

United States District Court
For the Northern District of California

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

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| |) | Case No. 12-1586 SC |
| |) | |
| MARKUS WILSON and DOUG CAMPEN, |) | ORDER GRANTING IN PART AND |
| individually and on behalf of |) | DENYING IN PART DEFENDANTS' |
| all others similarly situated, |) | MOTION TO DISMISS PLAINTIFFS' |
| |) | <u>FIRST AMENDED COMPLAINT</u> |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| FRITO-LAY NORTH AMERICA, INC. |) | |
| and PEPSICO, INC., |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |

I. INTRODUCTION

Now before the Court is Defendants Frito-Lay North America, Inc. ("Frito-Lay") and PepsiCo, Inc.'s ("PepsiCo") (collectively "Defendants") motion to dismiss Plaintiffs Markus Wilson and Doug Campen's ("Plaintiffs") first amended complaint. ECF Nos. 18 ("FAC"), 27 ("MTD"). The motion is fully briefed, ECF Nos. 34 ("Opp'n"),¹ 38 ("Reply"), and suitable for decision without oral argument, Civ. L.R. 7-1(b). For the reasons explained below, the Court GRANTS in part and DENIES in part Defendants' motion.

¹ Plaintiffs are instructed to review Civil Local Rule 3-4(c)(2), as the Court will strike portions of future filings that do not adhere to length limits or type size restrictions.

1 **II. BACKGROUND**

2 The following facts are taken from Plaintiffs' FAC.
3 Defendants are producers of retail food products. FAC ¶ 19.
4 Plaintiffs are two California consumers who purchased a variety of
5 Defendants' food products between March 29, 2012 and March 29, 2008
6 (the "Class Period"). Id. ¶¶ 16-17. Plaintiff Wilson bought
7 "Lay's Classic Potato Chips" and Plaintiff Campen bought "Lay's
8 Classic Potato Chips, Lay's Honey Barbeque Potato Chips, Lay's
9 Kettle Cooked Mesquite BBQ Potato Chips, Cheetos Puffs, and Fritos
10 Original Corn Chips" (collectively the "Named Products"). Id. ¶
11 17. Plaintiffs allege that they bought other food products from
12 Defendants during the Class Period, but they do not specify what
13 these other products were. See id. Plaintiffs, on behalf of
14 themselves and others similarly situated, filed this putative class
15 action against Defendants, alleging that Defendants' website,
16 advertisements, and products contain deceptive and misleading
17 labeling information, in violation of state and federal law. Id.
18 ¶¶ 1-15.

19 The crucial factual background in this case concerns the
20 specific labeling practices that Plaintiffs claim are misleading.²
21 The only labels actually put before the Court -- described further
22 below -- are two versions of a Lay's Classic Potato Chips bag and
23 labels for the Named Products as they appeared at the time

24 ² Defendants filed a Request for Judicial Notice in this matter,
25 per Federal Rule of Evidence 201. ECF No. 28 ("Def.'s RJN"). The
26 Court GRANTS Defendants' request as to Exhibits B-F, per the
27 incorporation by reference doctrine, and DENIES Defendants' request
28 as to Exhibits A and G, because those exhibits are irrelevant per
Federal Rule of Evidence 402. The Court notes that Defendants' RJN
shows only the labels as they appeared at the time of Defendants'
RJN's filing, not the labels as they appeared to Plaintiffs before
or at the time of their filing the FAC.

1 Defendants filed their RJN. Plaintiffs' allegations that
2 Defendants' labels are misleading and deceptive are based on
3 Defendants' labeling and advertising of their food products (1) as
4 being "All Natural" despite containing artificial or unnatural
5 ingredients, flavoring, coloring, or preservatives; (2) as having
6 "0 Grams Trans Fat" content despite having more than thirteen grams
7 of fat per fifty grams of food product; (3) as having "No MSG"
8 despite containing MSG; (4) as being "low sodium" despite having
9 more than 140 milligrams of sodium per serving size and per fifty
10 grams of food product; (5) as being "healthy despite containing
11 disqualifying nutrient levels"; and (6) as including assertions
12 about other unauthorized health claims. See id. ¶ 2.

13 Plaintiffs assert that they "care about the nutritional
14 content of food and seek to maintain a healthy diet." Id. ¶ 149.
15 They also allege that they bought Defendants' Named Products and
16 other products throughout the Class Period, that they relied on
17 Defendants' labeling and other statements in making their
18 purchases, and that they would not have purchased Defendants'
19 products had they known the truth about them. See, e.g., id. ¶¶
20 150-157.

21 Based on these facts, Plaintiffs assert nine causes of action
22 against Defendants: (1-3) violations of the "unlawful," "unfair,"
23 and "fraudulent" prongs of California's Unfair Competition Law's
24 ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.; (4-5) violations
25 of the "misleading and deceptive" and "untrue" prongs of
26 California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code
27 § 17500, et seq.; (6) violations of California's Consumers Legal
28 Remedies Act, Cal. Civ. Code § 1750, et seq.; (7) restitution based

1 on unjust enrichment or quasi-contract; (8) breach of warranty
2 under California's Song-Beverly Act, Cal. Civ. Code § 1790, et
3 seq.; and (9) breach of warranty under the federal Magnuson-Moss
4 Act, 15 U.S.C. § 2301, et seq.

5
6 **III. LEGAL STANDARD**

7 **A. Motions to Dismiss**

8 A motion to dismiss under Federal Rule of Civil Procedure
9 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
10 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
11 on the lack of a cognizable legal theory or the absence of
12 sufficient facts alleged under a cognizable legal theory."
13 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
14 1988). "When there are well-pleaded factual allegations, a court
15 should assume their veracity and then determine whether they
16 plausibly give rise to an entitlement to relief." Ashcroft v.
17 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
18 must accept as true all of the allegations contained in a complaint
19 is inapplicable to legal conclusions. Threadbare recitals of the
20 elements of a cause of action, supported by mere conclusory
21 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
22 Twombly, 550 U.S. 544, 555 (2007)). The court's review is
23 generally "limited to the complaint, materials incorporated into
24 the complaint by reference, and matters of which the court may take
25 judicial notice." Metzler Inv. GMBH v. Corinthian Colls., Inc.,
26 540 F.3d 1049, 1061 (9th Cir. 2008) (citing Tellabs, Inc. v. Makor
27 Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

28 When a motion to dismiss is granted, a district court must

1 decide whether to grant leave to amend. Generally, the Ninth
2 Circuit has a liberal policy favoring amendments and, thus, leave
3 to amend should be freely granted. See, e.g., DeSoto v. Yellow
4 Freight System, Inc., 957 F.2d 655, 658 (9th Cir. 1992). However,
5 a court does not need to grant leave to amend in cases where the
6 court determines that permitting a plaintiff to amend would be an
7 exercise in futility. See, e.g., Rutman Wine Co. v. E. & J. Gallo
8 Winery, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to
9 amend is not an abuse of discretion where the pleadings before the
10 court demonstrate that further amendment would be futile.").

