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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SARAH A. SALAZAR, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

HONEST TEA, INC.,

Defendant.

No. 2:13-cv-02318-KJM-EFB

ORDER

Plaintiff Sarah A. Salazar (“plaintiff” or “Ms. Salazar”) filed this putative class action against defendant Honest Tea, Inc. (“defendant” or “Honest Tea”), alleging that its Honey Green Tea label is misbranded in violation of several federal and California laws. Based on evidence obtained during the deposition of Ms. Salazar, Honest Tea filed the pending early summary judgment motion under Federal Rule of Civil Procedure 56. Def.’s Mot. Summ. J., ECF No. 67 (“Mot.”). Ms. Salazar opposes the motion. Pl.’s Opp’n Mot. Summ. J., ECF No. 79 (“Opp’n”). The court held a hearing on the matter on September 25, 2015, at which L. Timothy Fisher, Yeremey Krivoshey, and Annick Persinger appeared for plaintiff; Travis Tu, Pro Hac Vice, and Tammy Webb appeared for defendant. As explained below, the court DENIES defendant’s Motion for Summary Judgment.

1 I. BACKGROUND

2 A. Allegations of the Purported Class

3 The First Amended Complaint alleges that Honest Tea’s Honey Green Tea labels
4 violate U.S. Food and Drug Administration (“FDA”) labeling requirements as adopted by
5 California law. First Am. Compl. ¶¶ 24-29, ECF No. 32 (“FAC”). Through the Sherman Food
6 Drug and Cosmetic Law, California expressly adopted “[a]ll food labeling regulations [of the
7 federal act] and any amendments to those regulations” as its own. Cal. Health & Safety Code
8 § 110100(a); FAC ¶ 24. California also enacted a law specifically providing that “[a]ny food is
9 misbranded if its labeling does not conform with the requirements for nutrient content or health
10 claims as set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the regulations
11 adopted pursuant thereto.” Cal. Health & Safety Code § 110670; FAC ¶ 24.

12 The First Amended Complaint claims that statements on several of Honest Tea’s
13 labels are misleading and unauthorized because they characterize the level of antioxidants in the
14 tea without satisfying the FDA’s requirements for nutrient content claims. FAC ¶¶ 24-29.
15 Honest Tea’s alleged unauthorized nutrient content claims include:

16 We’ll just say two words: Epigallocatechin gallate. It may not have
17 the ring of “sweetheart” but *EGCG is our favorite flavonoid, one
18 of many tea antioxidants*, (2013);

19 We’ll just say two words: Epigallocatechin gallate. It may not have
20 the ring of “sweetheart” but to us *EGCG is a key green tea
21 antioxidant*, (2011); and

22 Epigallocatechin gallate. It may not have the ring of sweetheart but
23 *EGCG is the most potent antioxidant around, and our organic
24 green tea is packed with it*, (2008).

25 *Id.* ¶ 28 (emphases in original).

26 The FDA has established Reference Daily Intakes (“RDIs”) for certain vitamins
27 and minerals that are essential to human nutrition, such as Vitamin A, Vitamin C, and Calcium.

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1 See 21 C.F.R. § 101.9(c)(8)(iv). FDA regulations prohibit the use of nutrient content claims on
2 food labels unless:

3 (1) An RDI has been established for each of the nutrients; [and]

4 . . .

5 (4) The names of the nutrients that are the subject of the claim are
6 included as part of the claim (e.g., “high in antioxidant vitamins C
7 and E”). Alternatively, when used as part of a nutrient content
8 claim, the term “antioxidant” or “antioxidants” (as in “high in
9 antioxidants”) may be linked by a symbol (e.g., an asterisk) that
refers to the same symbol that appears elsewhere on the same panel
of a product label followed by the name or names of the nutrients
with recognized antioxidant activity. . . .

10 21 C.F.R. § 101.54(g); see FAC ¶ 25. Honest Tea’s antioxidant statements allegedly violate these
11 regulations “(1) because there are no RDIs for flavonoid antioxidants, and (2) the nutrient content
12 claims do not include the nutrients that are subject of the claims or use a symbol to link the term
13 ‘antioxidant’ to those nutrients.” FAC ¶ 28. The First Amended Complaint also alleges that the
14 “Honest Tea” name itself is false and misleading. *Id.* ¶¶ 7-14.

15 Ms. Salazar and the class were allegedly injured by defendant’s violations
16 because:

17 (a) they would not have purchased Honey Green Tea on the same
18 terms absent Defendant’s illegal conduct . . . or if the true facts
19 were known concerning Defendant’s honesty; (b) they paid a price
20 premium for Honey Green Tea due to Defendant’s
misrepresentations and unauthorized nutrient content claims; and
(c) Honey Green Tea did not have the characteristics, benefits, or
quantities as promised.

21 *Id.* ¶¶ 54, 65, 73.

22 Taken as a whole, the First Amended Complaint asserts the following claims:

23 (1) breach of express warranty; (2) violation of California’s Consumers Legal Remedies Act
24 (“CLRA”), Cal. Civ. Code §§ 1750, *et seq.*; (3) violation of California’s Unfair Competition Law
25 (“UCL”), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (4) violation of California’s False
26 Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (5) negligent
27 misrepresentation; and (6) fraud. FAC ¶¶ 37-88.

