

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TWYLSA COGSWELL,

Case No. 1:23-cv-0311-DJC-JDP

Plaintiff,

13 || v.

## FINDINGS AND RECOMMENDATIONS

LESSEREVIL LLC,

Defendant.

17 Plaintiff brings this putative class action alleging that defendant LesserEvil LLC, a  
18 Connecticut-based company making snack products, violated California consumer protection  
19 labeling laws. ECF No. 13. The first amended complaint alleges that defendant's food labels  
20 used deceptive and misleading language, causing plaintiff and others to believe that the products  
21 were healthy when in fact they contained unhealthy levels of saturated fat. *Id.* Defendant moves  
22 to dismiss the amended complaint. ECF No. 16. I recommend that defendant's motion be  
23 granted in part and denied in part.<sup>1</sup>

## Background

2 Defendant is a food and snack company that makes popcorn and puff snacks. ECF No. 13  
3 at 6. Plaintiff alleges that, in the past three years, she has purchased three products made by  
4 defendant and sold in California: Himalayan Pink Salt Popcorn, Himalayan Gold Popcorn, and  
5 “No Cheese” Cheesiness Paleo Puffs. *Id.* Plaintiff alleges that she believed the products to be  
6 healthy because defendant’s labels and packaging had language including “healthier,” “Good  
7 Source of Fiber,” “40% Less Fat,” “33% More Fiber,” “20% Fewer Calories,” and “Nutrient  
8 Dense.” *Id.* at 7. Plaintiff alleges that this packaging is misleading and deceptive, and therefore  
9 misbranded, because the products contain high levels of saturated fat, which increases the risk of  
10 coronary heart disease.<sup>2</sup> *Id.* at 4 & 10.

11 The first amended complaint alleges claims on behalf of two punitive classes. ECF No.  
12 13 at 23. On behalf of a California class—consisting of consumers who purchased defendant’s  
13 products in California—plaintiff alleges claims under the California’s Unfair Competition Law  
14 (“UCL”), California’s False Advertising Law (“FAL”), and California’s Consumer Legal  
15 Remedies Act (“CLRA”). *Id.* at 25-36. On behalf of a nationwide class—comprised of  
16 consumers who purchased defendant’s products in the United States—plaintiff alleges a claim for  
17 unjust enrichment. *Id.* at 36-37.

## Legal Standard

19 A party may move to dismiss a case for a lack of subject matter jurisdiction, and such a  
20 challenge can be facial or factual. Fed. R. Civ. P. 12(b)(1); *Safe Air for Everyone v. Meyer*, 373  
21 F.3d 1035, 1039 (9th Cir. 2004). In advancing a facial challenge, as defendant does here, the  
22 moving party argues that the allegations in the complaint are “insufficient on their face” to  
23 establish federal jurisdiction. *Id.* “Whether subject matter jurisdiction exists therefore does not  
24 depend on resolution of a factual dispute, but rather on the allegations in [the] complaint.” *Wolfe*  
25 *v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). In evaluating such a claim, the court accepts the  
26 allegations as true, and the plaintiff need not present evidence outside the pleadings. *Id.*

<sup>27</sup> Plaintiff's first amended complaint includes pictures of the products labels, ECF No. 13  
28 at 8-9, which are reproduced in Exhibit A to these findings and recommendations.

1 A complaint can be dismissed for “failure to state a claim upon which relief may be  
2 granted.” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss for failure to state a claim, a  
3 plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*  
4 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has “facial plausibility when the plaintiff  
5 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
6 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*,  
7 550 U.S. at 556). The plausibility standard is not akin to a “probability requirement,” but it  
8 requires more than a sheer possibility that a defendant has acted unlawfully. *Iqbal*, 556 U.S. at  
9 678. For purposes of dismissal under Rule 12(b)(6), the court generally considers only  
10 allegations contained in the pleadings, exhibits attached to the complaint, and matters properly  
11 subject to judicial notice, and construes all well-pleaded material factual allegations in the light  
12 most favorable to the nonmoving party. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710  
13 F.3d 946, 956 (9th Cir. 2013); *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

## Analysis

15 Defendant argues that plaintiff's claims must be dismissed because: (1) they are  
16 preempted by federal law, (2) it is implausible that a reasonable consumer would be misled about  
17 the healthiness of defendant's snack products based on their labels, and (3) the pertinent language  
18 on defendant's products either constitutes nonactionable puffery or is commercial speech  
19 protected by the First Amendment—or both. *Id.* at 24 & 25. Lastly, defendant asserts that  
20 plaintiff's claim for injunctive relief should be dismissed for lack of standing. *Id.* at 19.