11 **B. Rule 9(b)**

12 Claims sounding in fraud are subject to the heightened
13 pleading requirements of Federal Rule of Civil Procedure 9(b),
14 which requires that a plaintiff alleging fraud "must state with
15 particularity the circumstances constituting fraud." See Kearns v.
16 Ford Motor Co., 567 F. 3d 1120, 1124 (9th Cir. 2009). "To satisfy
17 Rule 9(b), a pleading must identify the who, what, when, where, and
18 how of the misconduct charged, as well as what is false or
19 misleading about [the purportedly fraudulent] statement, and why it
20 is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys.,
21 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks
22 and citations omitted).

23

24 **IV. DISCUSSION**

25 Defendants make six arguments about why Plaintiffs' FAC should
26 be dismissed: (1) Plaintiffs did not sufficiently plead why PepsiCo
27 can be held liable for Frito-Lay's actions; (2) Plaintiffs lack
28 standing as to products they do not claim to have purchased; (3)

1 Plaintiffs fail to state claims for all of their causes of action
2 because no reasonable consumer is likely to be harmed or deceived
3 by the labels at issue, and because Plaintiffs' claims fail to meet
4 Rule 9(b)'s heightened pleading standard; (4) Plaintiffs' unjust
5 enrichment and quasi-contract claims fail as a matter of law; (5)
6 Plaintiffs fail to state a claim under the Magnuson-Moss Warranty
7 Act ("MMWA"); and (6) Plaintiffs fail to state a claim under the
8 Song-Beverly Consumer Warranty Act ("Song-Beverly"). See generally
9 MTD.

10 **A. The Statutory Framework**

11 The Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et
12 seq., as amended by the Nutrition Labeling and Education Act of
13 1990 ("NLEA"), 21 U.S.C. § 343(r), et seq., is the operative
14 statute in this matter.

15 The many subsections of 21 U.S.C. § 343 establish the
16 conditions under which food is considered "misbranded." Generally,
17 food is misbranded under 21 U.S.C. § 343(a)(1) if "its labeling is
18 false or misleading in any particular." Sections 343(q) and (r)
19 regulate the information that must be included in all packed
20 products' "nutrition box," as well as all other nutrient content
21 claims that appear elsewhere on the label.

22 Section 343(q) governs information that must be disclosed
23 about certain nutrients in food products -- principally in the
24 nutrition box area. Section 343(r) discusses "nutrition levels and
25 health-related claims" about food products made anywhere on their
26 labels. It governs all voluntary statements about nutrition
27 content or health information that a manufacturer includes on the
28 food label or packaging. The Food and Drug Administration ("FDA")

1 has classified these nutrient claims as "express" (e.g., "100
2 calories"), "implied" (e.g., "high in oat bran"), and "health
3 claims," which "characteriz[e] the relationship of any substance to
4 a disease or health-related condition." 21 C.F.R. §§ 101.13,
5 101.14; see also Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d
6 1111, 1116-17 (N.D. Cal. 2010) (describing the statutory scheme).
7 Section 343(r) clarifies that it does not govern nutrition content
8 claims made under Section 343(q) (i.e., inside the nutrition box),
9 though an accompanying regulation, 21 C.F.R. § 101.13, clarifies
10 that "[i]f such information is declared elsewhere on the label or
11 in labeling, it is a nutrition content claim and is subject to the
12 requirements for nutrient content claims [under Section 343(r)]."
13 See Chacanaca, 752 F. Supp. 2d at 1117.

14 **B. Plaintiffs' Claims Against PepsiCo**

15 Plaintiffs name PepsiCo as a defendant, but they never explain
16 exactly how PepsiCo, as Frito-Lay's parent company, is liable for
17 Frito-Lay's activity. To cure this problem, Plaintiffs ask the
18 Court to take judicial notice of a website purported to be
19 published by PepsiCo, on which PepsiCo allegedly directs consumers
20 to Frito-Lay's website. See ECF No. 35 (Pl.'s Response to Def.'s
21 RJN) at 1-2, Exs. 2-3. Plaintiffs also claim in their opposition
22 brief that they alleged PepsiCo to have jointly and unlawfully
23 labeled the misbranded products. Opp'n at 4-5 (citing FAC ¶¶ 2-4).

24 The Court DENIES Plaintiffs' request for judicial notice of
25 these documents, made in response to Defendants' RJN, as an
26 impermissible attempt to amend the pleadings. Plaintiffs did not
27 plead anything about these particular websites in their FAC.
28 Rather, they now attempt to supply new facts in their opposition

1 brief and their response to Defendants' RJN. The Court declines to
2 allow this practice. See, e.g., Schneider v. Cal. Dep't of
3 Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("[A] court
4 may not look beyond the complaint to . . . a memorandum in
5 opposition to a defendant's motion to dismiss."). However, the
6 Court takes judicial notice of the exhibits attached to Plaintiff's
7 opposition, which Defendants did not oppose, since those documents
8 -- FDA complaint letters, part of an FDA brochure, and a Lay's
9 Classic Potato Chips label -- are all either part of the public
10 record or incorporated by reference into the FAC. See Opp'n Exs.
11 1-7.

12 Plaintiffs' actual allegations are plainly that "Defendants"
13 made false claims about their products in a SEC filing and on an
14 unidentified website. FAC ¶¶ 2-4. These allegations fail to rise
15 above "threadbare recitals" of legal conclusions even when the
16 Court construes them most liberally. See Iqbal, 556 U.S. at 678.
17 The Court finds these pleadings insufficient to show that PepsiCo
18 is properly named as a defendant in this case. Plaintiffs' claims
19 against PepsiCo are DISMISSED with leave to amend. Plaintiffs may
20 amend to plead how PepsiCo is responsible for the allegedly
21 actionable conduct at issue here.

22 **C. Standing**

23 Plaintiffs plead that they bought five different Frito-Lay
24 products, but their claims appear to be based on a much wider
25 variety of products that they do not specify in their complaint,
26 including "other varieties of potato chips, corn-based snacks like
27 Cheetos and Fritos, and other types of salty snacks." Opp'n at 4;
28 see also FAC ¶ 1 (challenging "potato chips and other snack food

1 products . . . sold by [Frito-Lay]"). Defendants argue that
2 "Plaintiffs' standing arguments sweep far too broadly," because
3 Plaintiffs allege that they have standing to bring their case based
4 on an array of products that they do not even name. Reply at 1-2.
5 At this point, however, it is unnecessary for the Court to address
6 the issue of standing for these products: as discussed infra,
7 Plaintiffs' claims as to the unidentified products fail for lack of
8 specificity under Rule 9(b). See, e.g., Jones v. Conagra Foods,
9 Inc., -- F. Supp. 2d --, 2012 WL 6569393, at *11 (N.D. Cal. Dec.
10 17, 2012) (dismissing plaintiffs' claims against defendant for
11 failure to meet Rule 9(b)'s specificity standard because plaintiffs
12 did not provide details about "exactly which products they
13 purchased").

