UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARY SWEARINGEN, et al.,

Plaintiffs,

v.

LATE JULY SNACKS LLC,

Defendant.

Case No. 13-cv-04324-EMC

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Docket No. 101

I. INTRODUCTION

Plaintiffs Mary Swearingen and Robert Figy filed this class action complaint against Defendant Late July Snacks challenging Defendant's practice of labeling its products with the term "evaporated cane juice" ("ECJ") which Plaintiffs assert is a misleading term for sugar. Currently pending before the Court is Defendant's motion to dismiss Plaintiff's Second Amended Complaint. Docket No. 101 ("Motion"). The Court **DENIES** the motion.

II. BACKGROUND

A. California and Federal Laws Regulating Food Labeling

Food manufacturers in California must comply with identical state and federal laws and regulations that govern the labeling of food products. Foremost among these is the federal Food Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq*. ("FDCA"), including its food labeling regulations. 21 C.F.R. § 101 *et seq*. Pursuant to California Health & Safety Code § 110100, California's Sherman Law adopts and incorporates the FDCA, stating that "[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state." Under the FDCA, food is "misbranded" if "its labeling is false or misleading in any

particular," or if it does not contain certain information on its label or its labeling. 21 U.S.C. § 403(a).

The FDCA requires that ingredients be listed by their common or usual names, which are the names established by common usage or by regulation. 21 C.F.R. § 104(a)(1); 21 C.F.R. § 102.5. The position of the Food and Drug Administration ("FDA") is that "evaporated cane juice" is not the common or usual name of any sweetener (*e.g.*, sugar). In 2009, the FDA issued *Guidance for Industry: Ingredients Declared As Evaporated Cane Juice, Draft Guidance* ("Draft Guidance"), 2009 WL 3288507. According to the Draft Guidance, the term ECJ is "false and misleading" because it "fails to reveal the basic nature of the food and its characterizing properties (i.e., that the ingredients are sugars or syrups) as required by 21 C.F.R. § 102.5." *Id.* at *3; 21 U.S.C. 343(a)(1). The FDA did not initially finalize its draft guidance. On March 4, 2014, the FDA reopened the comment period on the Draft Guidance with the intent to "revise the draft guidance, if appropriate, and issue it in final form." *See* Docket No. 57 (Order on Supp. Briefing); Docket No. 53-1 (Def. Second Request for Judicial Notice, Ex. A, *FDA Notice to Reopen Comment Period*). On May 25, 2016, the FDA issued its final guidance on the use of the term "evaporated cane juice," titled "Ingredients Declared as Evaporated Cane Juice: Guidance for Industry" ("Final Guidance"). Docket No. 92. The Final Guidance states that "the common or usual name for an ingredient labeled as 'evaporated cane juice' includes the term 'sugar' and does not include the term 'juice.'" *Id.* at 7. This is because the "basic nature" of ECJ is a "sugar." *Id.*

B. Facts and Procedural History

Late July is a producer of retail food products. Docket No. 99 (Second Amended Complaint ("SAC")) ¶ 21. During part of the period covered by the allegations in this case, Late July manufactured, advertised, marketed, and sold products, such as Late July's Classic Saltines Crackers, Classic Rich Crackers, Sea Salt By The Seashore Multigrain Snack Chips, and other varieties of crackers and snack chips, labeled using the term "evaporated cane juice" on their ingredient lists to thousands of consumers nationwide, including many who reside in California.[1]

[1] Late July no longer uses the term "evaporated cane juice" on their product labels. Between November 2013 and March 2014, Late July replaced the term "evaporated cane juice" with the

SAC ¶¶ 2, 20.

Plaintiffs Mary Swearingen and Robert Figy, citizens of California, bought and purchased Late July products including a variety of crackers and snack chips labeled with ECJ during the Class Period, defined as September 18, 2009 to the present. SAC ¶¶ 2, 19. Plaintiffs are health-conscious consumers who wish to avoid "added sugars" in the products they purchase. *Id.* ¶ 72. As such, they scanned the ingredient lists of the products at issue for forms of added sugar and failed to recognize "evaporated cane juice" as a form of sugar. *Id.* ¶ 73. They would not have bought the products had they known that these products contained "added sugar." *Id.* ¶ 97.