## I. Preemption

22 Defendant argues that plaintiff's state law claims are expressly preempted by federal law  
23 because defendant's labels comply with FDA regulations and allowing the claims to proceed  
24 would effectively impose additional labeling requirements beyond those required by FDA  
25 regulations. ECF No. 16 at 22-23.

## A. Statutory and Regulatory Framework

27 The Federal Food, Drug, and Cosmetic Act (“FDCA”) prohibits the misbranding of food.  
28 In 1990, the FDCA was amended through the passage of the Nutrition Labeling and Education

1 Act (“NLEA”), which seeks to “establish[] uniform food labeling requirements, including the  
2 familiar and ubiquitous Nutrition Facts Panel found on most food packages.” *Lilly v. ConAgra*  
3 *Foods, Inc.*, 743 F.3d 662, 664 (9th Cir. 2014). The NLEA provides an extensive list of  
4 conditions under which a food product is considered “misbranded,” which are set forth in 21  
5 U.S.C. § 343. Its broad provision provides that food is misbranded if its label is “false or  
6 misleading in any particular.” 21 U.S.C. § 343(a)(1). The statute also includes several more  
7 specific provisions, one of which is relevant here.

8 Section 343(r) governs statements about nutritional content and health-related information  
9 that a manufacturer voluntarily chooses to include on its food label. It regulates labeling claims  
10 that “expressly or by implication,” “characterizes the level of any nutrient . . . [or] characterizes  
11 the relationship of any nutrient disease or health related condition . . . .” 21 U.S.C. § 342(r)(1).  
12 Implementing this statute, “[t]he FDA has promulgated regulations regarding three specific kinds  
13 of labeling claims: express nutrient content claims; implied nutrient content claims; and health  
14 claims.” *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1117 (N.D. Cal. 2010) (citing 21  
15 C.F.R. §§ 101.13, 101.14). “An expressed nutrient content claim is any direct statement about the  
16 level (or range) of a nutrient in the food, e.g., ‘low sodium’ or ‘contains 100 calories.’” 21 C.F.R.  
17 § 101.13(b)(1). The regulations define implied nutrient content claims as those that “suggest that  
18 a nutrient or an ingredient is absent or present in a certain amount” or “[s]uggest that the food,  
19 because of its nutrient content, may be useful in maintaining healthy dietary practices and is made  
20 in association with an explicit claim or statement about a nutrient (e.g., ‘healthy, contains 3 grams  
21 (g) of fat’).” 21 C.F.R. § 101.13(b)(2). The final category, health claims, are statements that  
22 “characterize[] the relationship of any substance to a disease or health-related condition” or imply  
23 that a “relationship exists between the presence or level of a substance in the food and a disease  
24 or health-related condition.” 21 C.F.R. § 101.14(a)(1).

25 “[T]he general rule is that ‘nutrient content claims’ are not permitted on food labels.”  
26 *Reid v. Johnson & Johnson*, 780 F.3d 952, 959 (9th Cir. 2015); *see* 21 C.F.R. § 101.13(b)  
27 (nutrient content claims may “not be made on the label or in labeling of foods unless the claim is  
28 made in accordance with this regulation and with the applicable regulations in subpart D of this

1 part . . .”). However, the FDA has authorized certain nutrient content claims, including  
2 “statements about the amount or percentage of a nutrient that are consistent with the labeling  
3 regulations (e.g., ‘less than 3 g of fat per serving’), similar statements that include a disclaimer  
4 (e.g., ‘only 200 mg of sodium per serving, not a low sodium food’), or statements that do not  
5 characterize the level of nutrient and are not false or misleading (e.g., ‘100 calories’).” *Reid*, 780  
6 F.3d at 959-60.

