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 12 MCDONALD’S USA, LLC.

13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION
 17

18 MONET PARHAM, on behalf of herself and
 those similarly situated,

19 Plaintiff,

20 v.

21
 22 McDONALD’S CORPORATION, and
 McDONALD’S USA, LLC.,

23 Defendants.
 24

Case No.: 11-cv-00511-MMC

**NOTICE OF MOTION AND MOTION
 TO DISMISS PLAINTIFF’S AMENDED
 CLASS ACTION COMPLAINT FOR
 VIOLATIONS OF THE UNFAIR
 COMPETITION LAW, THE
 CONSUMERS LEGAL REMEDIES ACT
 AND DECLARATORY AND
 INJUNCTIVE RELIEF;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

DATE: June 24, 2011
 TIME: 9:00 a.m.
 CTRM: 7
 JUDGE: Maxine M. Chesney

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Center for Science in the Public Interest (CSPI), the public interest group sponsoring
4 this action, has decided that McDonald’s should not be allowed to sell Happy Meals containing
5 toys in the State of California. This lawsuit is CSPI’s attempt to distort state consumer protection
6 law beyond recognition in order to impose that decision on California parents. Specifically,
7 Plaintiff Monet Parham, who is represented by CSPI’s “Director of Litigation,” alleges that
8 Defendants McDonald’s Corporation and McDonald’s USA, LLC (collectively “McDonald’s”)
9 violated California’s consumer protection statutes by advertising McDonald’s Happy Meals with
10 toys to children and by selling those Happy Meals to parents – an unquestionably legal practice
11 that has occurred for decades in thousands of restaurants (of numerous brands) in California and
12 across the country.

13 Beyond referencing the California Unfair Competition Law and the Consumers Legal
14 Remedies Act in summary fashion,¹ Plaintiff’s Amended Complaint bears little resemblance to a
15 lawsuit, instead favoring a policy paper outlining CSPI’s political views and regulatory agenda.
16 For example, Plaintiff devotes paragraph after paragraph to the issue of childhood obesity and its
17 impact on children’s health and healthcare costs. *See, e.g.*, Am. Compl. ¶¶ 34-60. But Plaintiff
18 does not allege that her children suffered any physical harm from eating at McDonald’s. Plaintiff
19 similarly devotes paragraph after paragraph in her amended complaint to the allegedly deceptive
20 nature of any advertising directed toward children, but Plaintiff does not allege that her own
21 children saw any particular advertisement or made a single purchase from McDonald’s. Her only
22 allegation is that she purchased Happy Meals for her children on occasion, while at other times
23 telling her children no because Ms. Parham prefers not to purchase Happy Meals. Am. Compl. ¶¶
24 112-114. In other words, her allegations confirm that *Ms. Parham* decided whether to purchase
25 Happy Meals independent of any information provided in McDonald’s advertising.

26
27 _____
28 ¹ As discussed below, Plaintiff also refers to California’s False Advertising Law, but Plaintiff does not devote any of the three counts of the Amended Complaint to an alleged violation of that statute.

1 In fact, Plaintiff's allegations of violations of California's consumer protection statutes are
2 remarkable for the things she does not allege. For instance, Plaintiff in this false advertising case
3 *does not identify one single McDonald's advertisement* (or other statement) that was allegedly
4 false or misleading. Plaintiff also *does not* allege that (i) the food provided in the Happy Meal was
5 unsatisfactory at the time it was eaten by her children; (ii) that McDonald's made any
6 misrepresentations or omissions about the Happy Meal food; (iii) that she did not understand or
7 could not find the nutritional value of the food; or (iv) as noted above, that her children suffered
8 any injury or other ill effects from eating the food. And although the Amended Complaint
9 contains numerous paragraphs outlining alleged harms to children of advertising and Happy
10 Meals, Plaintiff does not assert any claims on behalf of her children; she is the *only* plaintiff and
11 asserts claims *only* on her own behalf and on behalf of a class of other parents. Am. Compl. ¶ 27.

12 What then is Plaintiff's claim arising from the advertising and sale of Happy Meals?
13 Plaintiff contends that the advertising of Happy Meals containing a toy to children is an inherently
14 "unfair" trade practice, because the advertising causes children to "pester" their parents to
15 purchase a Happy Meal, and "these requests sometimes lead parents to purchase poor-nutrition
16 Happy Meal items they would otherwise not buy." Am. Compl. ¶ 55. As Plaintiff succinctly
17 restates the theory in paragraph 112 of the Amended Complaint, "[b]ecause of McDonald's
18 marketing, Ms. Parham's daughters frequently pester Ms. Parham into purchasing Happy Meals,
19 thereby spending money on a product she would not have otherwise purchased." Am. Compl. ¶
20 112. Thus, the Amended Complaint alleges that McDonald's has "undermined Parham's parental
21 authority," (Am. Compl. ¶ 115), and, on those occasions when Ms. Parham has not purchased a
22 Happy Meal, has "caus[ed] needless and unwarranted dissension in their parent-child
23 relationship." Am. Compl. ¶ 114.

24 The scope of the conduct that would qualify as a violation of California's consumer
25 protection statutes under Plaintiff's novel theory is vast to say the least. In short, advertising to
26 children any product that a child asks for but the parent does not want to buy would constitute an
27 unfair trade practice. If a child sees an ad for a doll, but the parent thinks it is too expensive and
28 decides to say no, then the company is violating California law. If a child wants a video game

1 advertised on television, but the parent does not want the child to play video games, then the
2 company is violating California law. Indeed, Plaintiff, in her allegations related to the alleged
3 misleading nature of advertising to children, provides her own illustration of conduct that would
4 now violate California law under this theory when she refers to a study that “observed high rates
5 of child disappointment and anger in response to the majority of parent refusals for cereal requests
6 at the supermarket.” Am. Compl. ¶ 44. Advertising any product to children would now be a *per*
7 *se* violation of California consumer protection laws if the parent’s decision not to buy the product
8 “place[s] a strain on parent-child interaction.” Am. Compl. ¶ 44.²

9 Not surprisingly, Plaintiff’s theory is as legally deficient as it is novel, and established
10 principles of law require the dismissal of the Amended Complaint in its entirety on multiple
11 independent grounds. As a threshold matter, under California’s Unfair Competition Law
12 (“UCL”), Plaintiff does not have standing to pursue her claim. Although Plaintiff alleges the
13 “loss” of money she spent on Happy Meals, her allegations confirm that she knew what she was
14 purchasing – in fact, she went to McDonald’s specifically to purchase a Happy Meal – and she
15 received the benefit of her bargain. A plaintiff who receives exactly what she bargained for has no
16 standing to sue under the UCL.

