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

ANNIE LAM, on behalf of)	Case No. 11-5056-SC
herself, and all others)	
similarly situated,)	ORDER GRANTING IN PART AND
)	DENYING IN PART DEFENDANT'S
Plaintiff,)	<u>MOTION TO DISMISS</u>
)	
v.)	
)	
GENERAL MILLS, INC.,)	
)	
Defendant.)	
)	

I. INTRODUCTION

Plaintiff Annie Lam ("Lam") brings this putative class action against Defendant General Mills, Inc. ("General Mills") for allegedly misleading consumers about the nutritional qualities of its fruit snacks, specifically Fruit Roll-Ups, Fruit by the Foot, and other, unidentified "similar products." ECF No. 27 ("FAC") ¶ 44. General Mills now moves to dismiss the action under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. ECF No. 33 ("MTD"). The motion is fully briefed. ECF Nos. 44 ("Opp'n"), 45 ("Reply"). Having reviewed the papers, the Court finds the matter suitable for resolution without oral argument. As detailed below, the Court GRANTS in part and DENIES in part General Mills's motion to dismiss.

///

1 **II. BACKGROUND**

2 As it must on a Rule 12(b)(6) motion to dismiss, the Court
3 takes all well-pleaded facts in Lam's First Amended Complaint
4 ("FAC"), the operative pleading, as true. General Mills is a
5 Fortune 500 company primarily concerned with food products and the
6 marketing of many well-known brands, such as Betty Crocker. FAC ¶
7 14. The General Mills portfolio includes more than one hundred
8 products. Id. Of these products, Lam targets "Fruit Roll-Ups and
9 Fruit by the Foot as well as other similar products" (the "Fruit
10 Snacks"). Id. ¶ 1. The FAC does not specifically identify what
11 these "other similar products" might be.

12 The Court takes judicial notice of the packaging of Fruit
13 Roll-Ups and Fruit by the Foot, examples of which were filed with
14 the Court by General Mills. Mand Decl. Ex. A, B.¹ The front panel
15 of the Fruit Roll-Ups and Fruit by the Foot packaging contains a
16 fanciful depiction of the products, which resemble fruit leather,
17 along with a statement identifying the product as a "fruit flavored
18 snack" and "strawberry natural flavored." Id. A box in the bottom
19 right corner of the front panel states the "calories per serving,"
20 and describes the products as "a good source of vitamin C," "low
21 fat," and "gluten free." Id. The side panel contains the label
22 "made with real fruit," along with a nutrition facts box which
23 lists the products' nutritional content and ingredients in much
24 smaller type. Id. The ingredients of strawberry-flavored Fruit
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26
27 ¹ Benjamin Mand ("Mand"), the Marketing Manager for General Mills
28 Fruit Flavored Snacks, filed a declaration in support of General
Mills's motion, attaching pictures of the Fruit Snacks' packaging.
ECF No. 35 ("Mand Decl.").

1 Roll-Ups, listed in descending order based on the amount of the
2 particular ingredient contained in the product, are:

3
4 Pears from Concentrate, Corn Syrup, Dried Corn Syrup,
5 Sugar, Partially Hydrogenated Cottonseed Oil, Citric
6 Acid, Acetylated Monoglycerides, Fruit Pectin, Dextrose,
7 Malic Acid, Vitamin C (ascorbic acid), Natural Flavor,
8 Color (red 40, yellows 5 & 6, blue 1).

