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16 **UNITED STATES DISTRICT COURT**
 17 **CENTRAL DISTRICT OF CALIFORNIA**
 18 **SOUTHERN DIVISION**

19 AMANDA OBNEY, On Behalf of
 20 Herself, All Others Similarly Situated
 21 and the General Public,
 22
 23 Plaintiff,
 24
 25 vs.
 26 TACO BELL CORPORATION,
 27
 28 Defendant.

) Case No. SACV11-00101 DOC (FFMx)
)
) **NOTICE OF MOTION AND**
) **MOTION TO DISMISS THE**
) **COMPLAINT PURSUANT TO FED.**
) **R. CIV. P. 12(b)(6) AND 9(b);**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES**
)
)
) Hearing Date: April 25, 2011
) Time: 8:30 a.m.
) Courtroom: 9D
) Judge: Hon. David O. Carter

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, on April 25, 2011, at 8:30 a.m., or as
3 soon thereafter as counsel may be heard before the Honorable David O. Carter, in
4 Courtroom 9D of the above-entitled Court, located at 411 W. Fourth Street,
5 Santa Ana, California, Defendant Taco Bell Corp. (“Taco Bell”), through its
6 undersigned counsel, will and hereby does move, pursuant to Federal Rules of Civil
7 Procedure 12(b)(6), for an order dismissing the Complaint because it fails to state a
8 claim for which relief may be granted under Rule 8 and Rule 9(b).

9 The Complaint fails to state a claim for two reasons. First, the Complaint
10 alleges no facts that plausibly support its claim that Taco Bell’s advertising and
11 labeling of its seasoned beef tacos, burritos and other products are misleading because
12 a “substantial majority of the filling is comprised of substances other than beef”
13 Compl. ¶ 9. The Complaint pleads no *facts* at all that support this foundational
14 assertion, let alone with any specificity. Nor does it suffice for plaintiff to make such
15 a naked assertion based solely on “information and belief,” without any personal
16 knowledge – as plaintiff admittedly tries to do here (Compl., p. 1) – because Plaintiff
17 fails to set forth any “information” that plausibly provides a basis for her “belief.”

18 Second, while Plaintiff asserts that Taco Bell’s use of the term “seasoned
19 beef” in its product names and descriptions violates USDA regulations, the USDA has
20 expressly and repeatedly stated that its regulations do not apply to restaurant menus,
21 menu descriptions or menu items.

22 This Motion is based upon this Notice of Motion and Motion, the
23 attached Memorandum of Points and Authorities, and the papers and pleadings on file
24 in this action. This Motion is made following the conference of counsel pursuant to
25 L.R. 7-3 which took place on February 24, 2011 and February 25, 2011.

1 Dated: March 1, 2011

Respectfully submitted:

2
3 SIDLEY AUSTIN LLP
4 David F. Graham
5 Thomas P. Hanrahan
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8 By: /s/ Thomas P. Hanrahan
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant Taco Bell respectfully submits this Memorandum of Points
3 and Authorities in support of its Motion to Dismiss.

4
5 **INTRODUCTION**

6 There is nothing deceptive, false or misleading about Taco Bell’s
7 advertising. Nevertheless, Plaintiff purports to bring claims on behalf of herself and
8 others similarly situated, asserting that Taco Bell’s seasoned beef tacos, burritos and
9 other products are falsely and misleadingly advertised because (1) the seasoned beef
10 filling in those products allegedly contains far less than 50% beef, and (2) USDA
11 regulations prohibit calling the beef in these products “seasoned beef,” instead
12 requiring that Taco Bell refer to it as “taco meat filling.” Each of these claims is
13 fatally deficient, both as a matter of law and pleading.

14 First, at the core of Plaintiff’s Complaint is the conclusory assertion that
15 Taco Bell’s seasoned beef food items are not composed primarily of beef: “In reality,
16 a substantial majority of the filling is comprised of substances other than beef...”
17 Compl. ¶ 9.¹ It is important to recognize that this is *not* a factual allegation that
18 purports to be made on personal knowledge. Rather, as the very first paragraph of the
19 Complaint makes clear, the Complaint’s allegations are almost entirely made on
20 “information and belief.” (Compl., p. 1) “Information and belief” allegations are not
21 some excuse or permissive judicial warrant for conclusory and unsupported
22 speculation, however. In this case, where Plaintiff pleads her “belief” that Taco Bell
23 is misleading its customers, the Complaint must plead facts that are at least sufficient
24 to establish the plausibility of the claim.