Plaintiffs first filed a class action complaint for equitable and injunctive relief on September 18, 2013. Docket No. 1 (Complaint). On February 3, 2014, Late July moved to dismiss the First Amended Complaint, arguing, in part, that this Court should apply the doctrine of primary jurisdiction based on the FDA's ongoing regulatory proceeding concerning the use of ECJ on food labels. Docket No. 32. Following the FDA's notice that it had reopened the comment period on its draft guidance regarding ECJ, this Court denied in part the motion to dismiss and stayed the action pursuant to the doctrine of primary jurisdiction on May 29, 2014. Docket No. 69.

On July 22, 2016, following the FDA's issuance of its Final Guidance, this Court lifted the stay. Docket No. 98. Plaintiffs filed their Second Amended Complaint shortly thereafter. Docket No. 99. Based on their allegations in the Second Amended Complaint, Plaintiffs brought claims for: (1) violations of California Business & Professions Code § 17200 (Unfair Competition Law or UCL); (2) violations of California Business & Professions Code § 17500 (California False Advertising Law or FAL); (3) violations of California Civil Code § 1750, *et seq.* (Consumer Legal Remedies Act or CLRA); and (4) and unjust enrichment. SAC ¶¶ 151-212. Late July then filed the instant motion to dismiss the Second Amended Complaint. Docket No. 101.

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term "Evaporated Cane Sugar" on all products that had used the term "evaporated cane juice." Since this change, Late July has not manufactured a product with a label bearing the term "evaporated cane juice." Docket No. 106 (Decl. of Paul Drakeford).

III. DISCUSSION

A. Legal Standard

Late July seeks to dismiss Plaintiffs' Second Amended Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Under Rule 12(b)(6), a party may move to dismiss based on the failure to state a claim upon which relief may be granted. A motion to dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering such a motion, a court must take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party, although "conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal." *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). While "a complaint need not contain detailed factual allegations . . . it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. at 556. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than sheer possibility that a defendant acted unlawfully." *Iqbal*, 556 U.S. at 678.

Claims sounding in fraud or mistake are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *see Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy the heightened standard under Rule 9(b), the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Thus, claims sounding in fraud must allege "an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (internal quotation marks omitted). The plaintiff must set forth "what is false or misleading about

a statement, and why it is false." *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir.1994) (en banc), *superseded by statute on other grounds as stated in Ronconi v. Larkin*, 253 F.3d 423, 429 n. 6 (9th Cir. 2001).

B. Plaintiffs' UCL, CLRA, and FAL Claims

As noted above, Plaintiffs assert fraud-based claims under the UCL, FAL, and CLRA.

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Because § 17200 is written in the disjunctive, it establishes "three varieties of unfair competition: practices which are unlawful, unfair, or fraudulent." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone, Co.*, 20 Cal. 4th 163, 180 (1999). Practices are "unlawful" when they violate other laws: § 17200 "borrows" violations of other laws, treating them as unlawful practices that are independently actionable under the UCL. *Id.* at 179 [citations omitted]. Practices are "unfair" when grounded in "some legislatively declared policy or proof of some actual or threatened effect on competition." *Id.* at 186-87. "Unfair," under § 17200, refers to conduct that could violate an antitrust law, that does violate the policy or spirit of such laws, or that could otherwise significantly threaten or harm competition. *Id.* at 187. Practices are "fraudulent" when "members of the public are likely to be deceived"; more specifically, under the fraud prong, "reliance [on the part of the plaintiff] is an essential element of fraud." *Poldolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647-48, *as modified* (Nov. 5, 1996), *as modified* (Nov. 20, 1996); *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009).

The FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal Bus. & Prof. Code § 17500. The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770.