9 Id. Strawberry-flavored Fruit by the Foot contains almost
10 identical ingredients. Id.

11 Lam, who purchased the Fruit Snacks for herself and her
12 children, alleges that the packaging misleads consumers into
13 believing that the Fruit Snacks are healthful. FAC ¶¶ 7, 13. Lam
14 alleges that General Mills fails to properly disclose that the
15 Fruit Snacks contain partially hydrogenated oil, an artificial
16 substance containing "trans fats" which has been known to cause
17 coronary disease, heart attacks, and death. Id. ¶ 7. Lam also
18 alleges that the Fruit Snacks contain large amounts of added
19 sugars; contain artificial food dyes; have no significant amounts
20 of real fruit; and have no dietary fiber. Id. ¶ 21. Lam alleges
21 that the statement "made with real fruit" incorrectly describes the
22 ingredients, which include "pears from concentrate," rather than
23 the fruit indicated by the name of the product. Id. ¶ 22. For
24 example, strawberry-flavored Fruit Roll-Ups contain no
25 strawberries. Id. ¶¶ 22-23. Lam also takes aim at the labels:
26 "fruit flavored snacks," "naturally flavored," and "gluten free."²
27 Id. ¶ 17.

28 ² In the FAC, Lam also targets the statements "good source of
Vitamin C," "[low number] of calories," and "low fat," id. ¶ 17;
however, she withdraws these claims in her opposition brief, Opp'n
at 13.

1 Lam's FAC asserts claims for: (1) unfair and deceptive acts
2 and practices in violation of Section 1750 of the California
3 Consumer Legal Remedies Act ("CLRA"); (2) unlawful business acts
4 and practices in violation of the California Unfair Competition Law
5 ("UCL"); (3) fraudulent business acts and practices in violation of
6 the California UCL; (4) misleading and deceptive practices in
7 violation of California Business and Professions Code § 17500 et
8 seq., aka California's False Advertising Law ("FAL"); (5) breach of
9 express warranty; (6) breach of implied warranty of
10 merchantability; and (7) unjust enrichment.³ Id. ¶¶ 34-83. Among
11 other things, Lam seeks restitution, disgorgement, monetary
12 damages, and an order enjoining General Mills's allegedly unlawful
13 and deceptive acts and practices.

14
15 **III. LEGAL STANDARD**

16 A motion to dismiss under Federal Rule of Civil Procedure
17 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
18 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
19 on the lack of a cognizable legal theory or the absence of
20 sufficient facts alleged under a cognizable legal theory."
21 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
22 1988). "When there are well-pleaded factual allegations, a court
23 should assume their veracity and then determine whether they
24 plausibly give rise to an entitlement to relief." Ashcroft v.
25 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court
26 must accept as true all of the allegations contained in a complaint

27
28 ³ The FAC also asserts a claim for violation of the Minnesota
Uniform Deceptive Practices Act, FAC ¶¶ 34-40, but this claim has
been withdrawn, Opp'n at 19.

1 is inapplicable to legal conclusions. Threadbare recitals of the
2 elements of a cause of action, supported by mere conclusory
3 statements, do not suffice." Id. at 663. (citing Bell Atl. Corp.
4 v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
5 complaint must be both "sufficiently detailed to give fair notice
6 to the opposing party of the nature of the claim so that the party
7 may effectively defend against it" and "sufficiently plausible"
8 such that "it is not unfair to require the opposing party to be
9 subjected to the expense of discovery." Starr v. Baca, 633 F.3d
10 1191, 1204 (9th Cir. 2011).

11
12 **IV. DISCUSSION**

13 **A. Definition of the Fruit Snacks**

14 Lam's claims are predicated on allegedly false and misleading
15 statements that appear on the packaging of the Fruit Snacks, which
16 are defined as "Fruit Roll-Ups and Fruit by the Foot as well as
17 other similar products." FAC ¶ 1. It is entirely unclear what
18 these "other similar products" are. General Mills's "brand
19 portfolio includes more than 100 leading U.S. brands." Id. ¶ 14.
20 The company should not have to guess at which of these other brands
21 are the subject of this suit. Accordingly, the Court DISMISSES the
22 FAC WITH LEAVE TO AMEND to the extent that it is predicated on
23 statements made concerning "other similar products." Plaintiff may
24 amend the FAC to specifically identify the particular General Mills
25 products that she intends to target.