25
26
27 ¹ The Complaint does not allege that Taco Bell has ever advertised that its tacos and
28 other items contain any specified percentage or amount of beef relative to other
ingredients (*e.g.*, cheese, lettuce, beans, etc.).

1 Here, however, the Complaint contains no factual “information” at all
2 that plausibly supports the conclusory “belief” that a “substantial majority” of Taco
3 Bell’s seasoned beef is not beef. *See* Compl. ¶¶ 1, 10, 15. Indeed, the only facts
4 pleaded to inform Plaintiff’s “belief” are that (1) containers shipped to Taco Bell
5 restaurants refer to its seasoned beef as “taco meat filling” (Compl., ¶ 19), and (2)
6 according to a USDA label policy guideline book for manufacturers, “taco meat
7 filling” should contain *at least* 40% beef (*id.*, ¶ 18). But it takes an unsupported leap
8 of logic to go from these two “facts” to a conclusion that Taco Bell’s seasoned beef
9 *actually* contains only *the 40% minimum* beef content, and a “substantial majority” of
10 other ingredients. The Complaint pleads no facts at all to even plausibly suggest that
11 Taco Bell’s seasoned beef contains only the minimum amount of beef referenced in
12 the policy book. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v.*
13 *Iqbal*, 129 S.Ct. 1937 (2009).

14 Moreover, because the Complaint alleges direct attempts to mislead
15 consumers, it “sounds in fraud” and must meet the heightened pleading standards of
16 Rule 9(b). The Complaint falls far short of those heightened pleading requirements.
17 It is well-established that mere “information and belief” allegations generally do not
18 meet the requirements of Rule 9(b).

19 Second, Plaintiff’s claim that Taco Bell has violated USDA regulations
20 by using “seasoned beef” in its product names and advertisements is flatly wrong.
21 *See, e.g.*, Compl. ¶ 17 (“Taco Bell’s use of the term ‘seasoned beef’ also violates and
22 is otherwise inconsistent with the United States Department of Agriculture’s
23 (‘USDA’) definition.”); *id.* ¶ 9 (claiming that Taco Bell’s beef filling “is required to
24 be labeled and advertised as ‘taco meat filling.’”) Taco Bell is not subject to those
25 USDA labeling requirements – its suppliers are. Indeed, the regulations themselves
26 expressly state that the labeling of restaurant items is outside the scope of the USDA’s
27 rules. There is no basis to claim that Taco Bell is liable for violating regulations when
28 those regulations do not apply to it.

1 In short, this enormously disparaging Complaint is insufficient on its
2 face. The Court should dismiss the Complaint in its entirety.

3
4 **BACKGROUND**

5 **I. Taco Bell Sells Mexican Style Food Items That Contain Seasoned Beef**

6 Taco Bell is the “largest Mexican fast-food chain in the United States,”
7 with over 5,600 restaurants. Compl. ¶¶ 6-7. Taco Bell sells “Mexican style food
8 products,” including among other things, tacos and burritos. *Id.* ¶ 8.

9 Many of Taco Bell’s tacos, burritos and other menu items are made with
10 “seasoned beef.” *Id.* Taco Bell does not make the seasoned beef itself; rather, Taco
11 Bell acquires cooked seasoned beef from its USDA-inspected suppliers. *See* Compl. ¶
12 19 (image of box from “supplier,” identifying the product as being “packaged
13 exclusively for use by Taco Bell and its franchises,” with USDA inspection stamp).

14
15 **II. Taco Bell’s Seasoned Beef Contains Beef, Water And A Seasoning Blend**

16 The Complaint does not allege that Taco Bell advertises that its seasoned
17 beef products contains any particular percentage of any particular ingredient.
18 However, as alleged in the Complaint, Taco Bell’s seasoned beef contains the
19 following ingredients (listed in the label reproduced in the Complaint):

- 20 • Beef;
21 • Water;
22 • Salt, Chili Pepper, Onion Powder, Tomato Powder, Sugar, Spices,
23 Maltodextrin (another form of sugar), Garlic Powder, Caramel
24 Color, Cocoa Powder, Soybean Oil Natural Flavors, Yeast,
25 Modified Corn Starch, Natural Smoke Flavor; Oats and Isolated
26 Oat Product;