7           B.     Federal Preemption Standard

8           Under the Supremacy Clause, “Congress may expressly preempt state law by enacting a  
9 clear statement to that effect.” *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prod.*  
10 *Liab. Litig.*, 959 F.3d 1201, 1211 (9th Cir. 2020). The NLEA states that “no State or political  
11 subdivision of a State may directly or indirectly establish under any authority or continue in effect  
12 as to any food in interstate commerce . . . any requirement respecting any claim of the type  
13 described in section 343(r)(1) of this title made in the label or labeling of food that is not identical  
14 to the requirement of section 343(r) . . . .” State consumer protection laws, such as the UCL,  
15 FAL, and CLRA, “are preempted if they seek to impose requirements that contravene the  
16 requirements set forth by federal law.” *Astiana v. Ben & Jerry’s Homemade, Inc.*, Nos. C 10-  
17 4387 PJC, C 10-4937 PJH, 2011 WL 2111796, \*8 (N.D. Cal. May 26, 2011) (citing *Wyeth v.*  
18 *Levine*, 555 U.S. 555, 575 (2009)); *see also Effinger v. Ancient Organics LLC*, 657 F. Supp. 3d  
19 1290, 1297 (N.D. Cal. 2003) (“[T]he Food, Drug, and Cosmetics Act (“FDCA”), 21 U.S.C. § 301  
20 *et seq.*, and its amendments implemented through the Nutrition Labeling and Education Act of  
21 1990 (“NLEA”), expressly preempt state laws and claims for relief that seek to impose ‘non-  
22 identical requirements in the field of food labeling.’”).

23           In enacting the NLEA, Congress specifically provided that the NLEA “shall not be  
24 construed to preempt any provision of State law, unless such provision is expressly preempted  
25 under [section 343–1] of the [FDCA].” Pub. L. No. 101-535, § 6(c)(1), 104 Stat. 2353, 2364.  
26 Accordingly, “preemption only occurs where application of state laws would impose more or  
27 inconsistent burdens on manufacturers than the burdens imposed by the FDCA. If a lawsuit  
28 asserts that a manufacturer has violated the FDCA (as amended by NLEA) and does not seek to

1 impose additional or contrary burdens to those imposed under the FDCA, the claims raised under  
2 state law are not preempted.” *Krommenhock v. Post-Foods, LLC*, 255 F. Supp. 3d 938, 951 (N.D.  
3 Cal. 2017); *see also Effinger*, 657 F. Supp. 3d at 1298 (“Where a state law claim attempts to  
4 impose the same requirements under federal law, however, [a preemption] problem does not  
5 arise.”). Conversely, if a state law claim “challenges a labeling statement that has been approved  
6 by the FDA under the FDCA, . . . such a claim may be preempted.” *Krommenhock*, 255 F. Supp.  
7 3d at 952.

8                   C.     Discussion

9 Plaintiff’s claims that defendant’s products are misbranded are premised on two theories.  
10 First, plaintiff alleges that defendant’s use of the term “healthier” violates FDA regulations  
11 because the term is an implied nutrient content claim that is made without satisfying the  
12 regulatory requirements governing the use of that claim. ECF No. 13 at 17-18. Second, plaintiff  
13 alleges that the product’s labels are false and misleading under 21 U.S.C. § 343(a)(1) because  
14 they include statements suggesting that the food is healthy when in fact it contains dangerous  
15 levels of saturated fat.

16                   1.     Implied Nutrient Content Claim

17 Plaintiff alleges that labels for each of defendant’s products contain the nutrient content  
18 claim that the food is “healthier,” as well as “additional health focused nutrient content claims.”  
19 ECF No. 13 ¶ 25. She contends that the FDA’s regulations prohibit defendant’s use of the term  
20 “healthier” because its products do not satisfy 21 C.F.R. § 101.65(d)’s nutritional requirements.  
21 ECF No. 13 at 17-18.

22 As discussed above, an implied nutrient content claim includes statements that “[s]uggest  
23 that the food, because of its nutrient content, may be useful in maintaining healthy dietary  
24 practices . . . .” 21 C.F.R. § 101.13(b)(2). The term “healthy” may be considered an implied  
25 nutrient content claim when “made in association with an explicit or implicit claim or statement  
26 about a nutrient.” 21 C.F.R. § 101.65(d)(1). If a food product’s label uses the term “healthy” or a  
27 derivative term as an implied nutrient content claim, the food must satisfy certain conditions for,  
28 among other things, saturated fat content. 21 C.F.R. § 101.65(d)(2). “[I]n determining whether

1 an implied nutrient claim has been made, the court must consider the context of where the  
2 challenged claim is made; while the ‘magic words’ that might create an implied nutrient claim do  
3 not need to be directly adjacent to the discussion of a nutrient to create an implied nutrient content  
4 claim, there must be connection given the words, their placement, and their context.”  
5 *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 571 (N.D. Cal. 2020) (some quotations  
6 omitted).