17 Plaintiff’s UCL claim also fails because she does not allege the required causal connection
18 between McDonald’s alleged conduct and her loss of the purchase price of a Happy Meal.
19 Plaintiff admits that the decision to purchase a Happy Meal is well within her control, and she
20 frequently tells her daughters “no” when they ask for Happy Meals. She was not misled by any
21 advertising, nor did she rely on any information from McDonald’s. Plaintiff’s understanding of
22 the relevant facts, and her decision as a parent to purchase a Happy Meal, negate any causal link

23
24 ² To the extent Plaintiff suggests that only allegedly “unhealthy” products would fall under this
25 theory, that distinction fails. First, consumer protection laws do not provide any protections
26 against allegedly “unhealthy” products absent a claimed misrepresentation, *e.g.*, a claim that a
27 product is low fat when in fact it is not. No such claim is even suggested here. Second, there is no
28 requirement that businesses advertise only “healthy” products, including food. Ice cream, cookies,
candy, etc. are all perfectly legal products to advertise. Third, despite its rhetoric, this lawsuit
does not seek to recover for any alleged harm from purportedly “unhealthy” products. The alleged
harm stems entirely from purchasing a product to avoid the purported “family rancor” that might
result from saying no, and such “rancor” could exist with any product a child might want.

1 between McDonald's alleged unlawful conduct and Plaintiff's "loss" of the money she spent on
2 Happy Meals.

3 Also under the UCL, Plaintiff does not allege any conduct that, if proven true, would
4 actually violate that statute. Plaintiff repeatedly invokes the UCL's prohibition of "unfair"
5 conduct, but her allegations do not tether that claim to any statutory or regulatory policy or to any
6 conduct that would constitute immoral, unethical, or unscrupulous business practices under the
7 UCL. In the absence of those allegations, Plaintiff is left only with her subjective belief that
8 McDonald's has acted "unfairly," but a plaintiff's subjective belief is not sufficient to state a claim
9 under the UCL.

10 Plaintiff's Consumer Legal Remedies Act ("CLRA") claim fails for similar reasons.
11 Plaintiff lacks standing under the CLRA, because she does not allege that she suffered damage or
12 that she relied on misrepresentations made by McDonald's. On the contrary, Plaintiff alleges that
13 she purchased Happy Meals despite her belief that Happy Meals are nutritionally inappropriate for
14 her children. Thus, Plaintiff does not even suggest that McDonald's made a misrepresentation to
15 her about the food, and she certainly does not come close to pleading reliance. Further, Plaintiff
16 also does not allege any conduct by McDonald's that would actually constitute a violation of the
17 CLRA. Instead, she simply lists the two CLRA subsections she claims McDonald's violated, but
18 she does not include any underlying facts in connection with those allegations. Repeating the
19 words of the CLRA falls well short of stating a viable claim under Rule 12(b)(6).

20 Additionally, Plaintiff does not allege conduct that violates California's False Advertising
21 Law ("FAL"). Because the FAL carries the same standing requirements as the UCL, and because
22 Plaintiff fails to identify any McDonald's advertisement at all, much less one that is likely to
23 deceive a reasonable consumer, Plaintiff's passing references in the Amended Complaint to
24 violations of the FAL are insufficient to state a viable claim under Rule 12(b)(6).

25 Plaintiff and CSPI ask this Court to rid Plaintiff of the potentially unpleasant experience of
26 having to tell her children "no" when they ask for something that she does not want them to have.
27 However, this is not a legally protected right under the UCL, the CLRA or the FAL. In addition,
28 no matter how convinced CSPI is of the correctness of its views related to advertising and Happy

1 Meals, those views do not entitle Plaintiff to relief under California’s consumer protection laws.
2 Accordingly, pursuant to Fed. R. Civ. P. 12(b)(6), McDonald’s requests that the Court dismiss
3 Plaintiff’s Amended Complaint in its entirety for failure to state a claim upon which relief can be
4 granted.

5 II. STATEMENT OF FACTS

6 Plaintiff Monet Parham is the mother of two daughters, ages two and six. Am. Compl. ¶
7 27. Plaintiff’s basic claim is that McDonald’s advertises Happy Meals to children, who in turn
8 “pester” their parents to purchase Happy Meals, and “these requests sometimes lead parents to
9 purchase poor-nutrition Happy Meal items they would otherwise not buy.” Am. Compl. ¶¶ 52-55.

10 Plaintiff’s Amended Complaint alleges that marketing to children is inherently deceptive
11 (Am. Compl. ¶ 39-51), and Plaintiff contends that “advertising Happy Meals to children by using
12 the lure of a toy directly and proximately inculcates poor dietary habits in California children,
13 placing them at a lifelong risk of developing a myriad of health problems.” Am. Compl. ¶ 62.

14 Despite these allegations, Plaintiff does not assert any claims on behalf of her children or
15 allege that her children (or any other children) have suffered any injuries. Rather, “Parham brings
16 this action on her own behalf,” (Am. Compl. ¶ 27), and on behalf of a purported class of other
17 California parents of children under the age of 8. Am. Compl. ¶ 116.