- 1 • Soy Lecithin, “an emulsifier, e.g., in salad dressing, processed
- 2 cheese and chocolate;”²
- 3 • Autolyzed Yeast Extract, “valuable ... as a ... strong savoury
- 4 flavor;”³
- 5 • Citric Acid, “a flavouring and acidifying agent;”⁴
- 6 • Silicon Dioxide, “an anticaking agent;”⁵
- 7 • Sodium Phosphate, “an emulsifier used in various processed foods
- 8 for helping to incorporate water;”⁶ and
- 9 • Less than 2%: beef broth, potassium phosphate, potassium lactate.

10 Compl. ¶ 19. Significantly, USDA-inspected suppliers must list ingredients on labels
11 in descending order of predominance, 9 C.F.R. §317.2(f)(1).

12 13 **III. Plaintiff’s Complaint**

14 Plaintiff, Amanda Obney, alleges that she is a California resident who
15 purchased Taco Bell food products that contained seasoned beef. Compl. ¶ 5.
16 Plaintiff does not allege any details about her claimed purchase. She does not allege,
17 for example, the “advertising and labeling claims” to which she “was exposed,” which
18 restaurant she visited, what product she purchased, or even when she purchased it.

19 The Complaint’s allegations are based almost entirely on “information
20 and belief.” The very first paragraph of the Complaint states: “Plaintiff alleges, on
21 information and belief, except for the information based on personal knowledge, as
22 follows.” Compl., p. 1. The only allegations that, in turn, appear to be based on

23 ² David A. Bender and Arnold E. Bender, *Benders’ Dictionary of Nutrition and Food*
24 *Technology* 232 (7th ed. 1999).

25 ³ *Id.* at 437.

26 ⁴ *Id.* at 104.

27 ⁵ Robert S. Igoe, *Dictionary of Food Ingredients* (1983); *see also* Ruth Winter, *A*
28 *Consumer’s Dictionary of Food Additives* (1978) (“[c]leared for use as ... an
anticaking agent”).

⁶ David A. Bender, *A Dictionary of Food and Nutrition* 220 (3d ed. 2009).

1 “personal knowledge” are those contained in paragraph 5 of the Complaint, describing
2 the Plaintiff herself.

3 Plaintiff brings suit under Cal. Bus. & Prof. Code § 17200 and the
4 Consumer Legal Remedies Act (“CLRA”), on behalf of “all persons in the United
5 States who purchased any food product from Taco Bell that was advertised or labeled
6 as containing ‘beef,’ ‘seasoned ground beef’ or ‘seasoned beef.’” *Id.* ¶ 20. She claims
7 that Taco Bell misrepresents its food items as containing “seasoned beef” filling,
8 because (1) “a substantial majority of the filling is comprised of substances other than
9 beef,” and (2) Taco Bell “is required” by the USDA to label and advertise its seasoned
10 beef as “taco meat filling.” Compl. ¶ 9; *see also, e.g.*, Compl. ¶¶ 1, 11, 17.

11 12 **LEGAL STANDARD**

13 To survive a motion to dismiss, the plaintiff must come forward with
14 “more than labels and conclusions, and a formulaic recitation of the elements of a
15 cause of action will not do.” *Twombly*, 550 U.S. at 555. Likewise, “[t]hreadbare
16 recitals of the elements of a cause of action, supported by mere conclusory statements,
17 do not suffice.” *Iqbal*, 129 S. Ct. at 1949.

18 After eliminating such conclusions, the court should “identify well-
19 pleaded factual allegations, which [it should] assume to be true, and then determine
20 whether they plausibly give rise to an entitlement to relief.” *Telesaurus VPC, LLC v.*
21 *Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (internal marks omitted). “[O]nly a
22 complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal*,
23 129 S. Ct. at 1950. “Determining whether a complaint states a plausible claim for
24 relief will, as the Court of Appeals observed, be a context-specific task that requires
25 the reviewing court to draw on its judicial experience and common sense.” *Id.* If the
26 court cannot “infer more than the mere possibility of misconduct, the complaint has
27 alleged-but it has not ‘show[n]’ - ‘that the pleader is entitled to relief.’” *Id.* (quoting
28 Fed. R. Civ. P. 8(a)(2)).