7 Plaintiff alleges that the labels for two categories of products—defendant’s popcorn  
8 products and paleo puffs—violate 21 C.F.R. § 101.65(d). As for the popcorn products, the labels  
9 undoubtably contain statements about the product’s nutrients.<sup>3</sup> The back, upper-left corner of the  
10 popcorn products packaging states, “good source of fiber” and “40% less fat” and “33% more  
11 fiber” than “typical oil-popped popcorn contains.” ECF No. 13 at 8-9. “Making healthier, less  
12 processed, earth-friendly snacking accessible to everyone” appears adjacent to those nutrient  
13 claims. This proximity, however, is the only link between the statements about fiber and fat  
14 content and the word “healthier.” Critically, the context in which the word “healthier” appears on  
15 the label undermines plaintiff’s contention that the term is used as an implied nutrient content  
16 claim—i.e., “made in connection with an explicit or implicit claim or statement about a  
17 nutrient.” 21 U.S.C. § 10165(d)(1)(ii). The sentence in which “healthier” appears is more  
18 accurately characterized as describing defendant’s business ethos rather than a specific nutrient in  
19 its product. Indeed, defendant’s statement that it is making “healthier” snacking more accessible  
20 is not connected to any particular nutrient. As such, defendant’s use of the term “healthier” is not  
21 an implied nutrient claim. *See Krystofia v. BellRing Brands, Inc.*, 737 F. Supp. 3d 782, 797  
22 (N.D. Cal. 2024) (finding that the defendant’s use of the word “healthy” was not an implied  
23 nutrient content claim where “the label state[d] ‘enjoy as a healthy snack but [was] not connected  
24 to any particular nutrient . . .’”); *Grausz v. Kroger Co.*, No. 19 Civ. 449 (JLS) (AGS), 2020 WL  
25 12688138, at \*5 (S.D. Cal. Mar. 3, 2020) (“The Product’s label, however, ‘does not state that [the  
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27 <sup>3</sup> Although plaintiff challenges the labeling for two different popcorn products—  
28 Himalayan Pink Salt Popcorn and Himalayan Gold Popcorn—the labels for these two products  
include the same allegedly misleading statements. Accordingly, I address them together.

1 Product] is healthy ‘because of its nutrient content’ or directly link the health claim to any  
2 nutrient claim.””).

3 The same is true for defendant’s “No Cheese” Cheesiness Paleo Puffs. The puff product’s  
4 label contains only two statements that are alleged to be implied nutrient content claims: “nutrient  
5 dense” and “healthier.” *See* ECF No. 13 at 9. Like the popcorn labels, the term “healthier”  
6 appears on the puff snack labels in the statement: “Making healthier, less processed, earth-  
7 friendly snacking accessible to everyone.” *Id.* Directly underneath, the label states “Organic,  
8 grain-free and nutrient-dense, these puffs are minimally processed and packed with organic  
9 cassava and sweet potato to satisfy any snack craving.” *Id.* at 3 & 9. Even if I were to agree with  
10 plaintiff’s contention that defendant’s use of the term “nutrient-dense” is an implied nutrient  
11 claim, and I do not, the label’s use of the term “healthier” is not connected to the term “nutrient-  
12 dense” or any other explicit or implicit claim about a specific nutrient.<sup>4</sup> *See* 21 C.F.R.  
13 § 101.65(d)(1)(ii); 21 C.F.R. § 101.13(b)(2).