14 **D. Plausibility and Specificity**

15 Defendants argue that the entire FAC sounds in fraud and must
16 therefore meet the heightened pleading standard of Rule 9(b)
17 because it alleges a continuous course of false, deceptive, and
18 misleading activity. See Opp'n at 24-25; MTD at 19-20. Plaintiffs
19 respond that the FAC complies with Rule 9(b) because it is specific
20 enough to give defendants notice of their alleged misconduct, and,
21 separately, that their unlawful business practices claim under the
22 UCL need not comply with Rule 9(b) because it does not sound in
23 fraud. Opp'n at 24.

24 Regarding Plaintiffs' latter point, the rule is that
25 plaintiffs need not satisfy Rule 9(b) as to the UCL's unlawful
26 prong when the basis of their claim does not sound in fraud. See
27 Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1105-06 (9th Cir. 2003).
28 However, when it does, and especially when a plaintiff alleges a

1 unified course of fraudulent conduct that forms the basis of their
2 UCL claims, plaintiffs must plead the UCL claims with specificity.
3 Id. In this case, Plaintiffs base their unlawful business practice
4 claims on Defendants' alleged violations of underlying laws by way
5 of allegedly fraudulent or deceptive labeling and advertising
6 practices. See FAC ¶¶ 176-79. Consequently Plaintiffs' entire
7 FAC, including its unlawful business practices claim, sounds in
8 fraud and must meet Rule 9(b)'s heightened pleading standards. See
9 Kearns, 567 F.3d at 1125; Vess, 317 F.3d at 1103-04. It is true
10 that, as discussed below, the actual likelihood of deception in
11 UCL, FAL, and CLRA cases is judged by a "reasonable consumer"
12 standard. See Williams v. Gerber Prods. Co., 552 F.3d 934, 938-40
13 (9th Cir. 2008); Colucci v. ZonePerfect Nutrition Co., No. 12-2907
14 SC, 2012 WL 6737800, at *7 (N.D. Cal. Dec. 28, 2012). However,
15 whether a plaintiff even reaches that point at the pleading stage
16 is governed in part by Rules 8 and 9(b). See, e.g., Colucci, 2012
17 WL 6737800, at *7; Jones, 2012 WL 6569393, at *11.

18 Many of Plaintiffs' allegations fail to meet Rule 9(b)'s
19 heightened pleading standard because Plaintiffs simply fail to
20 provide underlying factual details that give Defendant notice and
21 explain to the Court "the who, what, when, where, and how" of the
22 misconduct charged. Vess, 317 F.3d at 1106. Plaintiffs allege
23 that Defendants made false and misleading statements about a
24 variety of their products, but at no point in their 53-page, 252-
25 paragraph FAC do Plaintiffs provide details about those products,
26 or about the advertisements and websites they frequently quote to
27 support their claims. Nor does Plaintiffs' opposition brief
28 clarify these issues. Plaintiffs simply have not pled which

1 products they purchased in a way sufficient for Defendants to be on
2 notice of the products that are actually at issue. See Jones, 2012
3 WL 6569393, at *11.

4 Further, as to Rule 8, "[t]o survive a motion to dismiss, a
5 complaint must contain sufficient factual matter, accepted as true,
6 to 'state a claim to relief that is plausible on its face,'" Iqbal,
7 556 U.S. at 663 (quoting Twombly, 550 U.S. at 370), and the
8 critical facts must be pled as part of the "short and plain
9 statement of the claim showing that the pleader is entitled to
10 relief," Fed. R. Civ. P. 8. Plaintiffs' claims about unpurchased
11 or unnamed products do not rise to this level: given the variation
12 in food labeling even among the Named Products, the Court cannot
13 assume that all of the products at issue are mislabeled even if
14 Plaintiffs' pleadings are taken as true.

15 Despite Plaintiffs' pleading defects, Defendants gamely
16 address Plaintiffs' claims, supplying the labels toward which
17 Defendants assume Plaintiffs' allegations are addressed. See MTD
18 at 7-21; Reply at 5-12; Def.'s RJN Exs. B-F. Plaintiffs do not
19 object to the Court's taking notice of these current labels: they
20 appear to agree that the labels Defendants supply are at least some
21 of the labels at issue in their case. See ECF No. 35 (Pl.'s
22 Response to Def.'s RJN) at 1. The Court therefore assumes that the
23 packaging in Defendants' RJN -- the Named Products' packaging -- is
24 essentially the same packaging that Plaintiffs claim is misleading.
25 As for the one instance in which Plaintiffs argue that there is a
26 material difference in the labels before the Court -- the Lay's
27 Classic Potato Chips labeling and advertisement Plaintiffs include
28 in their FAC at paragraph five, versus different labeling for the

1 same product included in Defendants' RJN -- the Court's analysis
2 below will address both labels, since Plaintiffs claim that both
3 are misleading. See Opp'n at 7.

4 Plaintiffs' claims as to the Named Products are undisturbed.
5 Plaintiffs' claims as to all other products, as well as the
6 unidentified advertisements and web pages, are DISMISSED without
7 prejudice for failure to comply with Rules 8 and 9(b). Plaintiff
8 has leave to amend these claims if it can provide details on what
9 the unnamed but allegedly purchased products, advertisements, or
10 websites were, when they were purchased or viewed, where the
11 allegedly actionable statements appeared, how the statements were
12 misleading, who made the statements, and so forth.

13 **E. Whether Websites Mentioned on Product Labels Constitute**
14 **Labeling**

15 The parties dispute whether statements Defendants make on the
16 www.fritolay.com website can constitute "labeling" of the Named
17 Products under the FDCA. See Opp'n at 19; Reply at 11. Plaintiffs
18 claim that 21 U.S.C. § 321(m) renders the content on the website
19 "labeling," even though none of the website's content actually
20 appears on the labels at issue here, asserting that the FDA has
21 confirmed that "websites are indeed part of a product['s]
22 labeling." Opp'n at 19. Plaintiffs cite no authority for this
23 point. See id.

24 Section 321(m) defines "labeling" as "all labels and other
25 written, printed, or graphic matter (1) upon any article or any of
26 its containers or wrappers, or (2) accompanying such article." The
27 issue here is whether statements made on the www.fritolay.com
28 website "accompany" the Named Products such that they can be

1 classified as "labeling" under the FDCA.