18 Plaintiff’s Amended Complaint includes multiple allegations regarding the allegedly
19 unhealthy nature of the food in Happy Meals. While McDonald’s vigorously disputes those
20 allegations, the Court is required to accept them as true for purposes of this motion to dismiss.
21 Importantly, however, Plaintiff does not contend that McDonald’s misled her (either by
22 misrepresentation or omission) in any respect regarding the nutritional value of its food or any
23 other fact. On the contrary, Plaintiff claims that she did not want to purchase Happy Meals for her
24 children precisely because she believed them to be nutritionally poor. Am. Compl. ¶¶ 55, 104-
25 115.

26 Despite Plaintiff’s alleged desire not to purchase Happy Meals, she contends that
27 McDonald’s somehow forced her to make those purchases by advertising Happy Meals to her
28 children, although Plaintiff does not identify any particular advertisement that did so.

1 Nevertheless, Plaintiff alleges that McDonald's has "subvert[ed] [her] parental authority," (Am.
2 Compl. ¶ 110), and "unfairly interfered with Parham's relationship with her children." Am.
3 Compl. ¶ 111. Although Plaintiff "frequently denies her daughters' repeated requests for Happy
4 Meals, these denials have angered and disappointed her daughters, thus causing needless and
5 unwarranted dissension in their parent-child relationship." Am. Compl. ¶ 114. As a result,
6 "sometimes Parham, not wishing to cause family rancor, purchases such meals." Am. Compl. ¶
7 55.

8 Plaintiff does not allege that she identified anything wrong with the Happy Meals at the
9 time they were purchased and eaten or that McDonald's gave her anything less than what she was
10 promised. She also does not allege that McDonald's should have provided her with more or
11 different information about the Happy Meal, nor does she claim that she overpaid for the Happy
12 Meals. Plaintiff's only claimed injury is the money she spent on Happy Meals that she allegedly
13 was forced to purchase but did not actually want to buy. Am. Compl. ¶ 112.

14 Based on these allegations, Plaintiff asserts three counts in the Amended Complaint. In
15 Count I, Plaintiff alleges that McDonald's conduct constitutes an unfair practice in violation of the
16 California Unfair Competition Law pursuant to California Business and Professions Code § 17200
17 *et seq.* Am. Compl. ¶ 126-128. In Count II, Plaintiff alleges a violation of the Consumer Legal
18 Remedies Act pursuant to California Civil Code § 1750 *et. seq.* Specifically, Plaintiff alleges a
19 violation of two CLRA subsections: § 1770(a)(5), which prohibits "representing that goods or
20 services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities
21 which they do not have . . .," and §1770(a)(7), which prohibits "representing that goods or services
22 are of a particular standard, quality, or grade, or that goods are of a particular style or model, if
23 they are of another." Am. Compl. ¶¶ 129-140. In Count III, Plaintiff alleges that the violation of
24 the CLRA in turn constitutes an unlawful practice under the UCL, (Am. Compl. ¶¶ 141-143), thus
25 Plaintiff contends that McDonald's actions are both unfair (Count I) and unlawful (Count III)
26 under the UCL. Finally, Plaintiff refers in paragraphs 1 and 119 to California's False Advertising
27 Law, California Business and Professions Code § 17500 *et. seq.* Although Plaintiff does not plead
28 a specific count under this statute, McDonald's nevertheless addresses this theory below as well.

1 As discussed in detail below, each of Plaintiff’s claims is deficient in multiple respects,
2 and Plaintiff’s Amended Complaint should be dismissed in its entirety.

3 **III. ARGUMENT**

4 **A. Motion to Dismiss Standard.**

5 Plaintiff must meet the requirements of Fed. R. Civ. P. 12(b)(6) to survive a motion to
6 dismiss for failure to state a claim. A motion to dismiss should be granted if a plaintiff fails to
7 plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. v. Twombly*,
8 550 U.S. 544, 547 (2007). While facts alleged in a complaint are deemed to be true, the court
9 need not accept as true pleadings that are no more than legal conclusions or the “formulaic
10 recitation of the elements” of a cause of action. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)
11 (stating that “[t]hreadbare recitals of the elements of a cause of action, supported by mere
12 conclusory statements, do not suffice.”). “Determining whether a complaint states a plausible
13 claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its
14 judicial experience and common sense.” *Iqbal*, 129 S. Ct. at 1950.

15 **B. Plaintiff Fails to State a Claim for Relief Under the UCL.**

16 **1. Plaintiff does not have standing to pursue her UCL claim because**
17 **she has not alleged that she lost money or property as required by**
18 **the UCL.**

19 “A litigant’s standing to sue is a threshold issue to be resolved before the matter can be
20 reached on the merits.” *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305, 1345 (2009). To
21 allege standing and to survive McDonald’s motion to dismiss, Plaintiff must allege that she “lost
22 money or property”³ under the UCL. *See* Cal. Bus. & Prof. Code § 17204 (stating that an
23 individual may pursue a claim under the UCL only if she has “suffered an injury in fact and has
24 lost money as a result of the unfair competition.”). Here, Plaintiff’s alleged loss is the money she
25 spent on purchasing McDonald’s Happy Meals for her children: “Because of McDonald’s

26 ³ The UCL also requires a Plaintiff to allege an “injury in fact.” However, because the
27 Supreme Court of California has held “[i]f a party has alleged or proven a personal, individualized
28 loss of money or property in any nontrivial amount, he or she has also alleged or proven an injury
in fact,” the following discussion will focus on whether Plaintiff has alleged a loss of money or
property sufficient to satisfy the standing requirements of the UCL. *See Kwikset Corp. v. Super.*
Ct. of Orange Cnty., 246 P.3d 877 (Cal. 2011).

1 marketing, Parham’s daughters frequently pester Parham into purchasing Happy Meals, thereby
2 spending money on a product she would not have otherwise purchased.” Am. Compl. ¶ 112; *see*
3 *also* Am. Compl. ¶ 139-40. Because these allegations fail to establish an actionable “loss of
4 money,” Plaintiff lacks standing to pursue her UCL claims, and Counts I and III of the Amended
5 Complaint must be dismissed.