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1 B. Ms. Salazar’s Individual Allegations

2 The First Amended Complaint alleges that Ms. Salazar regularly purchased bottles
3 of Honest Tea’s Honey Green Tea from 2012 until August 2013. *Id.* ¶ 3. She allegedly relied on
4 the antioxidant statements on the label and “would not have purchased Honey Green Tea had she
5 known that the label did not contain only truthful information, or that the antioxidant nutrient
6 content claims on the labels were unauthorized and inaccurate.” *Id.*

7 The First Amended Complaint does not allege that Ms. Salazar read or relied on
8 the statements on the 2008 label. However, plaintiff proceeds on the theory that she has standing
9 to assert claims based on the 2008 label on behalf of the class because the product she purchased
10 in 2012 and 2013 is substantially similar to the product with the 2008 label. *See* Opp’n Mot.
11 Dismiss First Am. Compl. at 18-20, ECF No. 37; Opp’n Mot. Dismiss Compl. at 17-19, ECF No.
12 16; Order Den. Mot. Dismiss at 8-10, ECF No. 40.

13 C. Procedural Background

14 This court has issued two orders in response to Honest Tea’s motions to dismiss.
15 On June 9, 2014, the court dismissed with leave to amend plaintiff’s state law claims on
16 preemption grounds. ECF No. 29 at 17. On January 6, 2015, the court denied Honest Tea’s
17 Motion to Dismiss plaintiff’s First Amended Complaint. ECF No. 40.

18 On July 14, 2015, Honest Tea filed this early summary judgment motion based on
19 Ms. Salazar’s deposition testimony. Mot., ECF No. 67.¹ Because other discovery is still
20 proceeding and the class has not yet been certified, defendant’s Motion for Summary Judgment is
21 directed solely at Ms. Salazar’s individual claims. *See* 3/5/15 Transcript, Ex. 1 at 13, ECF No.
22 79-1. Specifically, the motion is targeted to the issue of whether Ms. Salazar relied on the alleged
23 nutrient content claims and the Honest Tea name.

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27 ¹ ECF No. 67 also includes Honest Tea’s Motion to Stay Discovery, which the court
28 denied in a separate order. *See* ECF No. 86.

1 Ms. Salazar filed an Opposition to defendant’s Motion for Summary Judgment on
2 August 13, 2015. Opp’n, ECF No. 79. Honest Tea filed a Reply on September 18, 2015. Def.’s
3 Reply, ECF No. 82 (“Reply”).

4 II. LEGAL STANDARD

5 A. Summary Judgment

6 The court recognizes that early summary judgment motions in cases such as this
7 do not fit neatly within the traditional summary judgment framework. The sole issue at this early
8 stage of the case is whether Ms. Salazar’s deposition testimony establishes that the pleadings lack
9 a factual basis or cannot prevail as a matter of law. Nevertheless, the Supreme Court’s landmark
10 decisions guide this court’s application of Rule 56(a) of the Federal Rules of Civil Procedure to
11 the summary judgment motion at hand.

12 A court will grant summary judgment if “there is no genuine dispute as to any
13 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
14 On a summary judgment motion, the moving party may meet its burden by showing that there is
15 an absence of evidence to support an element of the non-moving party’s case. *Celotex Corp. v.*
16 *Catrett*, 477 U.S. 317, 325 (1986). “One of the principal purposes of the summary judgment rule
17 is to isolate and dispose of factually unsupported claims or defenses” *Id.* at 323-24.

18 To avoid summary judgment, the nonmoving party must designate specific
19 materials in the record showing a genuine issue of material fact. *Matsushita Elec. Indus. Co. v.*
20 *Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). There is no genuine issue for trial “[w]here the
21 record taken as a whole could not lead a rational trier of fact to find for the non-moving party.”
22 *Id.* at 587 (citing *First Nat’l Bank of Ariz. v. Cities Service, Co.*, 391 U.S. 253, 289 (1968)). Here,
23 Honest Tea is entitled to summary judgment if a reasonable juror could not find that Ms. Salazar
24 relied on the alleged misrepresentations, given her deposition testimony. *See, e.g., Baghdasarian*
25 *v. Amazon.com, Inc.*, No. CV 05-8060 AG (CTX), 2009 WL 4823368, at *6 (C.D. Cal. Dec. 9,
26 2009) (granting summary judgment where “Plaintiff’s own deposition testimony undermine[d]
27 his own claims, showing that he did not actually rely on Defendant’s statements”), *aff’d*, 458 F.
28 App’x 622 (9th Cir. 2011); *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-02646-RMW, 2014 WL

1 46822, at *3 (N.D. Cal. Jan. 6, 2014) (“[T]he question here is whether Lanovaz unequivocally
2 admitted in her deposition that she did not rely on the labels or the website in her purchasing
3 decisions.”). In deciding a motion for summary judgment, the court draws all inferences and
4 views all evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at
5 587-88; *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008).