Claims asserting fraud or deception under each of these three statutes are analyzed using the "same objective test, that is, whether 'members of the public are likely to be deceived.'" *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 480 (C.D. Cal. 2012) (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009)); *see also Williams v. Gerber Prod. Co.*, 523 F.3d 934, 938 (9th Cir. 2008), *opinion amended and superseded on denial of reh'g*, 552 F.3d 934 (9th Cir. 2008). Fraud claims under each statute require "proof of reliance on the alleged

misrepresentations or omissions" by the defendant. *In re MyFordTouch Consumer Litigation*, C-13-3072-EMC, Docket No. 301 at 2 (N.D. Cal. 2016) (citing *In re Tobacco II*, 46 Cal. 4th at 328).

Plaintiffs allege that Late July's labeling of its products with the term "evaporated cane juice" is unlawful under the UCL. Motion ¶ 5. As noted above, the Sherman Law adopts and incorporates the federal Food Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq*. ("FDCA"). 21 U.S.C. § 343(a). Under the FDCA, food is "misbranded" if "its labeling is false or misleading in any particular," or if it does not contain certain information on its label or its labeling. 21 U.S.C. § 403(a). So, under the Sherman Law, products are "misbranded" when their "labeling is false or misleading." *See* 21 U.S.C. § 343(a); 21 U.S.C. § 403(a). Plaintiffs contend that Late July's use of the term ECJ was "false and misleading" in light of the FDA's determination that ECJ is not the common or usual name for sugar. SAC ¶ 50-51; Final Guidance at 6.

As an initial matter, the Court rejects Plaintiffs' claim that reliance need not be shown for their claims arising under the "unlawful" prong or any other prong of the UCL in this case. The California Supreme Court has made it clear that, regardless of which prong of the UCL a plaintiff asserts, when the basis of a plaintiff's UCL claim is a claim of misrepresentation, a plaintiff must demonstrate actual reliance on the allegedly deceptive or misleading statements. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326, 327 n.10 (2011).

Plaintiffs next argue that if it is required, reliance can be inferred because Late July's use of ECJ constitutes a "material misrepresentation." Docket No. 107 ("Opposition") at 12:7-8. Under California law, if the plaintiff fails to plead actual reliance, "a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material." *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 977 (1997). A misrepresentation is judged to be "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Engalla*, 15 Cal 4th 951, 977 (1997).

California courts have adopted the "reasonable consumer" standard for adjudicating the materiality of an alleged misrepresentation. *See In re Google AdWords Litig.*, 5:08–CV–3369 EJD, 2012 WL 28068 at *8 (N.D. Cal. Jan. 5, 2012) (citing *Tobacco II*, 46 Cal. 4th at 327); *see*

also Yung Kim v. Gen. Motors, LLC, 99 F. Supp. 3d 1096, 1107 (C.D. Cal. 2015) (explaining that this standard applies to claims under the CLRA, FAL, and UCL). Under the "reasonable consumer" standard, a plaintiff must show that members of the public are likely to be deceived by the business practice. *Brazil v. Dole Food Co.*, 935 F. Supp. 2d 947, 962-63 (9th Cir. 2013). "'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). Rather, the reasonable consumer standard adopts the perspective of the "ordinary consumer acting reasonably under the circumstances." *Id.* at 512.

This court has held that the "reasonable consumer" is not necessarily a "particularly sophisticated consumer." *See Brod v. Sioux Honey Ass'n, Co-op*, 927 F. Supp. 2d 811, 828 (N.D. Cal. 2013). Instead, under the "reasonable consumer" test, Plaintiffs must prove that an ordinary consumer acting reasonably would attach importance to Defendant's ECJ statements, or, alternatively, that Defendant knows or has reason to know that consumers are likely to regard the label statements as important in making purchasing decisions. *Tobacco II*, 51 Cal. 4th at 333 (citing *Engalla*, 15 Cal. 4th 951, 977).

Plaintiffs allege that "reasonable consumers would be, and were, misled in the same manner as plaintiffs" by the use of ECJ and that "reasonable consumers do not consider juice to be a sugar or syrup or a refined sugar." SAC ¶¶ 69, 107. The Court agrees. As Plaintiffs note, added sugar is a known health risk that consumers are advised to avoid by the federal government, as well as by scientific and educational institutions. SAC ¶ 74. The U.S. Department of Health and Human Services and the U.S. Department of Agriculture's 2010 Dietary Guidelines clearly distinguish between "added sugars" and naturally occurring sugars, and state that consumers should either eliminate or greatly limit their consumption of added sugars and foods containing added sugars. SAC ¶ 75. Plaintiffs cite similar statements from the National Institute of Health, the American Heart Association, the Harvard School of Public Health, and others. SAC ¶¶ 82-94.