6 Under California law, a plaintiff has standing when he or she does not receive the benefit
7 of the bargain.⁴ *See Kwikset Corp. v. Super. Ct. of Orange Cnty.*, 246 P.3d 877 (Cal. 2011)
8 (holding that because seller allegedly misrepresented that the product was “Made in America,” the
9 plaintiff alleged a loss of money sufficient to confer standing in that he paid more than he
10 otherwise might have been willing to pay). The case law reveals three ways in which a plaintiff
11 can allege an actionable loss of money under a benefit of the bargain theory: (1) the product
12 purchased was worth less than the amount paid for it; (2) the product was unsatisfactory in that it
13 differed from what was promised; or (3) an affirmative misrepresentation caused the consumer to
14 value the product higher than he or she would have but for the misrepresentation. *See Kwikset*,
15 246 P.3d at 888-92; *see also Chavez v. Blue Sky Natural Beverage Co.*, 340 Fed. App’x. 359 (9th
16 Cir. 2009) (finding standing where beverage company falsely represented that product was bottled
17 and produced in New Mexico); *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927 RMW, 2010
18 WL 94265 (N.D. Cal. Jan. 6, 2010) (finding standing based on allegation that defendant falsely
19 represented its products as being more environmentally friendly than they actually were).

20 California courts have refused to hold, however, that simply being induced to purchase a
21 product one would not otherwise have purchased, without a misrepresentation or omission on the
22 part of the seller, qualifies as a loss of money or property sufficient to confer standing under the
23 UCL. *See Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 853-55 (2008) (finding that plaintiff did not
24 allege an injury in fact sufficient to confer standing because, although the plaintiff expended
25

26 ⁴ *Kwikset Corp. v. Super. Ct. of Orange Cnty.*, 246 P.3d 877 (Cal. 2011) holds that a “loss of
27 money” occurs under the UCL in several circumstances. *See also Hall v. Time, Inc.*, 158 Cal.
28 App. 4th 847, 854-55 (2008). Because the benefit of the bargain theory is the only one that
appears even potentially applicable to the instant case, McDonald’s focuses on whether Plaintiff
received the benefit of the bargain.

1 money, he received everything that was promised in the transaction); *see also Hinjos v. Kohl's*
2 *Corp.*, No. CV 10-07590 ODW AGRX, 2010 WL 4916647, at *2 (C.D. Cal. Dec. 1, 2010)
3 (granting motion to dismiss for lack of standing because plaintiff did not allege that the
4 merchandise he purchased was unsatisfactory or that the merchandise was worth less than he paid
5 for it); *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1592 (2008) (dismissing UCL claims
6 because plaintiffs did not allege that they were uninformed about the insurance price or that the
7 insurance provided was unsatisfactory and rejecting plaintiff's argument that a person has lost
8 money under the UCL when the "money is no longer in their possession.").

9 Here, Plaintiff's alleged "loss of money" – paying for Happy Meals she now claims she
10 did not want – is not sufficient to confer standing, because Plaintiff does not include a single
11 allegation that, if true, would establish that she failed to receive the benefit of her bargain.
12 Specifically, Plaintiff does not (and could not) allege that: (1) she overpaid for Happy Meals; (2)
13 the Happy Meals were worth less than what she paid for them; (3) the Happy Meals were
14 unsatisfactory because they differed from the product that was promised; or (4) McDonald's made
15 any misrepresentation or provided her with information that caused her to place a higher value on
16 the Happy Meals than she otherwise would have.

17 In short, Plaintiff has not alleged – and could not allege – that she "lost money," because
18 she received *everything* she was promised by McDonald's. McDonald's promised Plaintiff Happy
19 Meals, including food items and a toy, and McDonald's provided those products. In fact, the
20 entire theory underlying Plaintiff's Amended Complaint is that McDonald's advertised Happy
21 Meals, Plaintiff went to McDonald's for the express purpose of purchasing Happy Meals, the
22 Happy Meals were exactly as advertised, and Plaintiff's children enjoyed them. The fact that
23 Plaintiff is now asserting belatedly that she did not want to buy those meals does not demonstrate
24 that she did not receive the benefit of her bargain. On the contrary, Ms. Parham received exactly
25 what she was promised and, therefore, has not alleged facts sufficient to confer standing under the
26 UCL. *Hall*, 158 Cal. App. 4th at 853-55; *Hinjos*, 2010 WL 4916647, at *2; *Peterson*, 164 Cal.
27 App. 4th at 1592.

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2. Plaintiff does not have standing to pursue her UCL claim because she has not alleged that McDonald’s practices caused her alleged loss of money.

In addition to a loss of money, Plaintiff must allege that her loss was “as a result of” McDonald’s actions in order to establish standing under the UCL. *See* Cal. Bus. & Prof. Code § 17204; *see also Kwikset*, 246 P.3d at 887; *Hall*, 158 Cal.App.4th at 855. “The phrase ‘as a result of’ in its plain and ordinary sense means ‘caused by’ and requires a showing of a causal connection or reliance on the alleged misrepresentation.” *Kwikset*, 246 P.3d at 887.

Plaintiff has not adequately alleged causation, because she has not alleged that McDonald’s marketing caused her to purchase Happy Meals for her daughters. To the extent Plaintiff includes any allegations related to causation, Plaintiff appears to rely on her “pester power” theory, *i.e.*, McDonald’s advertises to her children, and her children’s request for a Happy Meal in turn causes her to buy one. Am. Compl. ¶ 110-12. This theory fails, because Plaintiff alleges that she as the parent made the decision to purchase Happy Meals, and that she made an informed purchase and understood what she was purchasing. *See* Am. Compl. ¶ 98, 105, 112. In other words, even assuming McDonald’s misled her children, an allegation which McDonald’s vigorously disputes, Ms. Parham’s knowledge negates any causal connection between that misrepresentation and Ms. Parham’s purchase of a Happy Meal.

Absent an allegation that McDonald’s misrepresented its products or failed to provide full and accurate information regarding its products to *Ms. Parham*, Ms. Parham cannot satisfy the causation requirement for standing under the UCL. Her own choice, motivated by her desire to not have to tell her children “no,” severs any potential causal connection between McDonald’s marketing and her alleged loss of money. *See Hall*, 158 Cal. App. 4th at 857 (finding that plaintiff did not allege causation as required by the UCL); *Laster v. T-Mobile U.S.A., Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005) (finding that plaintiffs failed to allege causation because they did not allege that they saw, read, or in any way relied on the allegedly misleading advertisements).