26 **B. NLEA Preemption**

27 General Mills argues that Lam's claims are preempted by the
28 Nutrition Labeling and Education Act ("NLEA"), 21 U.S.C. § 343-1,

1 to the extent they are predicated on the "fruit flavored" and
2 "naturally flavored" labels which appear on the Fruit Snacks'
3 packaging. MTD at 6. Lam responds that her claims are not
4 preempted because she is seeking to enforce federal regulations
5 prohibiting false and misleading statements. Opp'n at 6.

6 Understanding the United States Food and Drug Administration's
7 ("FDA") regulatory scheme is central to addressing the parties'
8 dispute. The Federal Food, Drug, and Cosmetic Act ("FDCA") vests
9 the FDA with the authority to "protect the public health by
10 ensuring that . . . foods are safe, wholesome, sanitary, and
11 properly labeled." 21 U.S.C. § 393(b)(2)(A). Among other things,
12 the FDCA requires proper labeling of foods containing artificial
13 flavoring. See 21 U.S.C. § 343(k). Pursuant to this authority,
14 the FDA has promulgated a comprehensive set of regulations
15 pertaining to labeling requirements. See 21 C.F.R. § 101.1 et seq.

16 In 1990, Congress amended the FDCA by enacting the NLEA. The
17 NLEA was intended to "establish uniform national standards for the
18 nutritional claims and the required nutrient information displayed
19 on food labels." 1990 U.S.C.C.A.N. 3336, 3342. The NLEA also
20 amended the FDCA by adding a preemption provision, codified at 21
21 U.S.C. § 343-1. This provision expressly preempts state laws
22 addressing certain subjects that are "not identical to" various
23 standards set forth by the FDCA, including the labeling
24 requirements set forth in 21 U.S.C. § 343(k). 21 U.S.C. § 343-
25 1(a)(3). Under FDA regulations, the term "not identical to . . .
26 means that the State requirement directly or indirectly imposes
27 obligations or contains provisions concerning the composition of
28

1 labeling" that are "not imposed or contained in the applicable
2 provision[s]." 21 C.F.R. § 100.1(c)(4).

3 General Mills contends that Lam's claims are preempted because
4 statements that the Fruit Snacks are "fruit flavored" and
5 "naturally flavored" are expressly permitted by FDA regulations
6 promulgated under 21 U.S.C. § 343(k). MTD at 8. General Mills
7 specifically points to 21 C.F.R § 101.22(i), which provides, in
8 relevant part:

9 If the label, labeling, or advertising of a food makes
10 any direct or indirect representations with respect to
11 the primary recognizable flavor(s), by word, vignette,
12 e.g., depiction of a fruit, or other means, or if for any
13 other reason the manufacturer or distributor of a food
14 wishes to designate the type of flavor in the food other
than through the statement of ingredients, such flavor
shall be considered the characterizing flavor and shall
be declared in the following way:

15

16 (i) If the food is one that is commonly expected to
17 contain a characterizing food ingredient, e.g.,
18 strawberries in "strawberry shortcake", and the food
19 contains natural flavor derived from such ingredient
20 and an amount of characterizing ingredient
21 insufficient to independently characterize the food,
22 or the food contains no such ingredient, the name of
23 the characterizing flavor may be immediately
24 preceded by the word "natural" and shall be
immediately followed by the word "flavored" in
letters not less than one-half the height of the
letters in the name of the characterizing flavor,
e.g., "natural strawberry flavored shortcake," or
"strawberry flavored shortcake".

25 Thus, the regulation allows a producer to label a product as
26 "natural strawberry flavored," even if that product contains no
27 strawberries. While the regulation's logic is troubling, the Court
28 is bound to apply it.

