014 WL 4965959 at * 6 (N.D. Cal. Oct. 3, 2014)(finding the plaintiff
22 did not have standing for injunctive relief “[b]ecause [plaintiff] is now aware that the products use
23 SAPP, she cannot allege that she would be fraudulently induced to purchase the products in the future.”);
24 *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 458 (S.D. Cal. 2014) (“These consumers will not benefit
25 from the injunctive relief as they cannot demonstrate a probability of future injury; if they know the
26 ‘truth’ they cannot be further deceived.”).

27 Rahman has testified that he was misled by the “No Sugar Added” statement into thinking that
28 Mott’s 100% Apple Juice was lower in sugar and calories than comparable brands. He further testified

1 that, but for having been misled, he would have purchased less of the product. However, whatever his
2 prior state of knowledge, Rahman is now fully aware that “No Sugar Added” simply means that no sugar
3 was added to a product, not that the product does not contain sugar or is a good beverage for a Type 2
4 diabetic to drink. Rahman testified that despite being misled in the past, he wishes to purchase Mott’s
5 Apple Juice again in the future if the challenged statement is removed from the label, even though the
6 apple juice would have as much natural sugar as ever.

7 Absent showing a likelihood of future harm, a plaintiff may not manufacture standing for
8 injunctive relief simply by expressing an intent to purchase the challenged product in the future. The
9 future harm required is defined by California’s unfair competition laws. Those laws require, among other
10 things, that the plaintiff prove that he relied on the unlawful or deceptive act, and that he suffered
11 damages as a result. *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1138 (N.D. Cal. 2014) (“Plaintiffs
12 must allege that they relied on Defendant’s alleged misrepresentations in order to demonstrate standing
13 under the FAL, CLRA, and the UCL.”). Merely being exposed to an allegedly unlawful label is not a
14 cognizable harm. *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641(2009) (“Thus, the statute provides
15 that in order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but
16 some kind of damage must result.”). Similarly, merely feeling that one cannot trust defendant’s future
17 representations is not sufficient harm to confer standing for injunctive relief. *Profant v. Have Trunk Will*
18 *Travel*, CV 11-05339-RGK OPX, 2011 WL 6034370 at * 5 (C.D. Cal. Nov. 29, 2011) (“Plaintiffs allege
19 that they will face future harm by not being able to trust Defendants This future harm is conjectural
20 and too speculative to satisfy the standing requirements to seek injunctive and declaratory relief in federal
21 court.”). To have standing for injunctive relief, a plaintiff must show he “suffered or is threatened with
22 a concrete and particularized legal harm [and] a sufficient likelihood that he will again be wronged in a
23 similar way.” *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (internal citations
24 omitted). Rahman cannot plausibly prove that he will, in the future, rely on the “No Sugar Added”
25 statement to his detriment. He therefore lacks Article III standing for injunctive relief. “[T]he power of
26 federal courts is limited, and that power does not expand to accommodate the policy objectives

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1 underlying state law.” *Garrison v. Whole Foods Mkt. Grp., Inc.*, 13-CV-05222-VC, 2014 WL 2451290
2 at * 5 (N.D. Cal. June 2, 2014).⁴

3
4 **III. Reliance**

5 Mott’s argues that it is entitled to summary judgment because actual reliance is an element of all
6 of Rahman’s claims, and that he has failed to introduce evidence showing that he relied on, or was misled
7 by, the statement “No Sugar Added.” Docket No. 68 at 18-20.

8 The California Supreme Court has held that the UCL “imposes an actual reliance requirement on
9 plaintiffs prosecuting a private enforcement action under the UCL’s fraud prong.” *In re Tobacco II*
10 *Cases*, 46 Cal. 4th 298, 326 (2009). The California Supreme Court subsequently held that the actual
11 reliance requirement also applies to claims under the unlawful prong of the UCL where – as is the case
12 here – the alleged unlawful conduct is that the defendant engaged in misrepresentations and consumer
13 deception. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 n.9 (2011) (citing *Durell*, 183 Cal.
14 App. 4th at 1363 (“[T]he reasoning of *Tobacco II* [concerning the actual reliance requirement] applies
15 equally to the ‘unlawful’ prong of the UCL when, as here, the predicate unlawfulness is
16 misrepresentation and deception.”); *Hale v. Sharp Healthcare*, 183 Cal. App. 4th 1373, 1385 (2010)
17 (“[W]e conclude the reasoning of *Tobacco II* applies equally to the ‘unlawful’ prong of the UCL, when,
18 as here, the predicate unlawful conduct is misrepresentation.”). The reliance requirement is also applied
19 to the UCL’s unfair prong, when – as is the case here – the underlying conduct is alleged to misrepresent
20 or deceive. *In re Actimmune Mktg. Litigation*, C 08-02376 MHP, 2010 WL 3463491 (N.D. Cal. Sept. 1,
21 2010) *aff’d*, 464 F. App’x 651 (9th Cir. 2011). Courts have also held that plaintiffs must prove reliance
22 under the FAL and CLRA. *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1138 (N.D. Cal. 2014)
23 (“Plaintiffs must allege that they relied on Defendant’s alleged misrepresentations in order to demonstrate