6 B. Statutory Standing Requirements

7 1. UCL and FAL

8 Ms. Salazar brings claims under the three principle statutes governing advertising
9 practices in California—the Unfair Competition Law (“UCL”), False Advertising Law (“FAL”),
10 and Consumers Legal Remedies Act (“CLRA”). The standing requirements under the UCL and
11 FAL are identical: a private citizen must have “suffered injury in fact and . . . lost money or
12 property as a result of” the unfair competition or false advertising. Cal. Bus. & Prof. Code
13 §§ 17204, 17535; *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 321 (2011) (“Proposition 64
14 made identical changes to the standing provision[s] of [the UCL and] the false advertising
15 law . . .”). “Unfair competition” under the UCL means and includes “any unlawful, unfair or
16 fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Cal.
17 Bus. & Prof. Code § 17200. “Because [the UCL] is written in the disjunctive, it establishes three
18 varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. An
19 act can be alleged to violate any or all of the three prongs of the UCL . . .” *Berryman v. Merit*
20 *Prop. Mgm’t, Inc.*, 152 Cal. App. 4th 1544, 1554 (Ct. App. 2007) (citations omitted); *see also*
21 *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1374 (Ct. App. 2012). Ms. Salazar asserts
22 claims under all three prongs of the UCL. FAC ¶¶ 61-63.

23 The parties dispute whether a plaintiff must establish actual reliance under the
24 unlawful prong of the UCL. *See* Mot. at 15; Opp’n at 17-18. In *In re Tobacco II Cases*, 46 Cal.
25 4th 298 (2009), the California Supreme Court held that a plaintiff must establish “actual reliance”
26 on the misrepresentation to have standing under the fraud prong of the UCL. *Id.* at 326
27 (interpreting the phrase “as a result of” as requiring a showing of actual reliance). California
28 courts have subsequently extended the holding of *Tobacco II* to standing under the FAL and the

1 other prongs of the UCL when the claim involves false advertising and misrepresentations to
2 consumers. *Kwikset*, 51 Cal. 4th at 326, 326 n.9; *see also Durrell v. Sharp Healthcare*,
3 183 Cal. App. 4th 1350, 1363 (Ct. App. 2010). Because the alleged misconduct in this action
4 involves false advertising and misrepresentation, the court concludes that Ms. Salazar must
5 establish actual reliance to satisfy standing to proceed on each of her UCL claims and her FAL
6 claim. *See Kwikset*, 51 Cal. 4th at 226.

7 2. CLRA

8 The CLRA creates a cause of action for “[a]ny consumer who suffers any damage
9 as a result of” an unlawful practice specified by the act. Cal. Civ. Code § 1780(a). As with the
10 UCL and FAL, the phrase “as a result of” imposes a reliance requirement when the claim
11 involves false advertising. *See Princess Cruise Lines, Ltd. v. Superior Court*, 179 Cal. App. 4th
12 36, 46 (Ct. App. 2009); *Durrell*, 183 Cal. App. 4th at 1366-67. Accordingly, Ms. Salazar must
13 also establish reliance to have standing under the CLRA.

14 C. Reliance (Causation)

15 Courts have interpreted the reliance requirement under all three statutes similarly.
16 *See Kwikset*, 51 Cal. 4th at 326 (the “as a result of” language in the CLRA “mirrors” the
17 causation language added by Proposition 64 to the unfair competition and false advertising laws);
18 *see also Durrell*, 183 Cal. App. 4th at 1359-67; *Carrea v. Dreyer’s Grand Ice Cream, Inc.*,
19 No. C 10-01044 JSW, 2011 WL 159380, at *2 (N.D. Cal. Jan. 10, 2011) (jointly analyzing
20 standing under the UCL, FAL, and CLRA), *aff’d*, 475 F. App’x 113 (9th Cir. 2012). Actual
21 reliance under the California consumer protection statutes is construed “in accordance with well-
22 settled principles regarding the element of reliance in ordinary fraud actions.” *In re Tobacco II*
23 *Cases*, 46 Cal. 4th at 306. Accordingly, a plaintiff must show that the defendant’s
24 misrepresentation was “an immediate cause” of the injury-producing conduct. *Id.* at 326.
25 Although the plaintiff need not show the misrepresentation was the sole or predominant factor
26 influencing her conduct, it must have been at least a “substantial factor” in influencing her
27 decision. *Id.* Stated differently, causation is established when a plaintiff “in all reasonable
28 probability” would not have engaged in the conduct but for the misrepresentation. *See id.*

1 (quoting *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1110-11 (1993) (Kennard, J., concurring and
2 dissenting)); *cf. Kwikset*, 51 Cal. 4th at 330.

3 Plaintiff's common law claims for fraud, negligent misrepresentation, and breach
4 of warranty similarly require her to show justifiable reliance. *Robinson Helicopter Co., Inc. v.*
5 *Dana Corp.*, 34 Cal. 4th 979, 990 (2004) (common law fraud); *Century Sur. Co. v. Crosby Ins.,*
6 *Inc.*, 124 Cal. App. 4th 116, 129 (Ct. App. 2004) (negligent misrepresentation); *Williams v.*
7 *Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (Ct. App. 1986) (breach of warranty).

8 III. DISCUSSION

9 Honest Tea argues that Ms. Salazar's deposition testimony establishes that she
10 cannot prove reliance for four reasons: (1) she admitted she did not purchase Honey Green Tea
11 with its 2008 label; (2) she admitted the statements on the label are true; (3) she admitted she was
12 not familiar with the FDA regulations when she purchased the tea; and (4) her testimony
13 generally contradicts the theory of reliance pled in the First Amended Complaint. Honest Tea
14 also argues that reasonable consumers are not "likely to be deceived" by the nutrient content
15 claims as a matter of law. The court addresses each argument in turn.