1 Lam argues that her claims are not preempted because she is
2 seeking to enforce the regulatory scheme. Lam points to the FDCA,
3 which provides that a food is misbranded "[i]f it bears or contains
4 any artificial flavoring, artificial coloring, or chemical
5 preservative, unless it bears labeling stating that fact." Opp'n
6 at 6 (citing 21 U.S.C. § 343(k)). Lam also argues that the "fruit
7 flavored" and "naturally flavored" labels are false and misleading
8 because the Fruit Snacks are flavored with "unnatural, non-fruit
9 ingredients." Id.

10 Lam's arguments are unavailing. The crux of the FAC is that
11 the Fruit Snacks' labeling is deceptive because the products'
12 ingredients, not their flavors, are unnatural. See, e.g., FAC ¶¶
13 7, 23. However, under 21 C.F.R § 1022(i), a product may be labeled
14 as "fruit flavored" or "naturally flavored," even if it does not
15 contain fruit or natural ingredients. So long as that product
16 "contains natural flavor" which is "derived from" the
17 "characterizing food ingredient," it will not run afoul of the
18 regulation. If Lam means to assert that the Fruit Snacks violate
19 21 C.F.R. § 1022(i) or 21 U.S.C. § 343(k) because their flavors are
20 artificial, then she must allege as much in her complaint. She has
21 not. Accordingly, her claims concerning the flavoring labels are
22 preempted by the FDCA.⁴

23 Lam points to a number of cases concerning the use of the
24 labels "natural" and "all natural" to describe a product's

25 _____
26 ⁴ In her opposition brief, Lam argues that the Fruit Snacks are
27 flavored with "corn syrup, maltodextrin, and partially hydrogenated
28 oil." Opp'n at 6. It is unclear whether this list is exhaustive.
In any event, the FAC does not specifically allege that the Fruit
Snacks are artificially flavored, and Rule 8 requires that Lam set
forth her allegations in the pleadings, not her briefing.

1 ingredients. Opp'n at 7-10.⁵ These cases are inapposite since
2 they deal with the labeling of a product's ingredients, not the
3 labeling of its flavors. Here, the labeling challenged by Lam --
4 which is related to the Fruit Snacks flavor -- is expressly
5 permitted by FDA regulations. This was not the case in the
6 authority relied upon by Lam. See Holk, 575 F.3d at 340 ("[T]he
7 FDA declined to adopt a formal definition of the term 'natural' . .
8 . '[b]ecause of resource limitations and other agency
9 priorities'"); Hitt, 2009 WL 449190, at *4 (same); Lockwood, 597 F.
10 Supp. 2d at 1033-34 (same).

11 For these reasons, the Court finds that Lam's claims are
12 preempted to the extent they are predicated on the "naturally
13 flavored" and "fruit flavored" labels.

14 **C. Lam's UCL, CLRA, and FAL Claims**

15 The Court next addresses whether Lam's allegations regarding
16 the labels "gluten free" and "made with real fruit" can support a
17 claim under the UCL, CLRA, or FAL. The UCL prohibits any
18 "unlawful, unfair[,] or fraudulent business act or practice." Cal.
19 Bus. & Prof. Code § 17200. The CLRA prohibits "unfair methods of
20 competition and unfair or deceptive acts or practices." Cal. Civ.
21 Code § 1770(a). The FAL makes it unlawful to induce the public to
22 enter into any obligation through the dissemination of "untrue or
23 misleading" statements. Cal. Bus. & Prof. Code § 17500. In order
24 to state a claim under the UCL, CLRA, or FAL, Lam must allege that
25 the Fruit Snacks' labels are likely to deceive a reasonable
26

27 ⁵ Citing Holk v. Snapple Beverage Corp., 575 F.3d 329 (3rd Cir.
28 2009); Hitt v. Arizona Beverage Co., No. 08 CV 809 WQH, 2009 WL
449190 (S.D. Cal. Feb. 4, 2009); Lockwood v. Conagra Foods, Inc.,
597 F. Supp. 2d 1028 (N.D. Cal. 2009).