Given this widespread recognition of the potential dangers of added sugar, a reasonable consumer would likely be concerned with the addition of sugars to snack foods he or she was

considering purchasing, and would therefore attach importance to Late July's use of the term ECJ which is used in lieu of the common term "sugar." Nor is Late July correct that health concerns are unlikely given the generally unhealthful nature of snack foods. The market is replete with healthier alternatives to even traditional snack foods, such as reduced sodium potato chips or sugar-free candy. Consumers who purchase snack foods are not necessarily unconcerned with the relative healthfulness of those foods. Here, a reasonable consumer might well consider a snack food without added sugar to be a healthier alternative to snack foods with added sugar.

Late July further argues that even if Plaintiffs successfully plead that a reasonable consumer would be concerned about "added sugar," Plaintiffs fail to allege facts that would demonstrate that a reasonable consumer would be deceived by the use of ECJ. Reply at 6. Late July argues that because Plaintiffs do not explain how a reasonable consumer would interpret the term "ECJ," their assertion that a reasonable consumer would be deceived is too conclusory to state a claim. Reply at 7.

In fact, however, Plaintiffs do explain how they understood the term. Specifically, they allege that "at the time of purchase the believed ECJ was some type of ingredient that was healthier than sugar due to its inclusion of the word juice and its omission of the words sugar or syrup." SAC ¶ 114. Moreover, this interpretation is consistent with the FDA's rationale for determining that ECJ is a misleading term. As Plaintiffs point out, the FDA's determination was based on the fact that the term ECJ "falsely suggests that the sweeteners are juice," SAC ¶ 105 (quoting Draft Guidance, 2009 WL 3288507 at *1), which is defined by regulation as "aqueous liquid expressed or extracted from one or more fruits or vegetables, purees of the edible portions of one or more fruits or vegetables, or any concentrates of such liquid or puree," 20 C.F.R. § 120.1(a). The Final Guidance further explains that it is the word "juice" that makes the term ECJ "confusingly similar to the more common use of the term 'juice.'" Final Guidance at 3. The FDA points to a Department of Health and Human Services publication noting that "'cane juice' is one of the ingredient names used to hide added sugar in beverages and recommends for health reasons that fruit juice given to children be 100 percent fruit juice without any form of added sugar, including 'cane juice.'" Final Guidance at 6. That the FDA guidance indicates that "evaporated

cane juice" is for that reason a "false and misleading" term implies that a reasonable consumer would be confused by the term ECJ, and that that confusion could affect his or her purchasing decisions.

Late July further argues that this Court should not presume reliance because it is "implausible" that Plaintiffs could have relied on the use of the term ECJ. Courts cannot presume reliance where reliance is impossible or implausible. *See Pratt*, 2015 WL 5770799 at *7; *Caro*, 18 Cal. App. 4th at 668. Specifically, Late July argues that Plaintiffs' allegation of reliance is implausible in light of the fact that Plaintiffs allege in their complaint that proper, non-misleading alternatives to ECJ include the term "dried cane syrup." Given the similarity between "dried cane syrup" and "evaporated cane juice," Late July contends, it is not plausible, absent further factual allegations, that Plaintiffs could have been misled by the latter but nor the former. Motion at 12. In *Kane v. Chobani, Inc.* (*Chobani III*), 973 F. Supp. 2d 1120, 1134 (N.D. Cal. 2014), *vacated on other grounds*, 645 F. App'x 593 (9th Cir. 2016), this Court, considering a similar claim, found that Plaintiffs' repeated acknowledgment that "fruit juice concentrate" is a well-known added sugar undermined their alleged reliance on the word "juice" in "evaporated cane juice" as denoting something "healthy." Here, however Plaintiffs do not allege that that they would have recognized "fruit juice concentrate" as a form of added sugar.[2] And for the reasons discussed above, the term they *do* allege that they would have recognized, "dried cane syrup," is meaningfully different from "evaporated cane juice" because it omits the key confusing word "juice." Evaporated cane juice can be construed as connoting something more healthful than "dried cane syrup."