16 A. 2008 Label

17 Honest Tea first contends there is no factual basis for the allegations relating to
18 Honey Green Tea's 2008 label, because Ms. Salazar admitted in her deposition she had never
19 purchased Honey Green Tea with its 2008 label. Mot. at 5-6, 12. The First Amended Complaint,
20 however, does not allege that Ms. Salazar saw the 2008 label or purchased Honey Green Tea with
21 its 2008 label. *See* FAC ¶ 3 ("From 2012 until August 2013, Ms. Salazar regularly purchased
22 Honest Tea's Honey Green Tea."). Plaintiff proceeds on the theory that she has standing to assert
23 claims on behalf of the class because the product she purchased in 2012 and 2013 is substantially
24 similar to the product bearing the 2008 label. *See* Opp'n Mot. Dismiss First Am. Compl. at
25 18-20, ECF No. 37; Opp'n Mot. Dismiss Compl. at 17-19, ECF No. 16.

26 As this court explained in its prior orders, Ms. Salazar has alleged sufficient
27 similarity between the products to plead standing as to the 2008 label. *See* ECF No. 40 at 8-10;
28 ECF No. 29 at 12-13. Ms. Salazar's deposition testimony does not change this analysis. As the

1 court previously has observed, questions concerning any material differences between the labels
2 will be addressed at the class certification stage.

3 B. Truthfulness of Statements

4 Honest Tea asserts that Ms. Salazar’s deposition testimony contradicts the First
5 Amended Complaint’s allegation that she “would not have purchased Honey Green Tea had she
6 known that the label did not contain only *truthful information*,” because she admitted that the
7 antioxidant statements on the labels are in fact “true.” Mot. at 11 (quoting FAC ¶ 3) (emphasis in
8 original); *see id.* at 6-7, 12, 17-18. This court also rejected a similar argument in its prior order
9 denying defendant’s Motion to Dismiss the First Amended Complaint. ECF No. 40 at 3-5; Mot.
10 Dismiss First Am. Compl., ECF No. 35 at 2, 5, 6, 10 (arguing plaintiff failed to state a claim
11 because she did not dispute that defendant’s EGCG statements are true).

12 To support its Motion for Summary Judgment, Honest Tea submits deposition
13 testimony of Ms. Salazar admitting that Honey Green Tea contains EGCG, EGCG is an
14 antioxidant, and antioxidants have the potential to defend against free radicals. *See* Mot. at 12
15 (citing Salazar Tr. at 77:13-16, 87:2-7, 119:19-21, 86:18-23, ECF No. 67-3); Reply at 2-3.

16 Honest Tea claims that Ms. Salazar “could not identify any statements on the Honey Green Tea
17 labels that she believes are actually dishonest or untrue.” Mot. at 18.

18 Although the parties do not dispute that Honest Tea’s Honey Green Tea contains
19 EGCG, a type of antioxidant, the First Amended Complaint asserts that the antioxidant statements
20 are misleading and violate FDA labeling requirements for nutrient content claims. *See, e.g.*, FAC
21 ¶¶ 1, 3, 12, 28, 54, 60, 65, 73. A statement can mislead consumers even if it is not factually
22 untrue. *See Lanovaz v. Twinings N. Am., Inc.*, C-12-02646-RMW, 2014 WL 46822, at *7 (Jan. 6,
23 2014) (“[T]he UCL and FAL protect against true statements that are misleading.”). Ms. Salazar’s
24 testimony is consistent with this theory. For example, when asked why she believed the Honest
25 name is inaccurate, Ms. Salazar responded, “I was led to believe that Honest Tea’s Honey Green
26 Tea was the best way to get antioxidants and I thought because of the Honest name that would be
27 true.” Salazar Dep., Ex. 2 at 118:3-13; *see also id.* at 37:12-19 (“A: I am claiming that I spent
28 more money buying Honest Tea and I was deceptively led to believe that the Honey Green Tea

1 was the best source of antioxidants when, indeed, it is not.”). Accordingly, the court does not
2 find that this testimony establishes as a matter of law that Ms. Salazar was not misled by Honest
3 Tea’s representations.

4 C. Familiarity with FDA Regulations

5 Honest Tea next contends it is entitled to summary judgment because Ms. Salazar
6 admitted she was unfamiliar with the relevant FDA regulations at the time she purchased the tea.
7 *See* Mot. at 9-12 (citing Salazar Tr. at 39:7-39:13, 73:15-73:17, 74:1-74:7, ECF No. 67-3); Reply
8 at 8-9. Honest Tea insists that where a “claim is predicated on a purported violation of some
9 technical FDA requirement, a consumer can only have been ‘misled’ if she was aware of the FDA
10 requirement at the time of her purchases.” *See* Reply at 8. The court disagrees.