14 Because plaintiff’s use of the term “healthier” is not an implied nutrient content claim,  
15 federal preemption does not come into play.<sup>5</sup>

16 **2. False or Misleading Labeling**

17 Plaintiff also alleges that defendant’s use of the term “healthier” in connection with other  
18 health-related claims renders its labeling “false or misleading” in violation of 21 U.S.C. § 343(a).  
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20 <sup>4</sup> Plaintiff cites *Paschoal v. Campbell Soup Co.* in support of her position that the term  
21 “nutrient-dense” itself constitutes a nutrient content claim. No. 21-CV-07029-HSG, 2022 WL  
22 4280645, at \*6 (N.D. Cal. Sept. 15, 2022); ECF No. 18 at 16. However, in *Paschoal* the products  
23 at issue used “nutrient-dense” language “*in conjunction* with the direct statements” about the  
24 amount of protein and fiber in the products. *Paschoal*, 2022 WL 4280645 at \*6. Here, the  
25 “nutrient-dense” statement exists in isolation without reference to any specific nutrient. *See* ECF  
26 No. 13 at 9. More importantly, the allegations specific to the puff snack do not demonstrate that  
27 the label’s use of the term “healthier” was made as a nutrient content claim—i.e., in connection  
28 with a statement about a specific nutrient. *See Vitiosus v. Alani Nutrition, LLC*, No. 21-cv-2048-  
MMA (MDD), 2022 WL 2441303, \*4 (S.D. Cal. July 5, 2022) (assuming “fit” was a synonym of  
healthy, claim for violation of § 101.65(d) failed because “[p]laintiffs do not plead that the word  
alone makes any ‘explicit or implicit claim or statement about a nutrient’”).

29 <sup>5</sup> As discussed in more detail below, since the amended complaint fails to establish that  
defendant violated 21 U.S.C. § 101.65(d), plaintiff’s claims under the UCL, FAL, and CLRA—to  
the extent that they are premised on a violation of that regulation—fail.

1 ECF No. 13 at 15. Unlike plaintiff's other theory of liability, her claims based on labeling that is  
2 false or misleading arise under 21 U.S.C. § 343(a), which does not fall under the NLEA's express  
3 preemption provision. *See, e.g., Tabler v. Panera LLC*, No. 19-CV-01646-LHK, 2019 WL  
4 5579529, at \*5 (N.D. Cal. Oct. 29, 2019) ("The NLEA's preemption provision does not apply to  
5 21 U.S.C. § 343(a)(1)."); *Parks v. Ainsworth Pet Nutrition, LLC*, 377 F. Supp. 3d 241, 245  
6 (S.D.N.Y. 2019) ("Notably, the [NLEA's] preemption provision does not mention § 343(a).");  
7 *Manuel v. Pepsi-Cola Co.*, No. 17 Civ. 7955 (PAE), 2018 WL 2269247, at \*4 (S.D.N.Y. May 17,  
8 2018) ("Significant here, the NLEA's preemption provision does not apply to § 343(a), the  
9 FDCA's prohibition on false or misleading labeling.").

10 The complaint also alleges that defendant's products, including the puff snacks, are  
11 misbranded under 21 U.S.C. § 343(a) and California Health & Safety Code § 110660, which both  
12 prohibit food labeling that is "false or misleading in any particular." ECF No. 13 at 15. Under 21  
13 C.F.R. § 1.21(a)(1), food labeling is misleading if it fails to disclose facts that are "[m]aterial in  
14 light of other representations made or suggested by statement, word, design, device or any  
15 combination thereof." Plaintiff alleges that all of defendant's products include language  
16 indicating that the products are "healthful, conducive to health, and won't detriment health . . . ."  
17 *Id.* at 15-16. Indeed, the statement that defendant is "[m]aking healthier, less processed, earth-  
18 friendly snacking accessible to everyone" appears on all the products identified in the complaint.  
19 *See id.* at 8-9. Plaintiff alleges that these representations are misleading because the product  
20 labels do not disclose "the presence of high levels of saturated fat" and "the increased risk of  
21 serious chronic disease likely to result from the usual consumption of its Products." *Id.* at 15-16.  
22 Plaintiff's claims based on this separate theory are not preempted. *See Effinger*, 657 F. Supp. 3d  
23 at 1299 (declining to dismiss claims concerning non-nutrient content statements that would  
24 plausibly "mislead consumers into believing the Product is healthy for them (or healthier than  
25 competing products)" where the products' "high levels of saturated fat render it unhealthy or  
26 dangerous").