1 This Complaint must also meet Rule 9(b)'s heightened pleading
2 requirement because the thrust of Plaintiff's claim is that Taco Bell deliberately
3 attempted to deceive its customers. Although fraud is not an essential element of all
4 CLRA and 17200 claims, Rule 9(b) applies to "facts that necessarily constitute fraud
5 (even if the word 'fraud' is not used)." *Vess v. Ciba-Geigy Corp. USA*, 317 F. 3d
6 1097, 1105 (9th Cir. 2003); *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009)
7 ("we have specifically ruled that Rule 9(b)'s heightened pleading standards apply to
8 claims for violations of the CLRA and UCL" that sound in fraud). "Allegations
9 pleaded on information and belief usually do not meet Rule 9(b)'s particularity
10 requirement." *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009).

11 ARGUMENT

12 **I. Plaintiff Has Not Pled Sufficient Facts To Meet Rule 8(a) or 9(b)**

13 The Court should dismiss the Complaint because it does not meet even
14 the plausibility standard of Rule 8(a) under *Twombly* and *Iqbal*, let alone the
15 heightened pleading standard under Rule 9(b).
16

17 **A. The Complaint Fails Rule 8(a)'s Plausibility Requirement**

18 Plaintiff asserts, entirely upon "information and belief" (Compl., p. 1),
19 that Taco Bell's advertising and descriptions of its seasoned beef products are false
20 and misleading because Taco Bell's seasoned beef contains far less than 50% beef and
21 "mostly consists of 'extenders' and other non-meat substances." *Id.* ¶¶ 1, 9. These
22 allegations of Plaintiff's "belief" are not well-pleaded facts; they are merely
23 conclusory allegations, which the Court need not and should not credit. *Iqbal*, 129
24 S.Ct. at 1949 (disregarding as conclusory allegations that defendant was "the
25 'principal architect'" of an "invidious policy" to expose the plaintiff to "to harsh
26 conditions of confinement" on "account of [his] religion, race, and/or national
27 origin"); *Twombly*, 550 U.S. at 555 (disregarding as conclusory allegations that
28

1 defendants “ha[d] entered into a contract, conspiracy, or combination ... and ha[d]
2 agreed not to compete with one another”).

3 Indeed, precisely because “belief” is inherently conclusory and not based
4 on personal knowledge, pleading *factual* bases that plausibly support the alleged belief
5 is essential. Otherwise, an incantation of “information and belief” would allow
6 complaints to proceed on nothing more than naked speculation. That is not enough.
7 Rather, the Court should look at the facts and other “information” pleaded in the
8 Complaint to determine whether they plausibly justify Plaintiff’s “belief.” *See Bassett*
9 *v. Ruggles*, No. CV-F-09-528 OWW/SMS, 2009 WL 2982895 (E.D. Cal. Sept. 14,
10 2009) (dismissing complaint where “[n]o allegations are made identifying the basis of
11 Plaintiffs’ information and belief”); *Sandisk Corp. v. LSI Corp.*, No. C 09-02737
12 WHA, 2009 WL 3047375 (N.D. Cal. Sept. 18, 2009) (disregarding statements made
13 on information and belief because those statements, “which are not amplified by any
14 facts, do not allow a judge to make any reasonable inferences”).

15 The allegations deemed conclusory in *Iqbal* illustrate the inadequacies of
16 Plaintiff’s complaint here. In *Iqbal*, the complaint alleged that defendants designated
17 the petitioner a “person of high interest” based on his “race, religion, or national
18 origin.” 129 S.Ct. at 1944. The defendants then allegedly “approved” a “policy” of
19 holding persons like petitioner “in highly restrictive conditions of confinement” where
20 they knew he would be subject to “harsh” treatment. *Id.* The Supreme Court
21 dismissed these allegations as lacking the “factual content” needed to “unlock the
22 doors of discovery.” *Id.* at 1949-50. These were “bare assertions” and “bald
23 allegations,” no better than a “formulaic recitation of the elements” of a claim. *Id.* at
24 1951. The Court therefore concluded they were not “entitled to be assumed true” and
25 affirmed dismissal. *Id.*

26 Here, Plaintiff offers this Court far less in the way of facts than the
27 petitioner in *Iqbal*. Plaintiff does not cite a single fact to justify her conclusory
28 “belief” that a “substantial majority of the filling is comprised of substances other than