11 The California Supreme Court and Ninth Circuit have not addressed this issue, but
12 other district courts have articulated helpful guiding principles. Courts generally agree that a
13 plaintiff cannot circumvent the reliance requirement by arguing that statements are “per se”
14 misleading if the statements violate a technical FDA regulation. *See, e.g., Thomas v. Costco*
15 *Wholesale Corp.*, No. 5:12-CV-02908-EJD, 2014 WL 1323192, at *7 (N.D. Cal. Mar. 31, 2014)
16 (“Plaintiffs cannot circumvent the reliance requirement by simply pointing to a regulation or code
17 provision that was violated by the alleged label misrepresentation, summarily claiming that the
18 product is illegal to sell and therefore negating the need to plead reliance.”); *Trazo v. Nestle USA,*
19 *Inc.*, No. 5:12-CV-2272 PSG, 2013 WL 4083218, at *10 (N.D. Cal. Aug. 9, 2013) (“While
20 regulatory violations might suggest that these statements might be misleading to a reasonable
21 consumer, that alone is not enough to plead a claim under the FAL, CLRA, or the
22 misleading/false advertising prongs of the UCL.”); *see also Mason v. Coca-Cola Co.*, 774 F.
23 Supp. 2d 699, 705 n.4 (D.N.J. 2011). In *Victor v. R.C. Bigelow, Inc.*, No. 13-cv-02976-WHO,
24 2014 WL 1028881 (N.D. Cal. Mar. 14, 2014), for example, the court dismissed a claim involving
25 nutrient content claims directed to the antioxidant content of tea products, because the plaintiff
26 failed to explain “how precisely a reasonable consumer would be misled by the term ‘delivers
27 healthful antioxidants’ or what exactly is misleading about it aside from the fact that it may
28 technically violate FDA regulations.” *Id.* at *17. In short, the plaintiff “[did] not plead what

1 expectations a reasonable consumer might have from seeing or hearing that statement such that
2 they were fraudulently misled by what Bigelow actually offered.” *Id.*

3 Contrary to defendant’s assertion in its Reply brief, these cases do not hold that a
4 consumer must have been familiar with the FDA regulations to prove reliance. *See* Reply at 8.
5 Rather, courts simply have required plaintiffs to “connect the dots showing how the alleged
6 misbranding misled [the plaintiff] in a way that a reasonable consumer would be deceived.”
7 *Trazo*, 2013 WL 4083218, at *10. *Honest Tea* essentially adds an additional requirement of
8 familiarity with the regulations to the reliance standard. *Cf. In re Tobacco II Cases*, 46 Cal. 4th at
9 326 (“[R]eliance is proved by showing that the defendant’s misrepresentation or nondisclosure
10 was ‘an immediate cause’ of the plaintiff’s injury-producing conduct.”) (quoting *Mirkin*, 5 Cal.
11 4th at 1110-11) (alteration in original). Alleging that a plaintiff had certain expectations about a
12 product based on familiarity with the FDA regulations is one way to explain how statements
13 mislead consumers, but it is not the only way.

14 Here, plaintiff alleges that the language of the antioxidant statements misleads
15 consumers into believing the tea contains nutrients recommended for the daily diet. *See* Opp’n
16 Mot. Dismiss First Am. Compl. at 10-11. Ms. Salazar’s deposition testimony is consistent with
17 this theory, because she testified that the wording of the antioxidant statements created
18 expectations in her mind that were not met. *See* Salazar Dep., Ex. 2 at 28:14-16 (“When reading
19 the label, the wording that was used made me believe that it was the best way to get
20 antioxidants.”); *id.* at 28:20-24 (“Q: So what in the word ‘many’ made you think that it equated to
21 the best way to get antioxidants? A: I felt if there was [sic] many antioxidants in something that it
22 would be one of the best ways to get antioxidants in my diet.”); *id.* at 70:24-71:6 (“Q: Can you
23 tell me where on the label it talks about the product having many antioxidants? A: This one
24 doesn’t say ‘many,’ but what caught my eye is ‘EGCG is a key green tea antioxidant.’ Mainly
25 the word ‘key.’ Q: And what did that mean to you? A: That this antioxidant was a very
26 important antioxidant.”). The allegations in the First Amended Complaint and Ms. Salazar’s
27 testimony “connect the dots” and show how a reasonable consumer would be deceived by the
28 antioxidant statements, aside from the fact that the statements may technically violate FDA

1 requirements. The court finds Ms. Salazar’s admission that she was not familiar with the FDA
2 regulations does not entitle defendant to summary judgment at this stage.

3 D. Ms. Salazar’s Interpretation of the Antioxidant Statements

4 1. Whether Testimony Contradicts the First Amended Complaint

5 Honest Tea claims Ms. Salazar’s testimony contradicts the allegations in the First
6 Amended Complaint, because she testified she believed that Honey Green Tea was the “best
7 source” of antioxidants. *See* Mot. at 13 (citing Salazar Tr., Ex. A, at 37:12-23; 49:22-50:1, ECF
8 No. 67-3); Reply at 1-4. According to Honest Tea, “Salazar’s actual interpretation of the Honey
9 Green Tea labels had nothing to do with FDA regulations or RDIs as the FAC alleged”
10 Reply at 4.

11 Defendant construes plaintiff’s theory too narrowly. The First Amended
12 Complaint alleges that Ms. Salazar relied on the alleged nutrient content claims in deciding to
13 purchase Honey Green Tea, and was injured because the statements led her to believe that Honey
14 Green Tea had benefits it in fact did not have. *See* FAC ¶¶ 54, 65, 73. Specifically, plaintiff
15 alleges:

16 Honest Tea’s statements . . . deceive[] consumers by suggesting
17 that the health benefits of “EGCG” or “flavonoids” are equivalent
18 or superior to essential vitamins with antioxidant activity that the
19 FDA recommends in specific amounts for the daily diet
20 Honest Tea’s statement that Honey Green Tea contains “EGCG
[their] favorite flavonoid, one of many tea antioxidants”
misleadingly implies that drinking Honey Green Tea is one of the
best methods for incorporating antioxidants in the daily diet.