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26 _____
27 ⁴In ruling on defendant’s motion to dismiss Rahman’s First Amended Complaint, this Court
28 held, at the motion to dismiss stage, that pleading an intent to purchase the challenged product in the
future was *necessary* to confer standing for injunctive relief. Docket No. 46. However, upon reviewing
all the evidence presented on this motion for summary judgment, the Court finds that introducing
evidence which merely shows an intent to purchase the product in the future, where the product itself
remains the same, is not *sufficient* to confer standing for injunctive relief.

1 standing under the FAL, CLRA, and the UCL.”). Justifiable reliance is also an element of
2 misrepresentation. *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1201, n. 2 (9th Cir. 2001).

3 In *Tobacco II* 46 Cal. 4th at 326, the California Supreme Court held that in order to prove
4 reliance, a plaintiff must show that the alleged misrepresentation played a “substantial part” in
5 influencing his conduct (“It is not . . . necessary that [the plaintiff’s] reliance upon the truth of the
6 fraudulent misrepresentation be the sole or even the predominant or decisive factor influencing his
7 conduct . . . It is enough that the representation has played a substantial part, and so had been a
8 substantial factor, in influencing his decision.”).

9 Rahman concedes in his deposition testimony that taste and price are the two most important
10 factors he relies on when purchasing food and beverage products. Docket No. 68-3 at 71. He also admits
11 that he continued to purchase Mott’s even when the “No Sugar Added” statement was not present on the
12 label. *Id.* at 159-60 (“**Q:** In 1991, you were making a buying decision for Mott’s without considering on
13 the front of the label any reference to or words “No Sugar Added”? **A:** Correct.”). Rahman further notes
14 that he typically looks to a beverage’s nutrition facts to inform himself of its sugar and calorie content,
15 *id.* at 136-37, and that he did not rely on the “No Sugar Added” label to tell how many calories or sugar
16 were in the beverage, or how healthy it was. *Id.* at 194 (“**Q:** You can’t rely on the “No sugar added” to
17 tell you how many calories are in the apple juice; right? **A:** Correct.”).

18 However, Rahman also gave testimony tending to show he did in fact rely on the “No Sugar
19 Added” statement. For example, he testified that it caused him to believe there were fewer calories than
20 comparable apple juice products. *Id.* at 184. He testified that it caused him to believe that Mott’s 100%
21 Apple Juice had less sugar than similar products. *Id.* at 189 (“**A:** Well, I’m assuming– I’m assuming it
22 does have less sugar because of the label.”). Rahman also noted that the “No Sugar Added” statement
23 caused him to believe the product was healthier than other juices. *Id.* at 206-07. Finally, Rahman states
24 that the label caused him to purchase more of the product than he would have in the absence of the “No
25 Sugar Added” statement. *Id.* at 225 (“**A:** I purchased more because when I saw the label that said ‘No
26 sugar added,’ I thought it would be a less sugar content than the other apple juice products.”).

27 There is thus conflicting evidence on the issue of whether Rahman relied on the “No Sugar
28 Added” statement when making his purchasing decisions. On a motion for summary judgment, “all

1 reasonable inferences that may be drawn from the facts placed before the court must be drawn in the light
2 most favorable to” the nonmoving party. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065 (9th Cir.
3 2003) (internal quotations omitted). The Court therefore finds that there is a triable issue of fact, and that
4 summary judgment is not warranted on the question of reliance.

5
6 **IV. The Reasonable Consumer Standard**

7 Mott’s contends that Rahman has failed to introduce evidence showing that a reasonable
8 consumer would be misled by the “No Sugar Added” statement on the label of Mott’s 100% Apple Juice.
9 Docket No. 68 at 16-17.

10 California’s UCL prohibits unfair competition by means of any unlawful, unfair or fraudulent
11 business practice. Cal. Bus. & Prof. Code §§ 17200-17210. “Each prong of the UCL is a separate and
12 distinct theory of liability.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). The UCL’s
13 fraud prong prohibits any “fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200.
14 California’s FAL prohibits any “unfair, deceptive, untrue, or misleading advertising.” *Id.* § 17500.
15 California’s Consumer Legal Remedies Act (“CLRA”) prohibits “unfair methods of competition and
16 unfair or deceptive acts or practices.” Cal. Civ. Code § 1770.