Plaintiffs' allegations thus meet the reasonable consumer standard. Plaintiffs have alleged sufficient facts to show that a reasonable consumer would share Plaintiffs' concern about added sugar and that a reasonable consumer would be misled by Defendant's misrepresentation. For that reason, Late July's alleged misrepresentation was material, and Plaintiffs' reliance may be presumed.

[2] The SAC does quote various authorities that identify "fruit juice concentrate" as a term denoting added sugar, but it nowhere states that Plaintiffs in this case would have recognized it as such, unlike the term "dried cane syrup."

1. Plaintiffs' Claims Meet the Heightened Pleading Standard Set by Rule 9(b)

Under Rule 9(b), claims sounding in fraud or mistake are subject to heightened pleading requirements, which require plaintiffs alleging fraud to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); s*ee Kearns,* 567 F.3d at 1124. Thus, claims sounding in fraud must allege "an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" *Swartz,* 476 F.3d at 764 (internal quotation marks omitted). The plaintiff must set forth "what is false or misleading about a statement, and why it is false." *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d at 1548 (9th Cir. 1994). This Court has found that Rule 9(b) applies to violations of the UCL under the "unlawful" prong where, as here, the crux of Plaintiffs' "unlawful" UCL claim alleges fraudulent conduct. *See, e.g.*, *Park v. Welch Foods, Inc.*, No. 5:12-CV-06449-PSG, 2013 WL 5405318, at *4–5 (N.D. Cal. Sept. 26, 2013). In *Park*, this Court found that Plaintiffs failed to meet Rule 9(b)'s heightened pleading requirements because they failed to allege "when during the class period, where, how many, or how many times" they purchased the products, whether they were personally exposed to the alleged misrepresentations, and the content of these labels. 2013 WL 5405318, at *4–5.

In *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2011 WL 2111796, at *6 (N.D. Cal. May 26, 2011), this Court found that allegations similar to those in this case met Rule 9(b)'s heightened pleading requirements. In *Astiana*, the plaintiffs claimed that the defendants' statements were allegedly misleading because they did not disclose that their products contained synthetic ingredients. *Id.* The plaintiffs alleged that the "*who*" was the defendants, the "*what*" was the statement that product was "all natural," the "*when*" was "since at least 2006," and "throughout the class period," and the "*where*" was on the product labels. *Id.* This Court found that these allegations sufficiently explained the "who, what, when, where, and how" of the alleged deception. *Id.* at 6. Similarly, in *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889 (N.D. Cal. 2012), where the plaintiffs alleged that ConAgra had deceptively labeled their products with "100% natural" and "organic," among other claims about their products' health benefits, this Court found that the plaintiffs' allegation that they had bought the products "since 2008, and throughout the Class Period," was enough to put ConAgra on notice. *Id.* at 902.

Plaintiffs allegations are sufficient under this standard. Late July places great emphasis on the fact that Plaintiffs do not allege how many times or where they purchased the products during the class period, but these omitted details are unnecessary in light of the purposes behind Rule 9(b). The purposes of Rule 9(b) are to provide defendants with adequate notice to defend the charges against them, to deter plaintiffs from filing complaints merely to enable discovery of unknown wrongs, to prevent reputations from being harmed by baseless fraud charges, and to prohibit plaintiffs from unilaterally imposing social and economic costs without factual basis. *Kearns*, 567 F.3d at 1125 (citing *In re Stacs Elecs. Sec. Litig.*, 89 F.3d at 1405). Alleging the purchase of specific identified products with particular labels at issue "throughout the Class Period" (which commences in a given year) is sufficient to put a defendant on notice of the claims against it. *Jones*, 912 F. Supp. 2d at 902. Requiring Plaintiffs to specify *e.g.*, the specific stores they purchased Late July's products, or the exact dates of purchase, would not materially affect Late July's ability to mount a defense.