21 Opp’n Mot. Dismiss First Am. Compl. at 10-11 (footnote omitted), ECF No. 37. Again, Ms.
22 Salazar’s testimony that the unauthorized nutrient content claims made her believe Honey Green
23 Tea was the “best source” of antioxidants or “one of best ways to get antioxidants in [her] diet” is
24 not inconsistent with plaintiff’s allegations. *Compare id., with* Salazar Dep., Ex. 2 at 28:20-24
25 (“Q: So what in the word ‘many’ made you think it equated to the best way to get antioxidants?
26 A: I felt if there was [sic] many antioxidants in something that it would be one of the best ways to
27 get antioxidants in my diet.”); *see* Salazar Dep., Ex. 2 at 37:12-19 (“A: I am claiming that I spent
28 more money buying Honest Tea and I was deceptively led to believe that the Honey Green Tea

1 was the best source of antioxidants when, indeed, it is not.”); *id.* at 49:9-11 (“A: The complaint
2 was that I had spent more money on tea that I thought was a good source of antioxidants and it
3 wasn’t.”); *id.* at 70:24-71:6 (“Q: Can you tell me where on the label it talks about the product
4 having many antioxidants? A: This one doesn’t say ‘many,’ but what caught my eye is ‘EGCG is
5 a key green tea antioxidant.’ Mainly the word ‘key.’ Q: And what did that mean to you? A: That
6 this was a very important antioxidant.”).

7 Other testimony given by Ms. Salazar during her deposition further connects her
8 interpretation of the labels to what the FDA regulations require. Ms. Salazar testified the tea did
9 not have the benefits she expected because it does not contain the amount of antioxidants
10 recommended by the FDA for human consumption. Salazar Dep., Ex. 2, at 60:10-22 (“Q: Sitting
11 here today you don’t think that what’s on the label is true? A: . . . it’s based on what the FDA
12 says it’s not the best way to get antioxidants. While there may be antioxidants in tea, it’s not the
13 recommended human intake amount.”); *id.* at 39:4-6 (A: “It does contain antioxidants, but not the
14 amount that’s for human -- that’s not the recommended amount for human consumption,
15 according to the FDA”). She explained that a better way to get antioxidants would be through
16 vitamins, blueberries, and orange juice. Salazar Dep., Ex. 2, at 27:4-9 (“Q: . . . What would be a
17 better way to get antioxidants? A: Through vitamins, blueberries, orange juice.”); *see id.* at 72:3-
18 8. Ms. Salazar’s testimony is consistent with the theory that the label’s statements “‘deceive[]
19 consumers by suggesting’ that the antioxidants in Honey Green Tea are ‘equivalent or superior to
20 essential vitamins’ for which FDA has ‘established baseline intake amounts (RDIs).’” Opp’n
21 Mot. Dismiss First Am. Compl. at 10-11; *see id.* (“[E]ven though consuming a beverage like
22 orange juice provides vitamin C with recognized antioxidant activity, plus a whole range of
23 nutrients that tea lacks, Honest Tea’s statement . . . misleadingly implies that drinking Honey
24 Green Tea is one of the best methods for incorporating antioxidants in the daily diet.”).

25 Defendant cites several decisions granting early summary judgment to support its
26 position. *See* Mot. at 11, 16. But those cases are distinguishable, because the lead plaintiff’s
27 deposition testimony in each clearly established that the plaintiff did not in fact rely on the
28 alleged misrepresentations. In *Baghdasarian v. Amazon.com, Inc.*, No. CV 05-8060 AG (CTX),

1 2009 WL 4823368 (C.D. Cal. Dec. 9, 2009), *aff'd*, 458 F. App'x 622 (9th Cir. 2011), for
2 example, the court granted summary judgment because the plaintiff's deposition testimony
3 established that Amazon's shipping policy was not a substantial factor in his purchasing decision.
4 *Id.* at *6. The plaintiff had testified, "It's not that if they had told me of the fees . . . I would have
5 never bought something from Amazon. But the fact that they hid it . . . kind of turned me
6 off . . ." *Id.*; *see also Princess Cruise Lines, Ltd. v. Superior Court*, 179 Cal. App. 4th 36, 43-44
7 (Ct. App. 2009) (holding plaintiff did not rely on representations about cost of shore excursions,
8 because she testified she would go on shore excursions "whatever it cost"). In *Khasin v. Hershey*
9 *Co.*, No. 5:12-cv-01862-EJD (N.D. Cal. Mar. 31, 2015),² the plaintiff alleged that statements on
10 Hershey's kisses labels are misleading because they make nutrient content claims without
11 disclosing that the product contains disqualifying amounts of saturated fat. *Id.* at 9. The court
12 granted summary judgment because the plaintiff testified that Hershey's products are candy, not
13 health foods, and that he is not concerned about the fats or sodium in Hershey's products. *Id.* at
14 8; *see also Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-CV-03067-EJD, 2015 WL 859491,
15 at *4 (N.D. Cal. Feb. 26, 2015) (finding plaintiff not deceived by fact that labels state "No Sugar
16 Added" without disclosing that beverages are not low calorie, because plaintiff testified she never
17 believed products were low calorie).