2 It is true that statements not actually printed on a label
3 itself can constitute "labeling" for FDCA purposes. What matters
4 is whether the separate material serves the purpose of labeling,
5 which is to supplement or explain the product. Kordel v. United
6 States, 335 U.S. 345, 349-350 (1950) ("One article or thing is
7 accompanied by another when it supplements or explains it . . . No
8 physical attachment one to the other is necessary. It is the
9 textual relationship that is significant."); Alberty Food Prods.
10 Co. v. United States, 185 F.3d 321, 324-25 (9th Cir. 1950) (citing
11 Kordel for this proposition); see also United States v. Harkonen,
12 No. C 08-0164 MHP, 2009 WL 1578712, at *9 (N.D. Cal. June 4, 2009)
13 (Kordel "remains the leading Supreme Court authority on the scope
14 of the labeling provision."). In this matter, Plaintiffs base
15 their claims on the fact that some of the Named Products include
16 the words "Visit our website @ fritolay.com" in tiny print at the
17 bottom of their back labels. See Def.'s RJN Exs. B-F. From this
18 Plaintiffs claim that Defendants' marketing language on the
19 www.fritolay.com website constitute mislabeling under the FDCA.
20 See, e.g., FAC ¶¶ 42, 60, 102, 127, 129, 152-53.

21 The Court does not find that the language on the
22 www.fritolay.com website constitutes labeling under the FDCA,
23 because as cited by Plaintiffs, none of the website language
24 explains or supplements the individual Named Products such that the
25 website could generally be found to "accompany" the Named Products.
26 See Kordel, 335 U.S. at 349-50. Even though the Named Products'
27 labels ask consumers to visit the website, they do not state that
28 the website will inform consumers of the details of the Named

1 Products' nutritional facts, and none of the language Plaintiffs
2 cite is drawn closely enough to the Named Products themselves to
3 merit the website's being found to constitute "labeling." To the
4 extent that any of Plaintiffs' claims are based on language from
5 the www.fritolay.com website, those claims are DISMISSED with leave
6 to amend if Plaintiffs are able to provide or describe labels or
7 website language constituting "labeling," per above.

8 **F. Defendants' Preemption Arguments**

9 Defendants maintain that Plaintiffs' state law claims as to
10 Defendants' statements that their products contain "No MSG" and "0
11 Grams Trans Fat" are preempted by federal law.

12 The FDCA, as amended by the NLEA, contains an express
13 preemption provision, making clear that state laws imposing
14 labeling requirements not identical to FDA mandates are preempted.
15 See 21 U.S.C. § 343-1(a). "Where a requirement imposed by state
16 law effectively parallels or mirrors the relevant sections of the
17 NLEA, courts have repeatedly refused to find preemption."
18 Chacanaca, 752 F. Supp. 2d at 1118 (citing N.Y. State Restaurant
19 Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 123 (2d Cir. 2009);
20 Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 370 (N.D.
21 Cal. 2010)). The FDA itself appears to endorse this approach,
22 stating: "[I]f the State requirement does the same thing that the
23 Federal law does . . . then it is effectively the same requirement
24 as the Federal requirement . . . [T]he only State requirements that
25 are subject to preemption are those that are affirmatively
26 different from the Federal requirements on matters that are covered
27 by Section 403A(a) of the Act." Final Rule, 60 Fed. Reg. 57076,
28 57120 (Nov. 13, 1995).

1 "This means that plaintiffs' claims need not fail on
2 preemption grounds if the requirements they seek to impose are
3 either identical to those imposed by the FDCA and the NLEA
4 amendments or do not involve claims or labeling information of the
5 sort described in [21 U.S.C.] sections 343(r) and 343(q)."
6 Chacanaca, 752 F. Supp. 2d at 1119. "That is, if the statements at
7 issue are nutrient content claims as contemplated by [21 U.S.C. §
8 343(r)], plaintiffs' deception claims may only go forward if they
9 can show that the statements would also be 'misbranded' under the
10 terms of [the FDCA and NLEA]." Id.

11 i. **"0 Grams Trans Fat" Claims Are Not Preempted**

12 Plaintiffs' claims as to Defendants' "0 Grams Trans Fat"
13 labels are based on a theory that while the claim itself is
14 accurate as to the products' trans fat content, those labels are
15 nevertheless unlawful under 21 C.F.R. § 101.13(h)(1), which states
16 that whenever an express nutrient content claim is made on a food
17 label, that label must bear further disclosures about ingredients
18 that the FDA has found pose diet-related health risks:

19 If a food . . . contains more than 13.0 g of
20 fat, 4.0 g of saturated fat, 60 milligrams
21 (mg) of cholesterol, or 480 mg of sodium per
22 reference amount customarily consumed, per
23 labeled serving, or, for a food with a
24 reference amount customarily consumed of 30
25 g or less . . . per 50 g . . . then that
26 food must bear a statement disclosing that
the nutrient exceeding the specified level
is present in the food as follows: "See
nutrition information for ___ content" with
the blank filled in with the identity of the
nutrient exceeding the specified level,
e.g., "See nutrition information for fat
content."

27 Plaintiffs clarify that Defendants violate this provision by
28 making "0 Grams Trans Fat" claims even though their products

1 contain more than 13 grams of fat. FAC ¶ 84. As Plaintiffs
2 allege, Defendants' labeling "bears a statement telling consumers
3 to 'see nutrition facts for saturated fat info,'" even though the
4 total fat level is also high, "thus misdirecting consumers to a
5 nutrient in which the product is low, while failing to draw their
6 attention to the harmful levels of the nutrient (total fat) they
7 are mandated by law to disclose." Id. According to Plaintiffs'
8 theory, whenever Defendants label a food product with "0 Grams
9 Trans Fat," the accompanying statement under 21 C.F.R. § 101(h)(1)
10 should say something like "See nutrition facts for saturated fat
11 and total fat info," thereby including all of the nutrients that
12 would be required per 21 C.F.R. § 101(h)(1). See FAC ¶ 84; Opp'n
13 at 7-16.

14 Defendants argue that all claims based on such "0 Grams Trans
15 Fat" statements are preempted by the FDCA. See MTD at 11-13; Reply
16 at 8-9. They base this argument primarily on two recent decisions
17 from this Court: Carrea v. Dreyer's Grand Ice Cream, Inc., No. 10-
18 1044 JSW, 2011 WL 159380 (N.D. Cal. Jan. 10, 2011), aff'd, 475 Fed.
19 App'x 113 (9th Cir. 2012), and Delacruz v. Cytosport, No. 11-3532
20 CW, 2012 WL 2563857 (N.D. Cal. June 28, 2012). Both cases are
21 distinguishable and inapposite to the preemption discussion.

22 In Carrea, the plaintiff's "0 Grams Trans Fat" claim was based
23 on the theory that, since the product in question actually
24 contained more than zero but less than half a gram of trans fat,
25 the defendants could not label the food product as "0g Trans Fat."
26 See Carrea, 2011 WL 159380, at *3. However, FDA regulations
27 explicitly stated that "If the serving [in question] contains less
28 than 0.5 gram, the content, when declared, shall be expressed as

1 zero." Id. (citing 21 C.F.R. § 101.9(c)(2)(ii)). Since
2 plaintiff's state law claims in Carrea imposed labeling
3 requirements not identical to the FDA's promulgations, this Court
4 found that they were preempted per the FDCA as amended by the NLEA.
5 See id. at *3-4. In other words, in Carrea, the plaintiffs had
6 tried to impose an obligation that was explicitly disclaimed by FDA
7 regulations, and so its imposition through state law was held to be
8 preempted. See id.