1 3. **Plaintiff fails to state a claim because she has not alleged that**
2 **McDonald’s marketing practices are “unfair” as defined by the**
3 **UCL.**

4 As recognized by the Ninth Circuit Court of Appeals, “California’s unfair competition law,
5 as it applies in consumer suits, is currently in flux.” *See Lozano v. AT&T Wireless Servs., Inc.*,
6 504 F.3d 718, 735 (9th Cir. 2007). Specifically, “California courts have not yet determined how
7 to define ‘unfair’ in the consumer action context,” and two tests have emerged, the “legislative
8 policy” test and the balancing test. *Id.* at 736. Thus, absent further guidance from the California
9 Supreme Court, the Ninth Circuit Court has held that district courts evaluating allegations of
10 “unfair” acts or practices under the UCL can look to both the “legislative policy” test and to the
11 “balancing test” applied by California courts. *Id.*; *see also Morris v. BMW of N. Am.*, No. C 07-
12 02827 WHA, 2007 U.S. Dist. LEXIS 85513, at *18-22 (N.D. Cal. Nov. 7, 2007); *Kowalsky v.*
13 *Hewlett-Packard Co.*, No. 10-CV-02176-LHK, 2010 U.S. Dist. LEXIS 131711, at *31-33 (N.D.
14 Cal. Dec. 13, 2010).

15 Key to these claims, both tests require that an allegedly “unfair” practice must consist of
16 more than a plaintiff’s subjective belief that he or she has been treated unfairly. Accordingly, no
17 matter which standard is applied to Ms. Parham’s allegations, Ms. Parham fails to adequately
18 allege that McDonald’s marketing practices are “unfair” under the UCL.

19 (i) ***Ms. Parham has not adequately alleged that McDonald’s***
20 ***marketing practices are “unfair,” because she has not tied***
21 ***McDonald’s practices to a legislatively declared policy.***

22 In *Cel-Tech Commc’ns., Inc. v. Los Angeles Cellular Tel. Co.*, the California Supreme
23 Court defined “unfair” under the UCL for purposes of claims involving competitors. 973 P.2d
24 527, 541 (Cal. 1999). Prior to *Cel-Tech*, all UCL unfairness claims were evaluated under a
25 balancing test discussed below in section III.B.3.ii. Wary of the level of subjectivity invited by
26 the balancing test, the California Supreme Court held that an alleged violation of the UCL’s
27 unfairness prong must be tied to a legislatively declared policy. *Id.* The court, however, noted
28 that its decision involved only actions by competitors, resulting in confusion among California
courts regarding the standard necessary to allege an unfair practice in UCL actions brought by
consumers. *See Lozano*, 504 F.3d at 735.

1 Recognizing that the same policy considerations present in *Cel-Tech* are present in
2 consumer actions, several California courts have found that, in consumer cases, an allegation that
3 a defendant has violated the unfairness prong of the UCL requires the plaintiff to tether the
4 challenged practice to conduct that violates a legislatively declared policy, “otherwise [] courts
5 will roam across the landscape of consumer transactions picking and choosing which
6 [transactions] they like and which they dislike.”⁵ *Morris*, 2007 U.S. Dist. LEXIS 85513, at *22;
7 *see also Similia v. Am. Sterling Bank*, No. 09-CV-781JLS(CAB), 2010 U.S. Dist LEXIS 108440,
8 at *16 (S.D. Cal. Oct. 12, 2010) (finding that the “tether” test is more in line with the California
9 Supreme Court’s reasoning in *Cel-Tech*, and that the balancing test is “too amorphous and
10 provide[s] too little guidance to the courts.”).

11 In the wake of *Cel-Tech*, several district courts have been unwilling to sustain allegations
12 of unfairness when a plaintiff fails to identify a declared legislative policy and fails to allege how
13 defendant’s conduct violates that policy. *See Morgan v. Harmonix Mus. Sys.*, 2009 U.S. Dist.
14 LEXIS 57528, at *16 (N.D. Cal. July 7, 2009) (dismissing plaintiffs’ unfairness claim despite
15 allegations of a CLRA violation because plaintiffs did not alleged facts sufficient to show that
16 defendants’ conduct violated a declared legislative policy); *Sarbaz v. Wachovia*, No. C 10-03462
17 CB, 2011 U.S. Dist. LEXIS 21552, at *11-12 (N.D. Cal. Mar. 3, 2011) (dismissing plaintiff’s
18 UCL claims, in part, because plaintiff did not set forth a legislatively declared policy that
19 defendant violated); *Similia*, 2010 U.S. Dist LEXIS 108440, at *16 (dismissing plaintiff’s “unfair”
20 UCL claims because plaintiffs did not sufficiently tether their allegations to any underlying law).

21 Applying this standard, Plaintiff has failed to plead a violation of the “unfairness” prong of
22 the UCL, because, to the extent that Plaintiff even identifies the practice being challenged
23 (presumably the practice of advertising Happy Meals with toys), she does not allege that
24 McDonald’s marketing practices violate a declared legislatively policy. Rather, Plaintiff simply
25 alleges a subjective belief that McDonald’s has treated her unfairly by marketing and advertising a
26 meal that contains a toy. While Plaintiff includes multiple allegations related to the alleged harms

27 ⁵ The California Supreme Court in *Cel-Tech* held that “unfair” practices, for the purposes of
28 establishing a violation of the UCL, must be limited so that “[c]ourts may not simply impose their
own notions of the day as to what is fair or unfair.” *Cel-Tech*, 973 P.2d at 541.

1 of advertising to children and childhood obesity, Plaintiff does not rely on any authority
2 suggesting that advertising children's products violates a declared legislative policy of the State of
3 California. Because Plaintiff's Amended Complaint does not tether her "unfairness" claims to a
4 declared legislative policy, her subjective belief that she has been treated unfairly is insufficient to
5 sustain a claim for unfairness under the UCL.