1 beef.” *See* Compl. ¶ 9. Instead, Plaintiff cites a USDA policy book that provides
2 guidance that “taco meat filling” labeled in USDA-inspected facilities should be *at*
3 *least* 40% beef. Compl. ¶ 18. Plaintiff then points to a copy of a container label
4 shipped to Taco Bell by its suppliers, which describes the contents as “taco meat
5 filling.” *Id.* at ¶ 19. Based on these two bare “facts,” Plaintiff assumes the conclusion
6 that Taco Bell’s seasoned beef must contain less than 50% beef, and claims that its
7 advertising is therefore deceptive (even though there is no allegation that Taco Bell
8 says anything at all about the amount of beef in its “seasoned beef” filling).

9 But the conclusion that Taco Bell’s seasoned beef contains less than 50%
10 beef requires a leap of logic wholly unsupported by these premises. The label policy
11 book establishes only a *minimum* amount of beef for products that meat processors are
12 allowed to label as “taco meat filling;” it says nothing at all about whether the amount
13 of beef *actually* in products so labeled exceeds these minimums, or by how much.
14 This falls short of the pleading requirements of Rule 8. *See Twombly*, 550 U.S. at 555
15 (“Factual allegations must be enough to raise a right to relief above the speculative
16 level”). Significantly, Plaintiff does not allege any facts indicating that Taco Bell’s
17 suppliers ship the company product with only the minimum amount of beef.

18 Nor has Plaintiff pleaded any facts that plausibly support her conclusion
19 that Taco Bell’s seasoned beef “mostly consists of ‘extenders’ and other non-meat
20 substances.” *See* Compl. ¶ 1.⁷ To the contrary, the only factual allegation in the
21 Complaint that bears on this – the ingredient list shown on the box reproduced in
22 paragraph 19 of the Complaint – actually contradicts Plaintiff’s conclusory belief.

23 The USDA regulations governing Taco Bell’s suppliers mandate that
24 ingredients be listed on the label of the USDA-inspected products in descending order
25

26 ⁷ Meat extenders are “vegetable proteins (commonly textured soya protein) added to
27 meat products to replace part of the meat.” David A. Bender, *A Dictionary of Food*
28 *and Nutrition* 346 (3d ed. 2009); *id.* at 529 (defining “textured vegetable protein” as
“[s]pun or extruded vegetable protein, usually made to simulate meat”).

1 of predominance. *See* 9 C.F.R. §317.2(f)(1). And the very first ingredient listed is
2 “beef,” a fact entirely *consistent* with its comprising a majority of the product.⁸ *See*
3 Compl. ¶ 19. Nothing on the label suggests otherwise, nor are any contrary *facts*
4 elsewhere pleaded in the Complaint.

5 In short, the Complaint does not plead a single fact that plausibly
6 supports the alleged “belief” that Taco Bell’s seasoned beef is not comprised primarily
7 of beef, much less that Taco Bell misleads consumers in any regard.

8
9 **B. The Complaint Fails To Meet Rule 9(b)’s Particularity Requirement**

10 In addition to failing the plausibility requirement of Rule 8 under
11 *Twombly* and *Iqbal*, the Complaint also fails to meet the particularity requirement
12 under Rule 9(b). Although fraud is not an essential element of all Cal. Bus. & Prof.
13 Code § 17200 and the CLRA claims, the Ninth Circuit has held that Rule 9(b)’s
14 heightened pleading standard applies to claims made under those statutes where the
15 complaint alleges “facts that necessarily constitute fraud (even if the word ‘fraud’ is
16 not used).” *Vess*, 317 F.3d at 1105; *Kearns*, 567 F.3d at 1125 (applying Rule 9(b) to
17 complaint alleging only violations of § 17200 and CLRA because “the claim is . . .
18 grounded in fraud’ or to ‘sound in fraud,”) (internal quotation marks omitted); *see*
19 *also, e.g., Zepeda v. Paypal, Inc.*, No. 5:10-CV-02500 JF (PSG), 2011 WL 570231 at
20 *5-6 (N.D. Cal. Feb. 11, 2011) (applying Rule 9(b) and dismissing § 17200 claim that
21 plaintiff “relied on deceitful marketing materials and representations in deciding to
22 use and pay for PayPal’s services”).