In addition, Plaintiffs' allegations in this case are at least as strong as the allegations in *Astiana*, which this court found satisfied Rule 9(b)'s requirements. 2011 WL 2111796, at *6. In *Astiana*, the "who" was the defendants, the "what" was the statement that product was "all natural," the "when" was "since at least 2006" and "throughout the class period," and the "where" was on the product labels. *Id.* The plaintiffs alleged that the statements were misleading because the defendants did not disclose that the product contained synthetic ingredients. *Id.* This Court found that the plaintiffs' allegations sufficiently explained the "who, what, when, where, and how" of the alleged deception. *Id.* at 6. The same is true here.

Plaintiffs' allegations therefore satisfy the heightened pleading requirement of Rule 9(b).

2. Preemption

The FDCA expressly preempts efforts by states to impose certain food labeling requirements that go beyond those required by federal statute or regulation. Specifically, the Act provides that "no State or political subdivision of a State may directly or indirectly establish under any authority . . . any requirement for nutrition labeling of food that is not identical to the requirements" of various sections of the federal statute, including those governing nutritional

labeling (§ 343(q)) and mandating the use of the "common or usual name" of ingredients (§ 343(i)). 21 U.S.C. § 343-1(a). Late July argues that Plaintiffs' claims are preempted, for two reasons. First, it contends that Plaintiffs are, in effect, attempting to impose a requirement to label "added sugar," contrary to the requirements of federal law. Second, it argues that both preemption and due process concerns prohibit states from banning the use of the term "ECJ" during the period prior to the FDA's Final Guidance. The Court rejects each of these contentions.

With respect to the first argument, Late July appears to conflate two separate federal requirements. Plaintiffs argue that the term "ECJ" as used in ingredient lists misled them because they read the lists in an effort to determine whether the products at issue contained "added sugar." Late July points to the fact that 21 U.S.C. § 343(q) contains requirements regarding the provision of information about the amount of sugars and other nutrients in food products, and that 21 C.F.R. § 101.60 contains detailed requirements governing the use of terms like "sugar free." *See* Motion at 18-19. Because none of those requirements mandate differentiation between naturally occurring sugar and added sugar, Late July argues, Plaintiffs' claims impermissibly seek to add an additional requirement to indicate the presence of added sugar.

Late July mischaracterizes Plaintiffs' claims. Plaintiffs have nowhere alleged that Late July was required explicitly to warn of added sugars, nor do they raise any claims pertaining to the labeling of the amount of sugar in the nutrition information, as governed by § 343(q). Instead, Plaintiffs focus on the separate statutory requirement, in both federal and state law, that the *ingredient list* use the "common or usual name" for the various ingredients listed therein. *See* 21 U.S.C. § 343(i); Cal. Health & Safety Code § 110725. ECJ, Plaintiffs contend, is not the common or usual name for sugar, and Late July's labels thus violated both the federal requirement and the identical state requirement. This claim does not seek enforcement of any requirement exceeding those existing under federal law.

Second, Late July argues that because the FDA issued its Final Guidance clarifying that ECJ is not the common or usual name for sugar only in May 2016, Plaintiffs cannot assert liability for the use of that term prior to that date, because to do so would both impose a requirement beyond the federal requirements, resulting in preemption, and would violate due process through

the retroactive application of an agency's interpretation of a regulation. *See* Motion at 20-22. In support of this argument, Defendants rely on two recent district court cases, *Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp. 2d 1134, 1147 (N.D. Cal. 2013) and *Peterson v. ConAgra Foods, Inc.*, No. 13-CV-3158-L NLS, 2014 WL 3741853, at *4 (S.D. Cal. July 29, 2014). *Wilson* and *Peterson* each concern the FDA's disclosure requirements for MSG. Plaintiffs in each case brought mislabeling claims under California law with respect to assertions on various products that they contained "No MSG." During the class periods, the FDA issued a statement clarifying that under its rules, manufacturers were prohibited from using a "No MSG" label on a product as long as any of its ingredients contained MSG. Both courts found that Plaintiffs' claims were barred during the period prior to the FDA statement. The focus in each decision was on due process. *Wilson* emphasized that "Before the FDA's November 2012 clarification, the only information about the FDA's MSG regulations that would have been available to Defendant were warning letters based on specific factual circumstances and a proposed rule that was abandoned. Defendant was simply not on notice during the Class Period that its labels did not comply with the FDA rule." 961 F. Supp. 2d. at 1147. By contrast, in the present case, Late July had clear notice at least as early as 2009 that the FDA considered the term ECJ to be false and misleading. Accordingly, the same fairness and notice considerations are not implicated in the instant case.