17 False advertising claims under the FAL, the CLRA, and the fraudulent and unfair prongs of the
18 UCL are governed by the reasonable consumer standard. *Williams v. Gerber Products Co.*, 552 F.3d 934,
19 938 (9th Cir. 2008); *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 504 (2003); *Kasky v. Nike,*
20 *Inc.*, 27 Cal. 4th 939, 951 (2002). The reasonable consumer standard also applies to claims for negligent
21 misrepresentation. *Girard v. Toyota Motor Sales, U.S.A., Inc.*, 316 F. App’x 561, 562 (9th Cir. 2008)
22 (“Girard’s negligent misrepresentation claim likewise hinges on the reasonable consumer standard since
23 justifiable reliance cannot be established if reasonable consumers would not rely on the purported
24 misrepresentation.”). Under the reasonable consumer standard, a plaintiff must show that members of
25 the public are likely to be deceived. *Williams*, 552 F.3d at 938 (“The California Supreme Court has
26 recognized that these laws prohibit not only advertising which is false, but also advertising which[,]
27 although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or
28 confuse the public.”) (internal quotation marks omitted). A likelihood of deception means that “it is

1 probable that a significant portion of the general consuming public or of targeted consumers, acting
2 reasonably in the circumstances, could be misled.” *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th
3 at 508.

4 Courts have taken divergent approaches in describing the burden a plaintiff must meet at the
5 summary judgment stage in order to show a likelihood that a reasonable consumer would be deceived.⁵
6 Some have said that the “plaintiff must demonstrate by extrinsic evidence, such as consumer survey
7 evidence, that the challenged statements tend to mislead consumers.” *Haskell v. Time, Inc.*, 965 F. Supp.
8 1398, 1407 (E.D. Cal. 1997); *see also William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 258 (9th Cir.
9 1995) (plaintiff failed to meet its burden of showing, under the Lanham Act, that “a significant portion”
10 of letter recipients were misled by defendant, where plaintiff’s evidence consisted of testimony of two
11 of 300 letter recipients, an employee who had received phone calls from confused recipients, and the
12 company president); *Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*,
13 960 F.2d 294, 297 (2d Cir. 1992) (“Where, as here, a plaintiff’s theory of recovery is premised upon a
14 claim of implied falsehood, a plaintiff must demonstrate, by extrinsic evidence, that the challenged
15 commercials tend to mislead or confuse consumers It is not for the judge to determine, based solely
16 upon his or her own intuitive reaction, whether the advertisement is deceptive.”).

17 Other courts have taken a less data-driven approach, requiring only that “reasonable minds could
18 differ” in order to find a triable issue of fact as to whether a reasonable consumer would be deceived.
19 *Miletak v. Allstate Ins. Co.*, C 06-03778 JW, 2010 WL 809579 (N.D. Cal. Mar. 5, 2010); *see also Park*
20 *v. Cytodyne Technologies, Inc.*, GIC 768364, 2003 WL 21283814 (Cal. Super. Ct. May 30, 2003) (“[T]o
21 establish that advertising is misleading under a reasonable consumer test should not require the use of
22 consumer surveys. Considering that the advertisement speaks for itself, the judge is in a position to
23 determine whether it is misleading, i.e. likely to deceive, under a ‘reasonable consumer’ standard.”);
24 *Brockey v. Moore*, 107 Cal. App. 4th 86, 99 (2003).

27 ⁵As one court noted, “case law is less than clear as to what a private plaintiff needs to prove to
28 successfully litigate a cause of action alleging misleading or deceptive practices” under the UCL and
CLRA. *Johns v. Bayer Corp.*, 09CV1935 AJB DHB, 2013 WL 1498965 (S.D. Cal. Apr. 10, 2013).

1 This Court need not resolve the debate in order to rule on this motion. While Rahman contends
2 that he was misled by the “No Sugar Added” statement, Docket 68-3 at 207-08, he also readily conceded
3 on numerous occasions throughout his testimony that he would have no way of knowing whether other
4 consumers were similarly deceived, or more generally, what information they relied on when purchasing
5 Mott’s 100% Apple Juice. *Id.* at 205 (“**Q:** And what other consumers thought when they saw ‘No sugar
6 added’ on there, if they even saw it, is up to them; right? **A:** Correct. **Q:** We’d have to ask them? **A:**
7 Correct.”); *Id.* at 38, 52-53, 61, 72, 78, 121, 154, 169, 177, 180, 222, 228-29. The Court agrees with
8 Rahman that, standing alone, evidence of his experience with the Mott’s 100% Apple Juice product is
9 not sufficient to draw a conclusion as to whether a reasonable consumer would have been similarly
10 misled. This is especially true here, because the allegedly deceptive nature of the statement is not self-
11 evident (presumably both parties would agree that “No Sugar Added” is literally true, in that it accurately
12 reflects the ingredients used to make Mott’s 100% Apple Juice). Therefore the Court finds that Rahman
13 must introduce some additional evidence in order to raise a triable issue of fact as to whether a reasonable
14 consumer would be misled by the labeling on Mott’s 100% Apple Juice. The testimony of a single
15 consumer in a putative class of potentially millions is not enough to meet this burden.