1      **II. Sufficiency of Plaintiff's UCL, FAL, and CLRA Claims**

2      Defendant argues that the amended complaint's consumer protection claims should be  
3      dismissed because plaintiff's allegations that she was misled by the product labels are not  
4      plausible. Defendant contends that the language "healthier," "Good Source of Fiber," "40% Less  
5      Fat," "33% More Fiber," "20% Fewer Calories," or "Nutrient Dense," could not plausibly lead  
6      plaintiff to conclude that defendant's products contained less than three grams of saturated fat.  
7      *See* ECF No. 16 at 7 & 11. Plaintiff responds that defendant mischaracterizes her claims. She  
8      argues that her belief was that defendant's snack products were "healthy, healthful, better for her,  
9      and a healthier alternative to the competition," and that this belief was based on defendant's  
10     claims on its labels, including its explicit use of the word "healthier." ECF No. 18 at 9-10; ECF  
11     No. 13 at 7.

12     Plaintiff's causes of action under California's consumer protection statutes are governed  
13     by the "reasonable consumer" standard, under which plaintiff "must show that 'members of the  
14     public are likely to be deceived.'" *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir.  
15     2008) (quoting *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). This standard "requires  
16     a plaintiff to show potential deception of consumers acting reasonably in the circumstances—not  
17     just any consumers." *Hill v. Roll Int'l Corp.*, 128 Cal. Rptr. 3d 109, 115 (Ct. App. 2011); *see*  
18     *Ham v. Hain Celestial Group, Inc.*, 70 F. Supp. 3d 1188, 1193 (N.D. Cal. 2014).<sup>6</sup>

19     Whether a business practice is deceptive is an issue of fact generally not appropriate for  
20     resolution on a motion to dismiss. *See, e.g., Williams*, 552 F.3d at 938-39 (citing *Linear Tech.  
21     Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134-35 (2007)). The Ninth Circuit has  
22     emphasized that, under the reasonable consumer test, it is a "rare situation in which granting a  
23     motion to dismiss is appropriate," *Williams*, 552 F.3d at 939, because "it raises questions of fact."  
24     *Reid*, 780 F.3d at 958. Accordingly, a reviewing court need only decide whether it is plausible  
25     that "a significant portion of the general consuming public or of targeted consumers, acting

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27     <sup>6</sup> Courts often analyze claims under the three relevant consumer protection statutes  
28     together, as I do here. *See, e.g., Hadley v. Kellogg Sales Co.*, 273 F. Supp. 3d 1052, 1064 (N.D.  
Cal. 2017).

1 reasonably in the circumstances, could be misled.”” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th  
2 Cir. 2016) (citation omitted). To determine whether a defendant’s labeling would mislead a  
3 reasonable consumer, a court must consider the packaging “as a whole.” *Freeman*, 68 F.3d at  
4 290; *Weiss v. Trader Joe’s Co.*, 838 F. App’x 302, 303 (9th Cir. 2021) (“[P]roduct packaging  
5 should be examined in its full context because it would be unreasonable to cherry-pick discrete  
6 statements to prove deception.”). Applying the reasonable consumer standard, I find it plausible  
7 that a reasonable consumer could be misled that defendant’s popcorn and puff products are  
8 healthy despite actually containing dangerously high levels of saturated fats. ECF No. 13 at 7 &  
9 19-21.

10 Defendant’s argument that it is implausible for plaintiff to rely on the challenged  
11 statements—e.g, “healthier,” “nutrient-dense”—to form a belief that its products’ fat content is  
12 less than what is disclosed in the Nutrition Facts is unavailing. At the motion to dismiss stage,  
13 “the relevant inquiry is not what the consumer actually believes, but whether Plaintiff has  
14 plausibly pleaded facts indicating what a reasonable consumer could believe.” *Escobar v. Just  
Born Inc.*, CV 17-1826-BRO (PJWx), 2017 WL 5125740, at \*10 n.5 (C.D. Cal. June 12, 2017).  
15 Moreover, “healthy” and its variations are regulated, and courts have recognized that reasonable  
16 consumers rely on food products’ use of the word “healthy” and its related terms. *See, e.g.*,  
17 *Hadley v. Kellogg Sales Co.*, 273 F. Supp. 3d 1052, 1084 (N.D. Cal. 2017) (“The fact that the  
18 FDA regulates the use of the term ‘healthy’ implies that ‘consumers rely on health-related claims  
19 on food products in making purchasing decisions,’” and that “how the term healthy will be  
20 understood is a question of fact ‘ill-suited for resolution on a motion to dismiss.’”) (citation  
21 omitted); *Stewart v. Kodiak Cakes, LLC*, 568 F. Supp. 3d 1056, 1068 (S.D. Cal. 2021) (“[A]  
22 reasonable consumer could conclude the term ‘healthy’ refers to foods that[] are low-fat”).  
23 Moreover, the mere fact that the products’ labels disclosed the actual saturated fat content in the  
24 Nutrition Facts panel does not immunize defendant from consumer protection claims. *See*  
25 *Ackerman v. Coca-Cola Co.*, No. CV-09-0395 (JG)(RML), 2010 WL 2925955, at \*16 (E.D.N.Y  
26 July 21, 2010) (“The fact that the actual sugar content of vitamin water was accurately stated in  
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28