Further, both *Wilson* and *Peterson* relied on a Ninth Circuit case, *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008), for the proposition that "retroactive application of a regulatory clarification contravenes due process." *Wilson*, 961 F. Supp. 2d. at 1147. But *AMC* involved an effort by the United States to impose retroactive liability for violating a regulation after a clarification. By contrast, the present cases involve claims under state laws that merely parallel the federal requirements. During the period before the FDA Guidance, the meaning of "common or usual name" as applied to ECJ was, at most, ambiguous. Indeed, as noted above, there were prior indications that the use of the term ECJ would be misleading under federal law. During that period, a state law determination that ECJ was not the common or usual name for sugar was not inconsistent with federal law; it was a reasonable interpretation of federal law. As such, California law did not clearly impose additional requirements on top of federal law. The

FDA Guidance did not change federal law or reverse an earlier decision; rather, it clarified any prior ambiguity about that federal law. Thus, finding of liability under California law would not be a retroactive application of new law; rather, the FDA Guidance confirmed that the state law labeling requirements were indeed consistent with federal law.

In sum, Plaintiffs claims under the UCL, FAL, and CLRA are not preempted by federal law. Because Plaintiffs adequately allege reliance under heightened pleading standard of Rule 9(b), Late July's motion to dismiss those claims is **DENIED.**

C. Plaintiffs' Claims for Unjust Enrichment

Plaintiffs assert a claim for unjust enrichment under the common law. *See* SAC ¶¶ 209-212. Late July points out that the Ninth Circuit has recognized that "in California, there is not a standalone cause of action for 'unjust enrichment.'" *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). As the court in *Asitana* recognized, however, California courts have stated that courts may construe an unjust enrichment claim "as a quasi-contract claim seeking restitution." *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014). Thus, as the Ninth Circuit previously explained, in fact the "Supreme Court of California and California Courts of Appeal have recognized actions for relief under the equitable doctrine of unjust enrichment." *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1006 (9th Cir. 2013) (citing *Ghirardo v. Antonioli*, 14 Cal.4th 39 (1996)). "The doctrine applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value." *Hernandez v. Lopez*, 180 Cal.App.4th 932, 938 (2009). For example, *Dunkin v. Boskey*, 82 Cal. App. 4th 171, 197 (2000), the court held that where a purported contract granting plaintiff paternity rights to a child conceived by artificial insemination, the plaintiff could nonetheless recover damages equal to the amount of benefit he had conferred on defendant in reliance of the agreement under an unjust enrichment theory. Alternatively, "a party to an express contract can assert a claim for restitution based on unjust enrichment by 'alleg[ing in that cause of action] that the express contract is void or was rescinded.'" *Rutherford Holdings*, 223 Cal. App. 4th at 231 (quoting *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.*

44 Cal.App.4th 194, 203 (1996)).

Late July is therefore incorrect that the unjust enrichment claim should be dismissed solely on the ground that no such claim is cognizable under California law. And because Plaintiffs have plausibly alleged that they were harmed by Late July's material misrepresentations, Plaintiffs can state a claim under either theory of unjust enrichment. First, it would be "inequitable for [Late July] to retain the benefit" Plaintiffs conferred upon them in reliance upon Late July's misrepresentation. Second, to the extent that Plaintiffs' purchase created a contractual relationship between them and Late July, a fraudulent misrepresentation makes a contract voidable and/or subject to rescission where the party seeking the remedy relied to his or her detriment on the misrepresentation. *See* Restatement (Second) of Contracts § 164 (1981); Cal. Civ. Code § 1689; *see also* Restatement (Second) of Contracts § 164 cmt. c (1981) ("No legal effect flows from either a non-fraudulent or a fraudulent misrepresentation unless it induces action by the recipient, that is, unless he manifests his assent to the contract in reliance on it."). Because, as discussed above, Plaintiffs adequately pled reliance on Late July's misrepresentation, they can also state a claim for unjust enrichment. Late July's motion to dismiss this claim is therefore **DENIED**.