9 In Delacruz, the plaintiff claimed that a nutrition bar's
10 statement of "0g Trans Fat" was actionable because the bar
11 contained "more than four grams of saturated fat and its label
12 omits the disclosure statement 'See nutrition information for
13 saturated fat content.'" 2012 WL 2563857, at *4. This Court found
14 that the "0g Trans Fat" statement, while an "alleged distraction,"
15 did not "amount to a false statement or misrepresentation and,
16 thus, [was] not an actionable claim." Id. That holding had
17 nothing to do with federal preemption: it concerned whether the
18 plaintiff had adequately pled one of her claims.

19 The Court finds that Plaintiffs' claims are in line with
20 federal law and regulations. Since Plaintiffs' state law claims
21 rely on statutes that explicitly incorporate federal law and
22 regulations without modification,³ and since those claims also do
23 not attempt to impose stricter requirements than those laws or
24 regulations, Plaintiffs' state law claims are not preempted. These
25 claims are all based on the theory that by not complying with the
26 relevant federal laws and regulations, Defendants' labels mislead

27 ³ Plaintiffs' state law claims are based on California's Sherman
28 Food, Drug, and Cosmetic Act ("Sherman Act"), Cal. Health & Safety
Code § 109875 et seq., which adopts and incorporates the FDCA.

1 and deceive consumers. The Court evaluates whether they survive a
2 Rule 12(b)(6) motion below.

3 **ii. Plaintiffs' "No MSG" Claims Are Not Preempted**

4 Plaintiffs' "No MSG" allegations are based on the fact that
5 some of the Named Products -- apparently just Lay's Honey Barbecue
6 Potato Chips and Lay's Mesquite BBQ Potato Chips -- contain
7 ingredients like torula yeast and yeast extract, which are sources
8 of monosodium glutamate ("MSG") despite not technically being MSG.
9 See FAC ¶¶ 59-72.

10 Defendants argue that the FDA's formal regulation on MSG
11 labeling provides that "[a]ny monosodium glutamate used as an
12 ingredient in food shall be declared by its common or usual name
13 'monosodium glutamate,'" 21 C.F.R. § 101.22(h)(5), while "sources
14 of MSG," like yeast extract, must be labeled according to their
15 common names, like "yeast extract" or "hydrolyzed protein," see,
16 e.g., id. §§ 101.22(h)(7) (protein hydrolysates), 184.1983 (baker's
17 yeast extract). Defendants conclude that their labels are
18 therefore proper: Named Products like Cheetos that contain MSG are
19 not labeled as having "No MSG," Def.'s RJN Ex. E, while Named
20 Products like Lay's Kettle Cooked Mesquite BBQ Potato Chips, Def.'s
21 RJN Ex. D, which contain yeast extract and torula yeast, state
22 those ingredients' common names in the nutrition box and include a
23 "No MSG" statement on the label.

24 However, Plaintiffs' opposition brief cites a November 19,
25 2012 FDA statement, made on the FDA's website section regarding
26 MSG, that purportedly clarifies the FDA's regulations here:

27 FDA requires that foods containing added MSG
28 list it in the ingredient panel on the
packaging as monosodium glutamate. However,

1 MSG occurs naturally in ingredients such as
2 hydrolyzed vegetable protein, autolyzed
3 yeast, hydrolyzed yeast, yeast extract, soy
4 extracts, and protein isolate, as well as in
5 tomatoes and cheeses. While FDA requires
6 that these products be listed on the
7 ingredient panel, the agency does not
require the label to also specify that they
naturally contain MSG. However, foods with
any ingredient that naturally contains MSG
cannot claim "No MSG" or "No added MSG" on
their packaging. MSG also cannot be listed
as "spices and flavoring."

8 Opp'n Ex. B. This statement, made several months after Defendants
9 filed their motion to dismiss, could save Plaintiffs' state law
10 claims from preemption if it is a binding regulation, since in that
11 case Plaintiffs' claims would be in line with federal law. The
12 issue here is whether the above statement is binding and entitled
13 to deference by the Court.

14 Defendants claim that because the above FDA statement is a
15 "nonbinding, informal guidance that does not alter the FDA's formal
16 regulatory scheme," because it was not preceded by notice,
17 opportunity for public comment, or expert testimony. Reply at 13
18 (citing Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) for
19 the principal that some agency action that is not the product of
20 formal adjudication or rulemaking lacks the force of law).
21 Defendants argue that the Court owes the FDA's statement no
22 deference under Auer v. Robbins, 519 U.S. 452, 461 (1997), because
23 the language of the regulation was not ambiguous and the FDA's
24 statement on its website "does not purport to interpret any
25 regulation." Reply at 13 n.10. Defendants state that "the [FDA's
26 statement on its website] does not purport to interpret any
27 regulation," but the Court finds that it does: the regulations in
28 question are the FDA's labeling requirements for MSG as a

1 particular ingredient and ingredients that are sources of MSG.

2 "[W]here an agency interprets its own regulation, even if
3 through an informal process, its interpretation of an ambiguous
4 regulation is controlling under Auer unless 'plainly erroneous or
5 inconsistent with the regulation.'" Bassiri v. Xerox Corp., 463
6 F.3d 927, 930 (9th Cir. 2006) (quoting Auer, 519 U.S. at 461). The
7 threshold question is whether the FDA's regulation on MSG and
8 sources of MSG was ambiguous. Id. at 931. In Bassiri, the Ninth
9 Circuit addressed whether a Department of Labor regulation was
10 ambiguous and found that it was, because the term at issue there,
11 "normal rate of compensation," "was left open to . . . various
12 interpretations" by the agency, the district court, and the
13 parties. Id.

14 In this case, the regulations have at least two possible
15 interpretations. The regulations might suggest that since the FDA
16 requires each type of ingredient to be listed with its proper name,
17 a "No MSG" statement would not be misleading under the regulations
18 because "MSG" means only "MSG" as an individually named ingredient.
19 Alternatively, the regulations might be interpreted to forbid such
20 a statement because they clearly acknowledge that MSG is just one
21 type of free glutamate, meaning that "No MSG" would be misleading
22 if the product contained another type of free glutamate other than
23 MSG despite properly providing that ingredient's name.

24 Under these circumstances, the FDA's statement on its website
25 appears to be its own interpretation of an ambiguous regulatory
26 scheme, and the Court finds that it owes the FDA's statement
27 deference under Auer, since the FDA's clarifying statements do not
28 appear "plainly erroneous or inconsistent with the regulation," nor

1 are they based on impermissible constructions of the governing
2 statute. Auer, 519 U.S. at 457, 461. The FDA made clear that even
3 though MSG and ingredients that are sources of MSG must be labeled
4 by their proper names, a manufacturer cannot say that a product
5 containing an ingredient that is a source of MSG, like torula
6 yeast, therefore contains "No MSG."