23
24 ⁸ The Complaint refers to “isolated oat product” as an ingredient. But it is listed after
25 beef, water, and various other spices and flavorings (Compl. ¶ 19) – a fact that in no
26 way lends support to the theory that a majority of the seasoned beef filling is not beef.
27 Moreover, while paragraph 10 of the Complaint attempts to treat “binders and
28 extenders” interchangeably, a “binding agent” is “an additive that makes prepared
food keep its shape and texture.” *Dictionary of Food Science and Nutrition* 24 (2006);
see also David A. Bender, *A Dictionary of Food and Nutrition* 66 (3d ed. 2009)
(defining “bind” as “[t]o add liquid, fat or egg to a mixture to hold it together”).

1 While Plaintiff avoids using the word “fraud,” plaintiff’s consumer fraud
2 claims clearly accuse Taco Bell of deliberately misleading its customers – e.g., Taco
3 Bell “knew” that “the representations were unsubstantiated, false and misleading.”
4 Compl. ¶ 30.⁹ Plaintiff’s Complaint is thus subject to the requirements of Rule 9(b) –
5 and the protections it affords against such reputation damaging assertions – even
6 though she avoids use of the word “fraud.” *Vess*, 317 F. 3d at 1105; *Kearns*, 567 F.3d
7 at 1125.

8 The Complaint fails to meet the particularity requirement of Rule 9(b).
9 Indeed, the insufficiencies of its “information and belief” allegations are even more
10 apparent. *See* Compl., p. 1; *Drobnak*, 561 F.3d at 783 (“Allegations pleaded on
11 information and belief usually do not meet Rule 9(b)’s particularity requirement.”);
12 *Buena Vista, LLC v. New Resource Bank*, No. 10-0512 CW, 2010 WL 3448561 at *7
13 (N.D. Cal. Aug. 31, 2010) (same). Moreover, the Complaint does not allege any
14 details about Plaintiff’s claimed purchase. She does not allege, for example, the
15 “advertising and labeling claims” to which she “was exposed,” which restaurant she
16 visited, what product she purchased, or even when she purchased it. For this
17 independent reason as well, the Court should dismiss the Complaint. *See id.*

18
19 **II. Taco Bell’s Use Of The Term “Seasoned Beef” Does Not Violate USDA**
20 **Regulations Because Those Regulations Do Not Apply to Taco Bell.**

21 The Complaint is also based on a fundamental misapprehension of the
22 law. The Complaint claims that Taco Bell has violated USDA “requirements” by

23 _____
24 ⁹ *See also, e.g.*, Compl. ¶ 5 (plaintiff expected defendant would act “honestly”); ¶ 19
25 (accusing Taco Bell of “even labeling the containers shipped to its restaurants
26 correctly, while not telling its customers”); ¶ 30 (alleging, in the alternative, that Taco
27 Bell “knew” that “the representations were unsubstantiated, false and misleading”);
28 ¶ 37 (alleging that Taco Bell’s conduct is “immoral” and “unscrupulous”); ¶ 40
(alleging that the conduct violates § 17200’s “prohibition against ‘fraudulent’ or
deceptive business practices” because defendant “deceive[d] reasonable consumers,
including consumers”).

1 referring to its beef filling as “seasoned beef” rather than as “taco meat filling.” *See*,
2 *e.g.*, Compl. ¶ 35 (accusing Taco Bell of “misbranding food in violation of federal
3 law”); ¶ 17 (“Taco Bell’s use of the term ‘seasoned beef’ also violates and is
4 otherwise inconsistent with the United States Department of Agriculture’s (‘USDA’)
5 definition.”) In support of this assertion, the Complaint cites various USDA
6 regulations. *See* Compl. ¶¶ 1, 17, 35 (citing 7 C.F.R. § 1260.119; 9 C.F.R. § 319.15).
7 But none of these regulations applies to Taco Bell’s retail advertising or choice of
8 food names or descriptions used on its menus.