1 consumer. See Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir.
2 1995). "[T]hese laws prohibit 'not only advertising which is
3 false, but also advertising which[,] although true, is either
4 actually misleading or which has a capacity, likelihood or tendency
5 to deceive or confuse the public.'" Kasky v. Nike, Inc., 27 Cal.
6 4th 939, 951 (Cal. 2002) (quoting Leoni v. State Bar, 39 Cal. 3d
7 609, 626 (Cal. 1985)). "[W]hether a business practice is deceptive
8 will usually be a question of fact not appropriate for decision on
9 demurrer." Williams v. Gerber Prods. Co., 552, F.3d 934, 938 (9th
10 Cir. 2008).

11 The Court finds that the statement "gluten free" cannot
12 support Plaintiff's claims under the UCL, CLRA, or FAL. The
13 statement is objectively true and communicates nothing more than
14 the absence of gluten in the product -- a message used to convey
15 the suitability of the Fruit Snacks to consumers with celiac
16 disease and others who may wish to avoid gluten. A reasonable
17 consumer is unlikely to interpret the statement "gluten free" to
18 mean that the Fruit Snacks contain no partially hydrogenated oils,
19 low amounts of sugar or corn-syrup, or that the Fruit Snacks are
20 otherwise healthful.

21 The Court reaches a different conclusion with respect to the
22 statement "made with real fruit." Lam alleges that the statement
23 "incorrectly describes the ingredients, which include partially
24 hydrogenated oil, sugars in quantities amounting to approximately
25 half of each serving, and 'pears from concentrate' rather than the
26 fruit indicated by the name of the Product." FAC ¶ 22. Lam also
27 argues that the challenged statements, along with the depiction of
28 imitation fruit leather on the packaging, are likely to deceive

1 consumers into thinking the Fruit Snacks are healthful, natural,
2 pressed-and-dried fruit products, when, in fact, they are an
3 amalgamation of artificial, non-fruit ingredients. Opp'n at 15.
4 General Mills argues that the statement "made with real fruit" is
5 objectively true and that a reasonable consumer would not interpret
6 the statement to mean that certain fruits were present in a
7 particular quantity or that a specific fruit was present in the
8 product. MTD at 16-17.

9 The Court agrees with Lam. A reasonable consumer might make
10 certain assumptions about the type and quantity of fruit in the
11 Fruit Snacks based on the statement "made with real fruit," along
12 with other statements prominently featured on the products'
13 packaging. For example, the statement "made with real fruit"
14 appears in large and colorful letters on the side panel of the
15 packaging of strawberry Fruit Roll-Ups. Additionally, the word
16 "strawberry" appears in large letters on the front, back, top, and
17 bottom panels. Taken together, these statements might lead a
18 reasonable consumer to believe that product is made with real
19 strawberries, not pears from concentrate. The names "Fruit Roll-
20 Ups" and "Fruit by the Foot," along with the fanciful depiction of
21 the products, which resemble fruit leather, may lead to further
22 confusion about the Fruit Snacks' ingredients. After seeing these
23 prominent aspects of the packaging, a reasonable consumer might be
24 surprised to learn that a substantial portion of each serving of
25 the Fruit Snacks consists of partially hydrogenated oil and sugars.
26 It is true that General Mills lists the ingredients of the Fruit
27 Snacks in small print on the bottom of the side panel. However, at
28 the pleading stage, the Court cannot conclude that a reasonable

1 consumer should be expected to look beyond "made with real fruit"
2 in order to discover the truth in the small print.