7 Plaintiffs' state law claims about "No MSG" statements are
8 therefore not preempted by federal law.⁴

9 **G. Plaintiffs' Surviving Claims as to Plaintiffs' UCL, FAL,**
10 **and CLRA Actions**

11 Plaintiffs' claims as to their purchases of the Named Products
12 remain in the case. Defendants were cognizant enough of these
13 products and their labels to respond to Plaintiffs' claims about
14 them in detail, and in any event, Plaintiffs meet the "who, what,
15 when, where, and how" standard as to those products per Rule 9(b).
16 The Court first considers Plaintiffs' allegations about each type
17 of allegedly actionable statement and whether Plaintiffs have
18 sufficiently pled their UCL, CLRA, and FAL claims based on these
19 statements. Defendants do not argue that Plaintiffs fail to plead
20 falsity, reliance, or injury: their contentions are essentially
21 that none of the statements in question are misleading as a matter
22 of law.

23 The CLRA, FAL, and UCL, which are the basis of Plaintiff's
24 first through sixth causes of action, are California consumer
25 protection statutes. The UCL makes actionable any "unlawful, unfair

26 ⁴ While the Court finds that the regulatory statement addressed in
27 this Section is binding and entitled to deference, the parties have
28 yet to address the issue of how, if at all, such a clarification
should apply retroactively to Defendants' statements made during
the Class Period, prior to the FDA's statements.

1 or fraudulent business act or practice." Cal. Bus. & Prof. Code §
2 17200. The FAL makes it unlawful to make or disseminate any
3 statement concerning property or services that is "untrue or
4 misleading." Id. § 17500. The CLRA also prohibits "unfair methods
5 of competition and unfair or deceptive acts or practices." Cal.
6 Civ. Code § 1770.

7 False advertising and unfair or fraudulent business practices
8 claims under the UCL, FAL or CLRA are governed by the "reasonable
9 consumer" test. Williams, 552 F.3d at 938 (citing Freeman v. Time,
10 Inc., 68 F.3d 285, 289 (9th Cir. 1995)). Under the reasonable
11 consumer standard, a plaintiff must "show that members of the
12 public are likely to be deceived." Id. (quotation marks and
13 citations omitted). The California Supreme Court has recognized
14 "that these laws prohibit not only advertising which is false, but
15 also advertising which[,] although true, is either actually
16 misleading or which has a capacity, likelihood, or tendency to
17 deceive or confuse the public." Id. at 938 (quoting Kasky v. Nike,
18 Inc., 45 P.3d 243, 250 (Cal. 2002)) (internal quotations omitted).

19 Generally, the question of whether a business practice is
20 deceptive presents a question of fact not suited for resolution on
21 a motion to dismiss. See id. However, the court may in certain
22 circumstances consider the viability of the alleged consumer law
23 claims based on its review of the product packaging. See Werbel v.
24 Pepsico, Inc., No. C 09-04456 SBA, 2010 WL 2673860, at *3 (N.D.
25 Cal. July 2, 2010). "Thus, where a court can conclude as a matter
26 of law that members of the public are not likely to be deceived by
27 the product packaging, dismissal is appropriate." Id. (citing
28 Sugawara v. Pepsico, Inc., No. 2:08-CV-01335-MCE-JFM, 2009 WL

1 1439115, at *3-4 (E.D. Cal. May 21, 2009) (finding that the
2 packaging for Cap'n Crunch cereal and its use [of] the term "Crunch
3 Berries" was not misleading); see also, e.g., Videtto v. Kellogg
4 USA, No. 2:08-cv-01324-MCE-DAD, 2009 WL 1439086, at *2 (E.D. Cal.
5 May 21, 2009) (dismissing UCL, FAL and CLRA claims based on
6 allegations that consumers were misled into believing that "Froot
7 Loops" cereal contained "real, nutritious fruit").

8 This Order addresses Plaintiffs' unjust enrichment and
9 warranty claims separately.

10 **i. "All Natural" Claims**

11 The following products bear a seal stating "Made with ALL
12 NATURAL Ingredients," according to the labels supplied in
13 Defendants' RJN: Lay's Classic Potato Chips, Lay's Kettle Cooked
14 Mesquite BBQ Potato Chips, and Fritos Original Corn Chips. The
15 other Named Products do not include that seal and are therefore
16 excluded from this discussion.

17 Plaintiffs explain that they base their "All Natural"
18 allegations largely on the FDA's interpretation of "natural" as
19 being truthful and not misleading when "nothing artificial or
20 synthetic . . . has been included in, or has been added to, a food
21 that would not normally be expected to be in the food." 58 Fed.
22 Reg. 2302, 2407 (Jan. 6, 1993). Plaintiffs allege that because
23 some of Defendants' products contain "artificial and unnatural
24 maltodextrin, ascorbic acid[,], citric acid, and caramel color in
25 the products," Defendants' use of "All Natural" language is
26 unlawful. Opp'n at 23-24. Defendants respond that they do not use
27 "All Natural" in a vacuum, since the full phrase is indeed "Made
28 with ALL NATURAL Ingredients." Reply at 8-11. Defendants assert

1 that no reasonable consumer would be misled by the phrase because,
2 in context -- including the "made with . . ." language and the
3 nutrition box -- the label only states that the product includes
4 some all-natural ingredients, in this case potatoes and natural
5 oils. See id. Defendants assert that a reasonable consumer, as a
6 matter of law, would read the statement in that context and sate
7 any further curiosity by reading the nutrition box. See id.

8 The Ninth Circuit provides guidance on how district courts
9 should approach claims like this one:

10 We disagree . . . that reasonable consumers
11 should be expected to look beyond misleading
12 representations on the front of the box to
13 discover the truth from the ingredient list
14 in small print on the side of the box
15 We do not think that the FDA
16 requires an ingredient list so that
17 manufacturers can mislead consumers and then
18 rely on the ingredient list to correct those
19 misinterpretations and provide a shield for
20 liability for the deception. Instead,
21 reasonable consumers expect that the
22 ingredient list contains more detailed
23 information about the product that confirms
24 other representations on the packaging.