16 Both parties have produced evidence on this issue. Mott’s has provided the expert testimony of
17 Dr. Kent Van Liere, who conducted a consumer survey of a few hundred people to ascertain whether
18 consumers relied on the “No Sugar Added” label when choosing to purchase Mott’s 100% Apple Juice.
19 Docket No. 68-6, Van Liere Dep. Dr. Van Liere concluded that “the presence of the ‘no sugar added’
20 label does not cause consumers to mention a low level of sugar as a reason for purchasing Mott’s over
21 other brands.” *Id.* at 43. Dr. Van Liere used a test group that was presented with the Mott’s 100% Apple
22 Juice label, and a control group that was presented with the same label except that it did not contain the
23 “No Sugar Added” statement. He found no significant difference in responses between the number of
24 respondents in each group who said they chose to purchase Mott’s because it was lower in sugar than
25 other brands. *Id.* at 79.

26 Plaintiff has produced the expert report of Professor Michael Belch, PhD. Docket No. 77-1, Exh.
27 E. Prof. Belch concludes, based on his “analysis of the materials provided” and his “experience in
28 advertising and consumer behavior” that the “No Sugar Added” message has a “high likelihood” of

1 misleading consumers into thinking that Mott’s 100% Apple Juice is healthier, lower in sugar, and lower
2 in calories than other brands. *Id.* ¶ 9. Prof. Belch’s report also criticizes perceived shortcomings in Dr.
3 Van Liere’s survey, *Id.* ¶¶ 16-20, and provides the general contours of a proposed alternative
4 methodology for conducting a consumer survey on the issue. *Id.* ¶¶ 14-15.

5 However, Prof. Belch did not conduct a survey of his own, he only stated that he *could* perform
6 such a survey. *Id.* A general description of the methodology of a proposed study, standing alone, is not
7 evidence of whether a reasonable consumer is likely to be deceived by the “No Sugar Added” statement.
8 Similarly, criticizing the methodology of a survey that tends to show a reasonable consumer would not
9 be deceived, is no substitute for introducing evidence which arrives at the opposite conclusion. Indeed,
10 Prof. Belch concedes that “the appropriate methodology for reaching valid and reliable answers to these
11 questions is to conduct a survey,” *id.* at ¶ 15, yet he has apparently failed to follow his own advice. Apart
12 from plaintiff’s own testimony, the only evidence advanced by plaintiff tending to show that a reasonable
13 consumer would be deceived is an assertion by Prof. Belch, unsupported by any independent facts or
14 data. “[C]onclusory, speculative testimony . . . is insufficient to raise genuine issues of fact and defeat
15 summary judgment.” *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).
16 “Further, a motion for summary judgment may not be defeated by evidence that is ‘merely colorable’ or
17 ‘not significantly probative.’” *Ogden v. Bumble Bee Foods, LLC*, 5:12-CV-01828-LHK, 2014 WL 27527
18 at * 6 (N.D. Cal. Jan. 2, 2014), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The
19 moving party may prevail on summary judgement by showing that “the nonmoving party does not have
20 enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion
21 at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000).
22 Here, plaintiff has failed to submit sufficient evidence to raise a genuine issue of fact as to whether a
23 reasonable consumer would be deceived by the “No Sugar Added” statement. Therefore, the Court grants
24 defendant’s motion for summary judgement as to plaintiff’s claims under the CLRA, FAL, the unfair and
25 fraud prongs of the UCL, and negligent misrepresentation.

26
27 **CONCLUSION**

28 For the foregoing reasons, the Court GRANTS in part and DENIES in part defendant’s motion

1 for summary judgment. Docket No. 68. The Court GRANTS defendant's motion for summary judgment
2 as to Rahman's claims under the CLRA, FAL, the fraud and unfair prongs of the UCL, and for negligent
3 misrepresentation. The Court GRANTS defendant's motion for summary judgment on whether Rahman
4 has Article III standing for injunctive relief. The Court DENIES defendant's motion for summary
5 judgment as to Rahman's claims under the unlawful prong of the UCL and for breach of quasi-contract.
6 This order resolves Docket Nos. 68 and 78.

7
8 **IT IS SO ORDERED.**

9 Dated: October 14, 2014

10 

11

SUSAN ILLSTON
United States District Judge