3 The Court's conclusion is supported by the Ninth Circuit's
4 opinion in Gerber. In that case, Gerber had stated that its fruit
5 juice snacks for toddlers were made with "fruit juice and other all
6 natural ingredients." Gerber, 552 F.3d at 939. The Ninth Circuit
7 found that these statements "could easily be interpreted by
8 consumers as a claim that all the ingredients in the product were
9 natural, which appears to be false." Id. The products' packaging
10 also juxtaposed the words "Fruit Juice" with images of fruits such
11 as oranges, peaches, strawberries, and cherries, even though the
12 product contained no fruit juice from any of the fruits pictured.
13 Id. at 936. The Ninth Circuit rejected the notion that a
14 reasonable consumer would not be deceived by such labeling because
15 the packaging specifically identified the products' ingredients.
16 Id. at 939. The court explained: "We do not think that the FDA
17 requires an ingredient list so that manufacturers can mislead
18 consumers and then rely on the ingredient list to correct those
19 misinterpretations and provide a shield for liability for the
20 deception." Id. Likewise, here, the Fruit Snacks' ingredients
21 list cannot be used to correct the message that reasonable
22 consumers may take from the rest of the packaging: that the Fruit
23 Snacks are made with a particular type and quantity of fruit.⁶

24 _____
25 ⁶ General Mills argues that Gerber is distinguishable since the
26 case also involved nutrition claims that are not present here. MTD
27 at 18-19. Specifically, the Ninth Circuit noted that "the claim
28 that Snacks is 'just one of a variety of nutritious Gerber
Graduates foods and juices that have been specifically designed to
help toddlers grow up strong and healthy' adds to the potential
deception." 552 F.3d at 939. While there is no indication that
General Mills has expressly represented that the Fruit Snacks are
"nutritious," that is hardly dispositive. As noted above, Gerber
involved a number of other potentially deceptive statements.

1 General Mills relies on two district court opinions decided
2 before Gerber, which dismissed UCL, CLRA, and FAL claims concerning
3 the labeling of food and beverage products. See MTD at 16-17
4 (citing McKinniss v. Sunny Delight Beverages Co., CV0702034-RGKJCX
5 ("Sunny Delight"), 2007 WL 4766525 (C.D. Cal. Sept. 4, 2007);
6 McKinniss v. Gen. Mills, Inc., CV 07-2521GAFFMOX ("McKinnis"), 2007
7 WL 4762172 (C.D. Cal. Sept. 18, 2007)). In both cases, the courts
8 held that a reasonable consumer should be expected to peruse the
9 FDA-mandated ingredients list to determine the true contents of a
10 product. See Sunny Delight, 2007 WL 4766525, at *4; McKinniss,
11 2007 WL 4762172, at *3. The Court declines to follow these
12 opinions to the extent that they are inconsistent with Gerber.

13 General Mills also cites to a number of post-Gerber cases
14 involving sugary cereals or ice cream. MTD at 19.⁷ In none of
15 these cases did the defendants claim that their products were made
16 with real fruit. As such, they are distinguishable. In Videtto,
17 which involved the cereal "Froot Loops," the court found that "the
18 fanciful use of a nonsensical word ['Froot'] cannot reasonably be
19 interpreted to imply that the Product contains or is made from
20 actual fruit." 2009 WL 1439086, at *3. In Werbel, the court found
21 that no reasonable consumer could mistake "cereal balls with a
22 rough, textured surface in hues of deep purple, teal, chartreuse
23 green and bright red" for natural fruit and noted that the
24 defendant did not represent that cereal was made with real fruit.

25 _____
26 ⁷ Citing Videtto v. Kellogg USA, 2:08CV01324-MCEDAD, 2009 WL
27 1439086 (E.D. Cal. May 21, 2009); Werbel v. Pepsico, Inc., C 09-
28 04456 SBA, 2010 WL 2673860 (N.D. Cal. July 2, 2010); Carrea v.
Dreyer's Grand Ice Cream, Inc., C 10-01044 JSW, 2011 WL 159380
(N.D. Cal. Jan. 10, 2011); Dvora v. Gen. Mills, Inc., CV 11-1074-GW
PLAX, 2011 WL 1897349 (C.D. Cal. May 16, 2011)

1 2010 WL 2673860, at *3-4. In Carrea, the court found that no
2 reasonable consumer would be deceived into thinking that ice cream
3 was wholesome or otherwise healthy by labels such as "original" or
4 "classic." 2011 WL 159380, at *5. Finally, in Dvora, the court
5 found that no reasonable consumer would believe that the cereal at
6 issue contained real fruit when "there are no pictures of any
7 fruits on the packaging, and there is no statement that the cereal
8 was made with actual fruit." 2011 WL 1897349, at *7.