25 Williams, 552 F.3d at 939.

26 In light of Williams, Defendants' argument fails. The label
27 is ambiguous because the phrase "all natural," lacking a hyphen,
28 could suggest either that the labeled product is exclusively
natural or that the product simply includes some all-natural
ingredients. Defendants urge otherwise, stating that the Court
could find that a reasonable consumer would ascribe significance to
the "made with . . ." qualifier and not be misled by the label, but
the Court does not find the choice so obvious as a matter of law,
and none of Defendants' cases are precisely on point. See, e.g.,
Red v. Kraft Foods, Inc., No. CV 10-1028-GW(AGRx), 2012 WL 5504011,

1 at *4 (C.D. Cal. Oct. 25, 2012) (obvious as a matter of law that no
2 reasonable consumer would think that a box of crackers would not be
3 composed primarily of fresh vegetables); Hairston v. South Beach
4 Beverages Co., Inc., No. CV 12-1429-JFW(DTBx), 2012 WL 1893818, at
5 *5 (C.D. Cal. May 18, 2012) (preempted statements about fruit names
6 and vitamins had been removed from the "All Natural," phrases at
7 issue making it "impossible for Plaintiff to allege how the 'all
8 natural' language is deceptive without relying on the preempted
9 statements regarding fruit names and vitamins").

10 While courts may have found it obvious as a matter of law,
11 under the reasonable consumer standard, that crackers are not
12 primarily made of fresh vegetables, Red, 2012 WL 5504011, at *4, or
13 that "Froot Loops" do not contain "real, nutritious fruit,"
14 Videtto, 2009 WL 1439086, at *3, the Court finds that Plaintiffs
15 have adequately pled that a reasonable consumer could interpret a
16 bag of chips claiming to have been "Made with ALL NATURAL
17 Ingredients" to consist exclusively of natural ingredients,
18 contrary to the reality described in the nutrition box. See
19 Williams, 552 F.3d at 939. Even though the nutrition box could
20 resolve any ambiguity, the Court cannot conclude as a matter of
21 law, in the context of a Rule 12(b)(6) motion, that no reasonable
22 consumer would be deceived by the "Made with ALL NATURAL
23 Ingredients" labels.

24 Plaintiffs' "All Natural" claims under the UCL, FAL, and CLRA
25 survive as to the Named Products whose labels bear that statement
26 and include non-natural ingredients. According to the labels
27 before the Court, this is limited to Lay's Kettle Cooked Mesquite
28 BBQ Potato Chips, since neither Lay's Classic Potato Chips nor

1 Fritos Original Corn Chips appear to contain any of the "non-
2 natural" or synthetic ingredients on which Plaintiffs' claims here
3 are premised. Plaintiffs' "All Natural" claims are DISMISSED with
4 leave to amend as to all of the Named Products except Lay's Kettle
5 Cooked Mesquite BBQ Potato Chips.

6 **ii. "No MSG" Claims**

7 This Order explains Plaintiffs' "No MSG" claims in Section
8 IV.F.ii, supra. FDA regulations support Plaintiffs' theory as to
9 why the Named Products featuring "No MSG" labels are actionably
10 misbranded: manufacturers are forbidden from claiming that a
11 product made with an ingredient that contains MSG therefore "No
12 MSG," rendering it both a violation of the underlying regulation
13 and, as Plaintiffs claim, confusing to consumers for some of the
14 Named Products' packaging to state that the product includes "No
15 MSG" when, in fact, it does. Therefore Plaintiffs have
16 sufficiently stated claims under the UCL, FAL, and CLRA as to the
17 Named Products that are actually labeled with the "No MSG" phrase
18 despite including what the FDA has indicated to be sources of MSG.

19 **iii. "0 Grams Trans Fat" Claims**

20 Plaintiffs' "0 Grams Trans Fat" claims are explained in
21 Section IV.F.i, supra. Plaintiffs argue that the "0 Grams Trans
22 Fat" labels are misleading when they were not, per FDA regulations,
23 accompanied with a statement directing consumers to the amount of
24 the product's fat content that exceeds the levels described in the
25 pertinent regulation, 21 C.F.R. § 101.13(h)(1). See FAC ¶¶ 84-99.
26 Plaintiffs state that they relied on these claims and were harmed
27 because they would not have purchased the product had they known
28 that the products also included levels of ingredients that should

1 have been noticed on the front of the label, per 21 C.F.R. §
2 101.13(h)(1), but were omitted. See id.

3 Defendants' response relies mainly on this Court's decision in
4 Delacruz, 2012 WL 2563857, at *8. In Delacruz, this Court
5 dismissed a plaintiff's claims as to a "0 Grams Trans Fat"
6 statement on a nutrition bar, holding that even though that
7 statement was not accompanied by a 21 C.F.R. § 101.13(h)(1)
8 disclosure of any sort, the statement was true, and the distraction
9 the statement posed relative to fat and saturated fat contents
10 constituted neither a false statement nor a misrepresentation. See
11 id. at *8-10.

12 Considering a motion to dismiss in this case, which has a
13 similar but ultimately distinct fact pattern from Delacruz, the
14 Court cannot conclude as a matter of law that Plaintiffs' "0 Grams
15 Trans Fat" claims would not be misleading or deceptive to a
16 reasonable consumer. See Williams, 552 F.3d at 939. Having
17 considered the FAC, as well as the properly noticed FDA letters and
18 regulations, the Court finds that Plaintiffs have sufficiently
19 alleged that the "0 Grams Trans Fat" statement was deceptive
20 because, accompanied by a disclosure of at least one of the
21 ingredients that 21 C.F.R. § 101.13(h)(1) requires to be disclosed,
22 they and other reasonable consumers would think that the statements
23 on the labels make accurate claims about the labeled products'
24 nutritional content when, in fact, they do not. See FAC ¶¶ 82-99.
25 Accordingly, all Named Products whose "0 Grams Trans Fat" statement
26 is not accompanied by statements that are fully compliant with 21
27 C.F.R. § 101.13(h)(1) remain in the case.

28 ///

1 **iv. "Low Sodium," "Healthy," and Other Nutrient Claims**

2 It is undisputed that none of the Named Products include "low
3 in sodium," "healthy," or beneficial nutrient labels on their
4 packaging. FAC ¶¶ 100-34. Plaintiffs' allegations are all based
5 on uncited websites or advertisements, which the Court has already
6 found are either not specified under Rules 8 or 9(b), not
7 judicially noticeable in this matter, or are not "labeling" for any
8 product as a matter of law. See id.; Opp'n at 19-22. Plaintiffs
9 have therefore not pled a cause of action based on any of these
10 claims. These claims are DISMISSED with leave to amend.

11 **H. Plaintiffs' Warranty Claims**

12 Plaintiffs asserted breaches of warranty under the federal
13 Magnuson-Moss Warranty Act ("MMWA") and California's Song-Beverly
14 Consumer Warranty Act ("Song-Beverly"). Defendants argue that
15 these claims fail as a matter of law. MTD at 22-23. They are
16 right. Under their MMWA claim, Plaintiffs allege that Defendants'
17 "All Natural," "No MSG," and other health and nutrient content
18 claims constitute express written warranties, which MMWA defines
19 as:

20 any written affirmation of fact or written
21 promise made in connection with the sale of
22 a consumer product by a supplier to a buyer
23 which relates to the nature of the material
24 or workmanship and affirms or promises that
25 such material or workmanship is defect free
26 or will meet a specified level of
27 performance over a specified period of time.