18 Unlike in *Baghdasarian* and *Khasin*, Ms. Salazar did not undermine her claim by
19 testifying that the antioxidant statements were not a substantial factor in her decision to purchase
20 the tea, or that she was never actually misled by the misrepresentations. To the contrary,
21 Ms. Salazar testified that she read the Honey Green Tea label and relied on the alleged nutrient
22 content claims in deciding to purchase the product:

23 Q: And what made you buy Honest Tea that [first time]?

24
25 _____
26 ² Having considered plaintiff's unopposed Request for Judicial Notice pursuant to Federal
27 Rule of Evidence 201 and good cause here appearing, the court GRANTS plaintiff's Request for
28 Judicial Notice of the following document: *Khasin v. Hershey Company*, Case No. 5:12-cv-
01862-EJD (In Chambers) Order Re: Defendant's Motion for Summary Judgment (N.D. Cal.
Mar. 31, 2015), ECF No. 80.

1 A: I enjoy tea and I was very intrigued and wanted to buy it because
2 of the antioxidant claims.

3 Q: Which antioxidant claims?

4 A: That it was full, packed of antioxidants. Had many antioxidants.

5 . . .

6 Q: (BY MS. COHEN) I mean you weren't seeking out products that
7 contained antioxidants?

8 A: I had assumed I was getting -- I assumed, but when I realized
9 that possibly I wasn't and this tea could give that to me, that's why
10 I jumped on board.

11 Q: Okay. So you said you assumed you were getting antioxidants,
12 but then you realized that you possibly weren't. What made you
13 realize that you might not be getting antioxidants?

14 A: I mean I can't know everything. Even if I say I'm health
15 conscious, that doesn't make me an expert so when I read on the
16 label that I could get -- that I would get more antioxidants from this
17 product, I was interested.

18 Q: . . . More antioxidants than what? . . .

19 A: Well, it said that there was [sic] many antioxidants, it mentioned
20 what types of antioxidants were in there. That's why.

21 Salazar Dep., Ex. 2, at 52:6-59:16; *see id.* at 57:23-58:10, 85:15-19; *see also id.* at 83:23-25
22 (“Q: Why did you stop purchasing [Honey Green Tea]? A: I stopped purchasing it because I
23 didn't believe that antioxidant part anymore.”). Ms. Salazar also testified she was misled by the
24 antioxidant nutrient content claims. *See, e.g.,* Salazar Dep., Ex. 2 at 37:12-19 (“A: I am claiming
25 that I spent more money buying Honest Tea and I was deceptively led to believe that the Honey
26 Green Tea was the best source of antioxidants when, indeed, it is not.”); *id.* at 28:20-24 (“Q: So
27 what in the word ‘many’ made you think it equated to the best way to get antioxidants? A: I felt
28 if there was [sic] many antioxidants in something that it would be one of the best ways to get
antioxidants in my diet.”).

Ms. Salazar's testimony does not contradict the allegations in the First Amended
Complaint.

1 2. Whether Testimony Presents New, Unpled Allegations

2 Relatedly, Honest Tea contends that even if Ms. Salazar’s testimony is not
3 inconsistent with the First Amended Complaint, it supports only a new theory not pled in the First
4 Amended Complaint. Mot. at 13; Reply at 1-3. “While a summary judgment motion does go
5 beyond the pleadings in the sense that it tests the sufficiency of the evidence to support the
6 allegations of the complaint, those allegations still serve to frame—and limit—the issues.” *Fox v.*
7 *Good Samaritan L.P.*, 801 F. Supp. 2d 883, 896 (N.D. Cal. 2010) (emphasis omitted), *aff’d*,
8 467 F. App’x 731 (9th Cir. 2012). Accordingly, Honest Tea argues that “a plaintiff cannot defeat
9 summary judgment by asserting that she was misled in a manner that was never alleged.” Mot. at
10 13.

11 Here, again, the cases cited by Honest Tea are not applicable. In each of those
12 cases, the plaintiff attempted to show a genuine dispute of material fact by raising a new, unpled
13 theory or allegation at the summary judgment stage. In *Patmont Motor Werks, Inc. v. Gateway*
14 *Marine, Inc.*, No. C 96–2703 TEH, 1997 WL 811770 (N.D. Cal. Dec. 18, 1997), the plaintiff
15 initially pled that the defendant breached one clause of the contract, but later argued on summary
16 judgment that the defendant had breached a different clause of the contract. *Id.* at *5. In
17 *Mattsson v. Home Depot, Inc.*, No. 11CV0533 AJB BLM, 2012 WL 2342948, at *4 (S.D. Cal.
18 June 20, 2012), an action for disability discrimination, the plaintiff initially alleged that his only
19 disabilities were asthma and knee problems, but later claimed that his heart attack played a role in
20 the termination decision. *Id.* at *4; *see also Laabs v. City of Victorville*, 163 Cal. App. 4th 1242,
21 1257-58 (Ct. App. 2008), *as modified on denial of reh’g* (July 7, 2008) (plaintiff initially pled that
22 city had failed to correct “dangerous road conditions due to inadequate sight distance and lack of
23 warning signs,” but later argued “[t]he City created another dangerous condition by the
24 installation of light fixtures too close to the roadway”).

25 In contrast to the cited cases, Ms. Salazar’s Opposition to the Motion for Summary
26 Judgment does not raise new allegations or theories not pled in the First Amended Complaint.
27 Although the First Amended Complaint did not use the specific phrasing “best way to get
28 antioxidants,” the underlying allegations and bases for the claims remain the same: Ms. Salazar

1 read and relied on the alleged nutrient content claims in deciding to purchase Honey Green Tea,
2 and she was injured because the statements led her to believe Honey Green Tea had benefits it did
3 not have. See FAC ¶¶ 3, 24-29, 54, 65, 73. The court rejects the argument Ms. Salazar’s
4 testimony constitutes a new theory not pled in the First Amended Complaint.