6 **(ii) Alternately, Plaintiff has not alleged that McDonald's**
7 **practices are "unfair" because Plaintiff has not alleged that**
8 **McDonald's practices are immoral, unethical or**
9 **unscrupulous and that any alleged injury outweighs the**
10 **benefits of the practice.**

11 In determining whether a plaintiff has stated a claim that a particular business practice is
12 "unfair" under the UCL, other California courts apply a balancing test. Under this test, "the
13 determination of whether a particular business practice is unfair necessarily involves an
14 examination of its impact on its alleged victim, balanced against the reasons, justifications, and
15 motives of the alleged wrongdoer." *Morgan*, 2009 U.S. Dist. LEXIS 57528, at *14. Generally,
16 district courts utilizing the balancing test have held that allegations of "unfair" practices constitute
17 immoral, unethical and unscrupulous conduct and involve allegations that a party engaged in
18 deceptive or misleading acts. *See Roling v. E*Trade Sec., LLC*, No. C 10-0488 MHP, 2010 U.S.
19 Dist. LEXIS 123714, at *30-31 (N.D. Cal. Nov. 22, 2010) (finding that plaintiffs stated a claim
20 under the "unfair" prong of the UCL when they alleged that defendant charged a fee without
21 contractual authorization); *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2010 U.S. Dist.
22 LEXIS 106600, at *36-38 (N.D. Cal. Oct. 5, 2010) (finding that plaintiffs' allegations that they
23 were "tricked" into purchasing a product based on a corporation's allegedly deceptive practices
24 were sufficient to allege a violation of the "unfair" prong of the UCL); *compare Kowalsky*, 2010
25 U.S. Dist. LEXIS 131711, at *29 (holding that plaintiff failed to state a claim because plaintiff
26 failed to provide any support suggesting that an unknowing distribution of defective products
27 should be considered unethical, immoral, oppressive or unscrupulous).

28 California courts, moreover, have refused to find sufficient allegations of "unfairness"
when a plaintiff provides nothing more than legal conclusions and a subjective belief of being

1 treated unfairly. *See Baba v. Hewlett-Packard Co.*, No. C09-05946, 2010 U.S. Dist. LEXIS 59747
2 (N.D. Cal. June 16, 2010) (finding that a cursory listing of statutes combined with vague
3 allegations that defendant’s conduct offends public policy and is unethical, oppressive and
4 unscrupulous were insufficient to state a claim for a violation of the “unfair” prong of the UCL);
5 *Sarbaz*, 2011 U.S. Dist. LEXIS 21552 (dismissing plaintiff’s UCL claims, in part, because
6 plaintiff relied on conclusory allegations of unfairness and did not allege that the defendant acted
7 unfairly when balancing the alleged acts against the alleged harm).

8 Here, Ms. Parham similarly fails to allege that McDonald’s engaged in immoral, unethical,
9 or unscrupulous acts that could constitute unfair conduct under the UCL. Ms. Parham and CSPI
10 attempt to satisfy this standard by referencing the alleged ills of advertising to children and laying
11 the blame for childhood obesity at McDonald’s feet. But the fact that CSPI might prefer less
12 advertising to children and less alleged “strain on parent-child interaction[s]” does not remotely
13 render McDonald’s alleged conduct immoral, unethical, or unscrupulous. McDonald’s is engaged
14 in an unquestionably legal practice – advertising and selling food – that is commonplace in our
15 society. Indeed, there is no question that millions of customers happily choose to eat at
16 McDonald’s and similar restaurants in California and across the country every day. Attempting to
17 place this conduct into the realm of the immoral and the unethical simply robs those words of any
18 meaningful definition.

19 In addition, Plaintiff’s apparent theory ignores the actual claims in this case. Plaintiff’s
20 alleged harm is not childhood obesity or any other alleged harm to her children. Ms. Parham’s
21 harm is the cost of Happy Meals that she went to McDonald’s for the express purpose of
22 purchasing. Thus, Ms. Parham’s Amended Complaint cannot survive any balancing of the alleged
23 harm against the utility of McDonald’s conduct, even assuming the Court needs to get that far.
24 Ms. Parham’s alleged harm is zero – she paid for the product she went to McDonald’s to purchase
25 and received that product. Ms. Parham does not claim that she was misled, and she could have
26 avoided purchasing Happy Meals by simply not going to McDonald’s or selecting other items on
27 McDonald’s menu. Ms. Parham, in other words, does not include a single fact that would tip the
28 balance in her favor. And while CSPI might dispute the utility of McDonald’s conduct, the fact

1 remains that McDonald's is a popular restaurant selling a product customers enjoy, and CSPI
2 cannot erase that fact by imposing its own views of which legal, non-misleading commercial
3 activity has utility. In fact, this case is the perfect example of the dangers of allowing the "unfair"
4 prong of the UCL to be based entirely on the plaintiff's subjective beliefs, or in this case the
5 beliefs of the public interest group backing her litigation.

6 Accordingly, because Ms. Parham cannot reasonably allege that McDonald's marketing
7 practices are immoral, unethical or unscrupulous or that the alleged harm suffered outweighs the
8 benefits of the practice, Ms. Parham has not alleged a violation of the "unfair" prong of the UCL.

9 **C. Plaintiff Fails to State a Claim for Relief under the CLRA.**

10 **1. Plaintiff lacks standing to pursue her CLRA claim, because she**
11 **has not alleged that she suffered damages as required by the**
12 **CLRA.**

13 To establish standing under the CLRA, Plaintiff must allege that she suffered "damages."
14 Cal. Civ. Code § 1780 (stating that "[a]ny consumer who suffers any damage as a result of . . . a
15 method, act, or practice declared to be unlawful by Section 1770 may bring an action..."). The
16 CLRA's "damages" requirement is similar to the UCL's "lost money" standing requirement, and
17 Plaintiff lacks standing under the CLRA for essentially the same reasons discussed in the UCL
18 section above.⁶ Thus, because Plaintiff does not adequately allege that she suffered damages as a
19 result of McDonald's Happy Meal advertising, Plaintiff does not have standing to pursue her
20 claims under the CLRA, and Count II of the Amended Complaint should be dismissed.