28 15 U.S.C. § 2301(6) (A) (emphasis added). The MMWA's disjunctive
language ("or") identifies two kinds of written warranties, the
first warranting a "defect free" product and the second warranting
a product that will "meet a specified level of performance over a
specified period of time." Plaintiffs also allege that Defendants

1 breached their implied warranties under the MMWA. While Defendants
2 argue that Plaintiffs simply have not pled claims under the MMWA,
3 Plaintiffs make no more than a conclusory defense of these claims
4 in their opposition brief. See Opp'n at 25 n.13.

5 The Court finds that Plaintiffs' claim fails as a matter of
6 law. Plaintiffs allege that Defendants' package labels are
7 warranties that Defendants breached by selling, at premium prices,
8 food products whose labels do not comply with federal or California
9 labeling requirements. FAC ¶¶ 247-49. This Court has held
10 repeatedly that such arguments are meritless, since product
11 descriptions like "All Natural" labels "do not constitute
12 warranties against a product defect." Astiana v. Dreyer's Grand
13 Ice Cream, Inc., No. C 11-2910 EMC, 2012 WL 2990766, at *3 (N.D.
14 Cal. July 20, 2012), mot. to certify appeal denied, No. C 11-2910
15 EMC, 2012 WL 3892391 (Oct. 12, 2012); see also, e.g., Colucci, 2012
16 WL 6737800, at *5-6; Jones, 2012 WL 6569393, at *12-13 (citing
17 cases). Further, none of the labels promise that the product "will
18 meet a specified level of performance over a specified period of
19 time." The labels were, at most, product descriptions.

20 Plaintiffs' MMWA claims are DISMISSED WITH PREJUDICE. Amendment
21 could not save these claims and would be prejudicial to Defendants.

22 Plaintiffs' Song-Beverly claims also fail. Plaintiffs allege
23 that Defendants' products contain express and implied warranties
24 under Song-Beverly, which Defendants breached by selling misbranded
25 products at premium prices. FAC ¶¶ 237-40. Song-Beverly defines
26 an "express warranty" as "[a] written statement arising out of a
27 sale to consumer of a consumer good pursuant to which the
28 manufacturer, distributor, or retailer undertakes to preserve or

1 maintain the utility or performance of the consumer good or provide
2 compensation if there is a failure in utility or performance."
3 Cal. Civ. Code § 1791.2 (emphasis added). Implied warranties under
4 Song-Beverly likewise attach to "consumer goods." Id. § 1791.1. A
5 "consumer good" is "any new product or part thereof that is used,
6 bought, or leased primarily for personal, family, or household
7 purposes, except for . . . consumables." Id. § 1791(a).

8 Plaintiffs' claims under Song-Beverly are deficient as a
9 matter of law: Song-Beverly does not provide for express or implied
10 warranties as to consumables, and so by definition Plaintiff cannot
11 plead breaches of those warranties under Song-Beverly as to any of
12 Defendants' food products. Plaintiffs' Song-Beverly claims are
13 DISMISSED WITH PREJUDICE for the same reason Plaintiffs' MMWA
14 claims were.

15 **I. Plaintiffs' Restitution Based on Unjust Enrichment Claim**

16 Defendants argue that Plaintiffs' cause of action for
17 restitution based on unjust enrichment fails as a matter of law
18 because (1) "there is no cause of action in California for unjust
19 enrichment," (2) Plaintiffs have not identified an unjustly
20 conferred benefit warranting redress, (3) Plaintiffs cannot allege
21 a quasi-contractual remedy because they alleged that their
22 relationship with Defendants was governed by binding express
23 warranties, and (4) Plaintiffs' request for equitable relief is
24 improper because there is an adequate remedy at law under the
25 statutes Plaintiffs cite. MTD at 21-22. Plaintiffs respond that
26 they have properly pled an unjust enrichment claim because they
27 alleged that Defendants were enriched by means of "unlawful,
28 fraudulent, and misleading labeling." Opp'n at 25 (citing FAC ¶¶

1 239, 246-49). In support of this response Plaintiffs cite Colucci,
2 in which this Court held that unjust enrichment had been properly
3 pled because those plaintiffs pled it in the alternative. 2012 WL
4 6737800, at *10.

5 Plaintiffs did not plead that their unjust enrichment claim is
6 based on quasi-contract or pled in the alternative. See FAC ¶¶
7 228-31. They simply assert that because they pled the elements
8 correctly, they are entitled to the claim. Opp'n at 25. This is
9 wrong. Cf. Colucci, 2012 WL 6737800, at *10 ("[C]laims for
10 restitution or unjust enrichment may survive the pleading stage
11 when pled as an alternative avenue of relief, though the claims, as
12 alternatives, may not afford relief if other claims do."). This
13 claim is DISMISSED with leave to amend if Plaintiffs wish to plead
14 it in the alternative.

15
16 **V. CONCLUSION**

17 For the reasons explained above, Defendants Frito-Lay North
18 America, Inc. and PepsiCo, Inc.'s motion to dismiss Plaintiffs
19 Markus Wilson and Doug Campen's first amended complaint is GRANTED
20 in part and DENIED in part. The Court orders as follows:

- 21 • Plaintiffs' claims as to PepsiCo are DISMISSED with leave
22 to amend.
- 23 • Plaintiffs' claims as to all products except the products
24 named and described in the complaint, Lay's Classic
25 Potato Chips, Lay's Honey Barbeque Potato Chips, Lay's
26 Kettle Cooked Mesquite BBQ Potato Chips, Cheetos Puffs,
27 and Fritos Original Corn Chips (collectively the "Named
28 Products"), are DISMISSED with leave to amend.

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- As to the Named Products and Defendant Frito-Lay, Plaintiffs' UCL, CLRA, and FAL claims based on all statements except the "All Natural," "No MSG," and "0 Grams Trans Fat" statements are DISMISSED with leave to amend. Plaintiffs' claims as to those three statements are undisturbed. Claims as to these statutes that are based on content appearing on websites or advertisements, including the "low sodium," health claims, and "other" claims, are DISMISSED with leave to amend.
- Plaintiffs' claim for breaches of warranties under the Magnuson-Moss Warranty Act and the Song-Beverly Consumer Warranty Act are DISMISSED WITH PREJUDICE.
- Plaintiffs' claim for restitution based on unjust enrichment is DISMISSED with leave to amend.

Plaintiffs may amend these claims if they can specify exactly which products, regulations or laws, and other relevant elements are at issue, and otherwise correct the deficiencies described above. Plaintiffs are instructed to keep their pleadings short, plain, and plausible. Boilerplate pleadings are strongly discouraged.

Plaintiffs have thirty (30) days from this Order's signature date to file an amended complaint, or the deficient claims may be dismissed with prejudice.

IT IS SO ORDERED.

Dated: April 1, 2013


UNITED STATES DISTRICT JUDGE