5 E. “Reasonable Consumer” Test

6 Once a plaintiff establishes individual reliance for purposes of standing, the
7 plaintiff must then satisfy the “reasonable consumer” test as a substantive element of the
8 consumer protection claims. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008);
9 *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (“[T]he false or misleading advertising
10 and unfair business practices claim must be evaluated from the vantage of a reasonable
11 consumer.” (citation omitted)); *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 506-07
12 (Ct. App. 2003). Under the “reasonable consumer” standard, a plaintiff must show that
13 “members of the public are likely to be deceived” by the misrepresentations. *Freeman*, 68 F.3d at
14 289 (quoting *Bank of West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992)).

15 Honest Tea argues that reasonable consumers are not “likely to be deceived” by
16 the nutrient content claims in the manner asserted by Ms. Salazar as a matter of law. Mot. at 13-
17 15; Reply at 4-6. To support its argument, Honest Tea relies solely on the plain language of the
18 labels. Mot. at 14. As Ms. Salazar notes, the parties have not yet completed discovery on
19 materiality or how reasonable consumers interpret the label.³ Opp’n at 15. Rather than
20 challenging the sufficiency of plaintiff’s evidence to support her allegations, Honest Tea instead
21 appears to challenge – again – whether the allegations themselves plausibly state a claim.

22 “California courts . . . have recognized that whether a business practice is
23 deceptive will usually be a question of fact not appropriate for decision [as a matter of law].”
24 *Williams*, 552 F.3d at 938-39 (citing *Linear Technology Corp. v. Applied Materials, Inc.*, 152 Cal.

25
26 ³ Moreover, at the March 5, 2015 Pretrial Conference, Honest Tea noted it planned to
27 bring an early summary judgment motion “directed solely to [the] issue” of whether plaintiff
28 “admit[ted] at deposition that she did not rely on the so-called ‘nutrient content claim.’” 3/5/15
Transcript, Ex. 1 at 13, ECF No. 79-1.

1 App. 4th 115, 134-35 (2007) (“Whether a practice is deceptive, fraudulent, or unfair is
2 generally . . . a question of fact which requires ‘consideration and weighing of evidence from both
3 sides’ and which usually cannot be made on demurrer.” (citation omitted)); *Committee on*
4 *Children’s Television*, 35 Cal. 3d 197, 197 (1983) (finding demurrer inappropriate in case where
5 parents alleged deceptive advertising of sugar cereals)). On rare occasions, courts have dismissed
6 claims when allegations of deception were implausible on their face and went against “well-
7 known facts of life,” *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGR_x), 2012 WL 5504011,
8 at *3 (C.D. Cal. Oct. 25, 2012). For example, in *Red v. Kraft Foods, Inc.*, the court dismissed
9 claims based on the phrase “made with real vegetables,” because the court concluded that “it
10 strains the credulity” to imagine that a reasonable consumer would believe that a box of crackers
11 is “healthy” and “contains a significant amount of vegetables.” *Id.* at *3-*4. The court reached a
12 similar conclusion in *Videtto v. Kellogg USA*, No. 2:08-cv-01324-MCE-DAD, 2009 WL
13 1439086 (E.D. Cal. May 21, 2009), dismissing claims because it was unlikely members of the
14 public would believe that Froot Loops cereal contains real, nutritious fruit. *Id.* at *3; *see also Hill*
15 *v. Roll Int’l Corp.*, 195 Cal. App. 4th 1295, 1304-05 (Ct. App. 2011) (dismissing UCL and CLRA
16 claims because a sole “green drop” symbol on the labels of water bottles could not plausibly
17 suggest that “the product is endorsed for environmental superiority by a third party
18 organization”).

19 The facts of this case do not amount to the rare situation in which it is appropriate
20 to decide as a matter of law whether a reasonable consumer would likely be deceived. The
21 evidence obtained in discovery could show that the statements “many” antioxidants, “key”
22 antioxidant, and “packed” with antioxidants lead reasonable consumers to believe, as the
23 complaint alleges, that Honey Green Tea is one of the best ways to incorporate antioxidants into
24 the daily diet. *See* FAC ¶ 28 (“It may not have the ring of ‘sweetheart’ but EGCG is our favorite
25 flavonoid, one of many tea antioxidants.”); *id.* (“ . . . to us EGCG is a key green tea antioxidant”);
26 *id.* (“ . . . EGCG is the most potent antioxidant around, and our organic green tea is packed with
27 it”). The court finds a triable issue of fact exists as to whether a reasonable consumer would be
28 misled by the statements on defendant’s labels.

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IV. CONCLUSION

Because Ms. Salazar’s testimony is not inconsistent with the allegations of reliance in the First Amended Complaint and is not unreasonable as a matter of law, the court finds that a triable issue of fact exists as to whether Ms. Salazar relied on the alleged nutrient content claims. Honest Tea’s Motion for Summary Judgment (ECF No. 67) is DENIED.

IT IS SO ORDERED.

DATED: November 11, 2015.


UNITED STATES DISTRICT JUDGE