9 Accordingly, the Court DENIES General Mills's motion to
10 dismiss with respect to Lam's UCL, CLRA, and FAL claims. These
11 claims may proceed to the extent they are predicated on the
12 statement "made with real fruit."

13 **D. Lam's Claims for Breach of Express and Implied Warranty**

14 For the reasons set forth below, the Court finds that Lam has
15 failed to state a claim for breach of express or implied warranty.

16 "Any description of the goods which is made part of the basis
17 of the bargain creates an express warranty that the goods shall
18 conform to the description." Cal. Comm. Code § 2313(1)(b). To
19 plead a cause of action for breach of express warranty, a plaintiff
20 must "allege the exact terms of the warranty, plaintiff's
21 reasonable reliance thereon, and a breach of that warranty which
22 proximately causes plaintiff['s] injury." Williams v. Beechnut
23 Nutrition Corp., 185 Cal. App. 3d 135, 142 (Cal. Ct. App. 1986). A
24 plaintiff may satisfy these requirements where she shows that the
25 defendant "utilized the advertising media to urge the use and
26 application of [the subject product] and expressly warranted to the
27 general public including plaintiff herein, that said product was
28

1 effective, proper and safe for its intended use." Id. (internal
2 quotation marks omitted).

3 As to implied warranties, the California Commercial Code
4 provides that "a warranty that the goods shall be merchantable is
5 implied in a contract for their sale." Cal. Comm. Code § 2314(1).
6 To be merchantable, a product must "[c]onform to the promises or
7 affirmations made on the container or label and must be fit for the
8 ordinary purposes for which such goods are used." Hauter v.
9 Zogarts, 14 Cal. 3d 104, 117-18 (1975) (internal quotations and
10 citations omitted).

11 Lam's claim for breach of express warranty is based on the
12 allegation that General Mills warranted that its "Fruit Snacks were
13 healthful and had particular healthful characteristics." FAC ¶ 74.
14 Likewise, Lam's claim for breach of implied warranty is predicated
15 on the allegation that the Fruit Snacks were "promoted, marketed,
16 advertised, packaged, and labeled as healthful and having
17 particular health characteristics." Id. ¶ 78. However, Lam fails
18 to point to any affirmative statement, whether it be in General
19 Mills's advertising or the Fruit Snacks' packaging, indicating that
20 the Fruit Snacks are healthful. As set forth more fully above, the
21 Fruit Snacks' packaging contains a number of statements concerning
22 the Fruit Snacks' ingredients and flavoring. Lam does not
23 challenge the truth of any of these statements. Nor does she
24 allege that the Fruit Snacks are not proper or safe for consumption
25 as food.

26 Accordingly, the Court DISMISSES Lam's claims for breach of
27 express and implied warranty.

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V. CONCLUSION

For the reasons set forth above, the Court GRANTS in part and DENIES in part General Mills's motion to dismiss Lam's FAC.

Specifically:

- The FAC is DISMISSED WITH LEAVE TO AMEND to the extent that it is predicated on unidentified General Mills products.
- The FAC is DISMISSED WITH PREJUDICE to the extent that it is predicated on statements that the Fruit Snacks are "fruit flavored," "naturally flavored," and "gluten free."
- Lam's claims for breach of express and implied warranty are DISMISSED WITH PREJUDICE.
- Lam's claims remain undisturbed in all other respects.

Lam may amend her complaint within thirty (30) days of this Order.

IT IS SO ORDERED.

Dated: May 10, 2012


UNITED STATES DISTRICT JUDGE