1 an FDA-mandated label on the product does not eliminate the possibility that reasonable  
2 consumers may be misled.”).

3 The motion’s remaining arguments as to why plaintiff’s state law claims cannot proceed  
4 are similarly unconvincing. Defendant asserts that the complaint fails to identify any factual  
5 misstatements, that the terms “healthier” and “nutrient dense” are nonactionable puffery, and that  
6 the challenged statements identified constitute commercial speech protected by the First  
7 Amendment. ECF No. 16 at 14 & 24. However, representations “may be deceptive and  
8 actionable under the UCL, FAL, and CLRA even though [they are] truthful.” *In re Ferrero*  
9 *Litigation*, 794 F. Supp. 2d at 1115; *see also Leoni v. State Bar*, 39 Cal. 3d 609, 626 (1985) (The  
10 UCL and FAL “have been interpreted broadly to embrace not only advertising which is false, but  
11 also advertising which although true, is either actually misleading or which has the capacity,  
12 likelihood or tendency to deceive or confuse the public”). While “nutrient dense” is not regulated  
13 in the same way as is the term “healthy,” courts have recognized that typically non-actionable  
14 language could “certainly contribute[] . . . to the deceptive context of the package as a whole.”  
15 *Jones v. Nutiva, Inc.*, No. 16-CV-00711-HSG, 2016 WL 5210935, at \*7 (N.D. Cal. Sept. 22,  
16 2016) (quoting *Williams*, 552 F.3d at 939 n.3). And the First Amendment does not protect  
17 misleading commercial speech. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 565-66.  
18 Furthermore, courts have concluded that general statements about a food being nutritious do not  
19 constitute puffery. *See, e.g., Johnson-Jack v. Health-Ade LLC*, 587 F. Supp. 3d 957, 969-70  
20 (N.D. Cal. 2022) (collecting cases and concluding that courts “have found that words like  
21 ‘healthy,’ ‘nutritious,’ or ‘wholesome’ do not constitute puffery because consumers may rely on  
22 those terms”).

23 Here, plaintiff alleges that defendant’s packaging, viewed as a whole, led her to believe  
24 that defendant’s products are “healthy, healthful, better for her, and a healthier alternative to the  
25 competition.” ECF No. 13 at 4. The amended complaint also identifies specific language and  
26 representations that form the basis of those beliefs, and alleges that she relied on those statements.  
27 *See* ECF No. 13 at 3-4. At this juncture, taking plaintiff’s allegations as true, I cannot conclude  
28 that a reasonable consumer would not be misled by defendant’s packaging. Accordingly,

1 defendant's motion is denied as to plaintiff's claims brought under the theory that the product's  
2 labels are false and misleading under 21 U.S.C. § 343(a)(1).

3 However, as discussed above, plaintiff's consumer production claims are also premised on  
4 the theory that defendant's products are misbranded because they use the term "healthier" without  
5 satisfying the requirements of 21 C.F.R. §101.65(d). As already explained, that regulation is  
6 inapplicable because the word "healthier" is not used as an implied nutrient content claim.  
7 Accordingly, plaintiff fails to state claims under UCL, FAL, and CLRA based on her theory that  
8 defendant's products were misbranded due to its failure to comply with 21 C.F.R. § 101.65(d).

9 *See Ryan v. Good Fat Co.*, No. 22-CV-03391-VC, 2023 WL 2714933, at \*1 (N.D. Cal. Mar. 30,  
10 2023) (dismissing claims without leave to amend regarding the phrase "Love Good Fats" where  
11 there was no accompanying nutrient content claim).