21 As with the UCL, standing under the CLRA results from purchasing a product that was not
22 delivered as promised or that was not worth the purchase price as a result of the defendant's
23 affirmative misrepresentation. *See Chavez*, 340 Fed. App'x. at 361; *Von Koenig v. Snapple*
24 *Beverage Corp.*, 713 F. Supp. 2d 1066, 1078 (E.D. Cal. 2010); *Aron v. U-Haul Co. of Cal.*, 143
25 Cal. App. 4th 796, 802 (2006). Also consistent with the UCL, a plaintiff has not suffered damages

26 ⁶ *See Carrea v. Dryer's Grand Ice Cream, Inc.*, No. C 10-01044 JSW, 2011 U.S. Dist. LEXIS
27 6371 (N.D. Cal. Jan. 10, 2011) (applying the same standing analysis to plaintiff's UCL, FAL, and
28 CLRA claims); *see also Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 802 (Cal. Ct. App.
2006) (applying the same economic injury standing analysis to plaintiff's UCL and CLRA
claims).

1 under the CLRA if the plaintiff receives the benefit of the bargain. *Von Koenig*, 713 F. Supp. 2d
2 at 1078.

3 Here, Plaintiff's claim that she suffered damages by purchasing Happy Meals she allegedly
4 did not want cannot establish standing under the CLRA. As discussed above, Plaintiff has not
5 alleged that she failed to receive the benefit of her bargain. Her allegations, in fact, establish that
6 she knew exactly what she was buying – a Happy Meal with a toy – and received exactly what
7 was promised. Alleged buyer's remorse is not sufficient to establish damages under the CLRA (or
8 the UCL), unless that remorse results from a failure to receive the product that was promised.
9 Because Plaintiff does not allege any such failure in this case, she has not adequately alleged
10 damages and lacks standing to pursue her CLRA claim.

11 **2. Plaintiff fails to state a claim under the CLRA because she does**
12 **not allege that McDonald's made a material misrepresentation or**
13 **that she relied on a material misrepresentation.**

14 "California requires a plaintiff suing under the CLRA for misrepresentations in connection
15 with a sale to *plead* and prove she relied on a material misrepresentation." *Kent v. Hewlett-*
16 *Packard Co.*, No. 09-5341 JF(PVT), 2010 WL 2681767, at *8 (N.D. Cal. July 6, 2010) (quoting
17 *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 946 (S.D. Cal. 2007) (emphasis added)).
18 "[A] misrepresentation is deemed material if a reasonable man would attach importance to its
19 existence or nonexistence in determining his choice of action in the transaction in question." *In re*
20 *Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 157 (2010) (internal quotes omitted); *see*
21 *also McKinniss v. Kellogg U.S.A.*, No. CV 07-2611 ABC (RCx), 2007 U.S. Dist. LEXIS 96106, at
22 *8-12 (C.D. Cal. Sept. 21, 2007) (dismissing plaintiff's CLRA claim because defendant's alleged
23 misrepresentations were not likely to mislead a reasonable consumer). A material
24 misrepresentation does not exist (and obviously could not be relied upon) when a plaintiff does not
25 believe the alleged misrepresentation. *Caro v. Procter & Gamble*, 18 Cal. App. 4th 644, 668
(1993).

26 Ms. Parham's Amended Complaint is entirely devoid of any allegations of a material
27 misrepresentation or of reliance on a misrepresentation. As discussed above, Plaintiff actually
28 pleads the opposite, *i.e.*, she had all of the relevant information about the Happy Meals, and, as a

1 result, she was allegedly reluctant to make her purchase. Those allegations undeniably negate the
2 required elements of a CLRA claim.

3 The only allegations in the Amended Complaint that purport to identify misrepresentations
4 concern the alleged misrepresentations to Ms. Parham’s children, but those allegations cannot save
5 her CLRA claim for two reasons. First, even those allegations, while using the word
6 “misrepresentation,” do not actually point to any specific statements by McDonald’s, much less
7 any statement that were misleading or untrue. Although the Amended Complaint contains
8 numerous allegations about the alleged nutritionally poor nature of the food,⁷ the complaint does
9 not identify any inaccurate or misleading statements about nutrition or any other topic. The
10 closest Plaintiff comes is alleging that “Parham’s daughters do not understand that McDonald’s
11 marketing efforts are intended to make them want to eat Happy Meals. The girls interpret this
12 marketing as good advice for proper eating.” Am. Compl. ¶ 101. But this allegation is simply a
13 statement of the alleged interpretation of McDonald’s unspecified “marketing efforts” and is not
14 connected at all to any identified statement or advertisement.⁸

15 Second, any alleged statements to Ms. Parham’s children cannot satisfy the CLRA’s
16 reliance requirement. To demonstrate reliance under the CLRA, Ms. Parham must allege “that
17 without the misrepresentation, plaintiff would not have acted as [s]he did.” *Caro*, 18 Cal. App.
18 4th at 668; *see also Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d. 939 (S.D. Cal. 2007). Thus,
19 even assuming that Ms. Parham’s children were misled regarding the nutritional quality of
20 McDonald’s food (and the Amended Complaint provides no factual basis for that conclusion), Ms.
21 Parham, by her own admission, did not rely on those alleged misrepresentations. Ms. Parham is
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24 ⁷ Plaintiff makes these allegations despite the fact that McDonald’s offers a selection of items
25 parents can choose as part of a Happy Meal purchase, including Apple Dippers and low-fat milk.
26 In fact, Plaintiff’s allegations are premised on the assumption that once at McDonald’s “children
27 are *likely* to receive a meal that is too high in calories, saturated fat, added sugars, and sodium, and
28 devoid of whole grains.” Am. Compl. ¶ 70 (emphasis added).