9 Retail stores, restaurants and similar retail-type establishments are
10 exempt from USDA inspection and labeling requirements. *See* 21 U.S.C. § 661(c)(2)
11 (meat); *id.* § 454(c)(2) (poultry); 9 C.F.R. § 303.1(d) (meat); *id.* § 381.10(d)
12 (poultry). 9 C.F.R. § 303.1(d)(1) expressly states that “[t]he requirements of the
13 [Federal Meat Inspection] Act and the regulations in this subchapter for inspection of
14 the preparation of products do not apply to operations of types traditionally and
15 usually conducted at retail stores and restaurants, when conducted at any retail store or
16 restaurant or similar retail-type establishment for sale in normal retail quantities or
17 service of such articles to consumers at such establishments.” 9 C.F.R. § 317.1(a)
18 makes clear that USDA-approved labels are required only for “official
19 establishments,” which are defined in 9 C.F.R. § 301.2 as facilities “at which
20 inspection is maintained under the regulations in this subchapter.”

21 Furthermore, the USDA has expressly excluded restaurant menus from
22 its labeling regulations. 9 C.F.R. § 317.400(b) (2010) (“Restaurant menus generally
23 do not constitute labeling or fall within the scope of these regulations.”); 9 C.F.R.
24 § 381.500(b) (2010) (same); 75 Fed. Reg. 82148, 82161 (December 29, 2010) (“As
25 FSIS explained in the proposed rule [66 Fed. Reg. 4969 (January 18, 2001)] restaurant
26 menus generally do not fall within the scope of the nutrition labeling regulations.”); 66
27 Fed. Reg. 4969, 4979 (same).

1 Finally, the two regulations cited by Plaintiff are inapplicable. *See*
2 *Western Min. Council v. Watt*, 643 F. 2d 618, 624 (9th Cir. 1981) (The court should
3 not “assume the truth of legal conclusions merely because they are cast in the form of
4 factual allegations”). Plaintiff relies on 7 C.F.R. § 1260.119 to define “beef” as “flesh
5 of cattle.” Compl. ¶ 17. This regulation, however, merely defines “beef” as it relates
6 to the powers and duties of the Cattlemen’s Beef Promotion and Research Board and
7 the Beef Promotion Operating Committee. *See* 7 C.F.R. § 1260 (2010). Plaintiff has
8 not alleged and cannot allege that Taco Bell is part of the Cattlemen’s Beef Promotion
9 board.

10 Plaintiff’s reliance on 9 C.F.R. § 319.15 for the definition of “ground
11 beef,” *see* Compl. ¶ 17, is similarly misplaced. This regulation applies only to the
12 products sold and packaged by USDA-inspected facilities, and expressly does not
13 apply to restaurants like Taco Bell that are exempted from USDA inspection and
14 labeling rules. *See* 9 C.F.R. § 317.1(a) (requiring approved labels be affixed to “any
15 inspected and passed product” in “an official establishment”); 9 C.F.R. § 319.1(a)
16 (requiring labels “in accordance with the general labeling provisions in part 317 of
17 this subchapter”).

18 Taco Bell cannot be held liable under California’s consumer protection
19 laws for violating USDA regulations when those regulations expressly *do not apply* to
20 it.

21
22 * * *

23 Plaintiff has not pleaded any facts to support her conclusory claim that
24 Taco Bell is falsely and misleadingly using the term “seasoned beef” to refer to a
25 product that contains less than 50% beef and is required to be labeled otherwise by the
26 USDA. The Court should not “unlock the doors of discovery for a plaintiff armed
27 with nothing more than conclusions.” *Iqbal*, 129 S. Ct. at 1950. The Court thus
28 should dismiss the Complaint.

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CONCLUSION

For all of the foregoing reasons, Taco Bell respectfully requests that this Court grant its Motion to Dismiss the Complaint in its entirety.

Dated: March 1, 2011

Respectfully submitted,

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By: /s/ Thomas P. Hanrahan
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1 **CERTIFICATE OF SERVICE**

2 I, Nitin Reddy, certify that true and correct copies of the foregoing
3 **NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT**
4 **PURSUANT TO FED. R. CIV. P. 12(b)(6) AND 9(b); MEMORANDUM OF**
5 **POINTS AND AUTHORITIES** were electronically filed and served on March 1,
6 2011. Those attorneys who are registered with the Electronic Case Filing (“ECF”)
7 System may access this filing through the Court’s system and notice of this filing will
8 be sent to the parties by operation of the Court’s ECF system. Counsel not registered
9 with ECF were sent this filing via U.S. mail.

10 */s/ Nitin Reddy*

11 Nitin Reddy

Service List

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