### 12 **III. Injunctive relief under CLRA**

13 Defendant claims that plaintiff lacks Article III standing to seek injunctive relief pursuant  
14 to the CLRA because plaintiff has not demonstrated either "a real and immediate threat of  
15 repeated injury" or that "the claimed threat of injury [is] likely to be redressed by the prospective  
16 injunctive relief." ECF No. 16 at 25 (citing *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985  
17 (9th Cir. 2007).

18 To have standing to seek prospective injunctive relief under Article III of the United  
19 States Constitution, a plaintiff must "demonstrate a real and immediate threat of repeated injury in  
20 the future." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (internal  
21 quotation marks omitted). The "threatened injury must be certainly impending to constitute  
22 injury in fact" and "allegations of possible future injury are not sufficient." *Clapper v. Amnesty  
23 Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis omitted) (citations omitted). In the context of  
24 labeling, the Ninth Circuit has held that "a previously deceived consumer may have standing to  
25 seek an injunction against false advertising or labeling, even though the consumer now knows or  
26 suspects that the advertising was false at the time of the original purchase, because the consumer  
27 may suffer an 'actual and imminent, not conjectural or hypothetical' threat of future harm."

1 *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (2018) (citation omitted). As an example  
2 of a threat of future harm, the Ninth Circuit provided that a consumer might “be unable to rely on  
3 the product’s advertising or labeling in the future, and so will not purchase the product although  
4 she would like to.” *Id.* at 969-70.

5 Here, plaintiff alleges that “[i]f she could be assured through prospective injunctive relief  
6 that the Products are properly labeled, she would consider purchasing the Products in the future.”  
7 ECF No. 13 at 7. As defendant points out, the Ninth Circuit has determined, in an unpublished  
8 decision, that such a speculative statement does not demonstrate a desire or intent to purchase  
9 defendant’s products in the future, and is therefore insufficient to confer standing. *In re Coca-  
10 Cola Products Marketing & Sales Practices Litigation (No. II)*, No. 20-15742, 2021 WL 3878654  
11 (9th Cir. Aug. 31, 2021) (holding that the plaintiffs’ “declarations that they would ‘consider’  
12 purchasing properly labeled Coke [] insufficient to show an actual or imminent threat of future  
13 harm”); *see also Lanovaz v. Twinings N. Am., Inc.*, 726 F. App’x 590, 591 (9th Cir. 2018)  
14 (finding that a plaintiff lacked standing where the plaintiff would only “consider buying” a  
15 product again). Here, plaintiff merely alleges that she would consider purchasing defendant’s  
16 products in the future if they were properly labeled. She has failed to establish standing to pursue  
17 injunctive relief.

#### IV. Unjust Enrichment

19 Defendant moves to dismiss plaintiff's claim for unjust enrichment on the grounds that  
20 plaintiff failed to sufficiently plead her other claims for relief. ECF No. 16 at 25. As explained  
21 above, plaintiff has sufficiently alleged that the products' labels contain false or misleading  
22 statements. *See infra* Parts I & II. Accordingly, defendant has failed to show that plaintiff's  
23 unjust enrichment claim should be dismissed.

## Conclusion

25 || Accordingly, it is hereby RECOMMENDED that:

26           1. Defendant's motion to dismiss the original complaint, ECF No. 11, be DENIED as  
27           moot.

1                   2. Defendant's motion to dismiss plaintiff's first amended complaint, ECF No. 16, be  
2 GRANTED in part and DENIED as follows:

3                   a. the motion be granted without leave to amend as to plaintiff's claims  
4 challenging defendant's labeling based on the theory that the product label include prohibited  
5 implicit nutrient content claims in violation of 21 U.S.C. § 343(r).

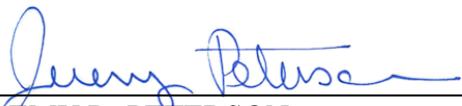
6                   b. plaintiff's CLRA claim, which seeks only injunctive relief, be dismissed with  
7 leave to amend for lack of standing.

8                   c. the balance of defendant's motion be denied.

9                   These findings and recommendations are submitted to the United States District Judge  
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
11 after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
14 objections shall be served and filed within fourteen days after service of the objections. The  
15 parties are advised that failure to file objections within the specified time may waive the right to  
16 appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez*  
17 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

18 IT IS SO ORDERED.

19  
20 Dated: March 7, 2025

21   
22 JEREMY D. PETERSON  
23  
24 UNITED STATES MAGISTRATE JUDGE

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EXHIBIT A





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