⁸ To the extent Plaintiff is attempting to allege a fraudulent statement under the CLRA, that
allegation would also fail to satisfy Rule 9(b)’s requirement of pleading with particularity. *See*
Kearns v. Ford Motor Co., 567 F.3d 1120 (9th Cir. 2009).

1 the plaintiff in this case, and she cannot state a claim under the CLRA. *See Caro*, 18 Cal. App. 4th
2 at 668.

3 The deficiency of Plaintiff's CLRA claim is further confirmed by the fact that Plaintiff
4 simply lists two subsections of the CLRA that McDonald's allegedly violated without providing
5 any facts connecting either subsection to the claims in this case. First, she alleges that
6 McDonald's violates subsection 1770(a)(5) by representing that its Happy Meals "have
7 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not
8 have." Am. Compl. ¶ 136. Plaintiff's Amended Complaint, however, makes no mention of
9 sponsorships, approvals, characteristics, ingredients, uses, benefits, or quantities associated with
10 the Happy Meal. Plaintiff simply does not provide any facts related to this claim. The same is
11 true of Plaintiff's allegation that McDonald's violates subsection 1770(a)(7) by representing that
12 its products "are of a particular standard, quality or grade, or that [Happy Meals] are of a particular
13 style or model" when in fact, they are of another. Am. Compl. ¶ 137. There is absolutely no
14 reference to any statement that qualifies its Happy Meals as of a particular standard, quality or
15 grade. Plaintiff's Amended Complaint offers nothing more than legal conclusions that do not
16 provide McDonald's sufficient notice of the claims against it and, therefore, should be dismissed
17 as a matter of law. *See Twombly*, 550 U.S. at 555; *see also Leong v. Square Enix of Am. Holdings,*
18 *Inc.*, No. CV09-4484 PSGVBKX, 2010 WL 1641364 (C.D. Cal. 2010); *London v. New*
19 *Albertson's Inc.*, No. 08-CV-1173H(CAB), 2008 WL 4492642 (S.D. Cal. 2008).

20 **D. Plaintiff Fails to State a Claim for Relief under the FAL.**

21 In Paragraphs 1 and 119(d) of Plaintiff's Amended Complaint, Plaintiff refers to
22 California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.* However, Plaintiff's
23 "Claims for Relief," contained in paragraphs 126-140, do not actually allege violations of the
24 FAL. Assuming Plaintiff intended to allege a violation of the FAL, Plaintiff's FAL claim, like her
25 UCL and CLRA claims, fails because Plaintiff does not have standing to pursue a FAL claim, and
26 because Plaintiff has not alleged that McDonald's advertising deceives reasonable consumers.

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1. Plaintiff lacks standing to pursue a violation of the FAL.

The standing requirements of the FAL and UCL are the same. *See* Cal. Bus. & Prof. Code § 17535 (stating that actions under this chapter may be brought by anyone “who has suffered injury in fact and lost money or property as a result of a violation of this chapter.”); *see also* *Arevalo v. Bank of Am. Corp.*, No. CIO-4959 TEH, 2011 WL 1195973, at *11 (N.D. Cal. Mar. 29, 2011 (stating that the “FAL carries the same standing requirements as the UCL.”); *Cattie v. Wal-Mart Stores, Inc.*, 504 F.Supp.2d 939 (S.D. Cal. 2007) (dismissing UCL and FAL claims under the same analysis for failure to adequately allege standing); *Hinjos*, 2010 WL 4916647 (C.D. Cal. Dec. 1, 2010) (same). Accordingly, for the reasons discussed above in connection with Plaintiff’s UCL claim, Plaintiff cannot demonstrate standing under the FAL. Plaintiff did not allege that she “lost money,” because she admittedly received the benefit of her bargain.

2. Plaintiff does not state a claim for violation of the FAL because Plaintiff has not alleged that a reasonable consumer would be deceived by a specific McDonald’s advertisement.

The FAL makes it unlawful to disseminate any statement concerning property or services that is untrue or misleading, and to establish a violation of the FAL, Plaintiff must allege that members of the public are likely to be deceived by the allegedly false advertising. *See Weberl ex rel. v. Pepsico, Inc.*, No. C 09-04456SBA, 2010 WL 2673860 (N.D. Cal. July 2, 2010); *Videtto v. Kellogg U.S.A.*, No. 2:08CV01324-MCEDAD, 2009 WL 1439086 (E.D. Cal. May 21, 2009).

Plaintiff fails to state a claim under the FAL, because she has not alleged that McDonald’s advertising is likely to deceive a reasonable consumer. Plaintiff fails to identify any advertisements that are false, deceptive, or misleading to her – the consumer – and she makes no allegations that McDonald’s advertising is deceptive to other reasonable consumers. Instead, Plaintiff again hopes that her allegations that McDonald’s advertising inherently deceives children will support a finding that she has alleged a violation of the FAL. However, as discussed above, Plaintiff does not identify any particular advertising that allegedly deceived her children, nor are her children plaintiffs in this case. Because Plaintiff has not alleged that either she, or reasonable consumers, are likely to be deceived by particular advertising, Plaintiff’s FAL claim fails as a matter of law.

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IV. CONCLUSION

Plaintiff's attempt to circumvent established law in the hopes of promoting CSPI's legislative and regulatory agenda should not be permitted. Plaintiff lacks standing to pursue any of her claims, because she admittedly received the benefit of her bargain. She also fails to sufficiently allege the requisite causal connection between her "loss" and McDonald's practice of advertising Happy Meals with toys, and Plaintiff offers no allegations sufficient to establish an unfair practice under California law. In her CLRA claims, Plaintiff fails to identify any alleged misrepresentation and admits that she did not rely on any information from McDonald's when deciding to purchase Happy Meals. She also relies entirely on quotes of the two CLRA subsections she claims McDonald's violated, but neglects to include any factual allegations that could support those claims. For all of these reasons, McDonald's respectfully requests that Plaintiff's claims be dismissed in their entirety.

DATED: April 18, 2011

Respectfully submitted,
ALSTON & BIRD LLP

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