D. Plaintiffs' Claims Outside of California

Despite asserting only claims under California law, Plaintiffs bring their claims "on behalf of a nationwide class of consumers who, within the Class Period, purchased Defendant's Misbranded Food Products." SAC ¶ 8. As Late July notes, the California Supreme Court has recognized a general "presumption against extraterritorial application" of state law, including the UCL and CLRA. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1207 (2011). Indeed, *Sullivan* explained that "[n]either the language of the UCL nor its legislative history provides any basis for concluding the Legislature intended the UCL to operate extraterritorially." *Id.*[3] In particular, these statutes do "not support claims by non-California residents where none of the alleged misconduct or injuries occurred in California." *Churchill Vill., L.L.C. v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1126 (N.D. Cal. 2000). Late July thus argues that Plaintiffs have stated no valid

[3] Courts have repeatedly recognized that the same conclusion applies to the FAL and CLRA. *See, e.g., Wilson*, 961 F. Supp. 2d at 1147.

claims with respect to out of state purchases, because they have alleged no nexus between any such purchases and California—indeed, there are no allegations at all concerning any out of state purchases. In the alternative, Late July argues that even if Plaintiffs were to assert claims under other states' consumer protection laws—which they did not—they would have no standing because they did not buy products in those states. Motion at 22 (citing *Pardini v. Unilever*, 2013 WL 3456872, at *9 (N.D. Cal. July 9, 2013).

Plaintiffs correctly point out that "Class allegations typically are tested on a motion for class certification, not at the pleading stage." *Pardini*, 961 F. Supp. 2d at 1061. However, "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). In such cases, "some courts have struck class allegations where it is clear from the pleadings that class claims cannot be maintained." *Pardini*, 961 F. Supp. 2d at 1061. Here, because Plaintiffs have made no allegations that they purchased products outside of California, and no allegations supporting a nexus between California law and any out of state purchases, and in light of the presumption against extraterritorial application of the California laws at issue, the Court will **DISMISS** their class allegations with leave to amend to correct these deficiencies. *See Pardini*, 961 F. Supp. 2d at 1061 (noting in similar circumstances that "[t]his is a pleading defect amenable to determination prior to a motion for class certification" and dismissing claims with leave to amend).

E. Injunctive Relief

Plaintiffs seek injunctive relief requiring Defendants to cease and desist from selling its allegedly mislabeled products. Late July contends that Plaintiffs lack standing to seek such relief. Under Ninth Circuit case law, "to establish standing to pursue injunctive relief . . . [a plaintiff] must demonstrate a 'real and immediate threat of repeated injury' in the future." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). Late July argues that Plaintiffs cannot make this showing for two reasons. First, Plaintiffs repeatedly allege that they would not have purchased the products had they known that ECJ means sugar; because they now know this, they cannot plausibly allege that they will be

similarly misled in the future. Second, Late July stopped using the term ECJ in 2014. *See* Motion at 25. Accordingly, there is no possibility of future injury.

As Plaintiffs argue, however, in some analogous consumer cases courts have found standing in similar circumstances on the ground that "[t]o do otherwise would eviscerate the intent of the California legislature in creating consumer protection statutes because it would effectively bar any consumer who avoids the offending product from seeking injunctive relief." *Koehler v. Litehouse, Inc.*, No. CV 12-04055 SI, 2012 WL 6217635, at *6 (N.D. Cal. Dec. 13, 2012); *see also Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012) ("[W]ere the Court to accept the suggestion that plaintiffs' mere recognition of the alleged deception operates to defeat standing for an injunction, then injunctive relief would never be available in false advertising cases, a wholly unrealistic result.").

Crucially, however, in nearly all cases finding standing to seek injunctive relief in similar circumstances, the plaintiffs had specifically alleged that they intended to purchase defendants' products in the future.[4] As such, their injury was ongoing; absent injunctive relief, "they could not rely on [defendants' label] representation[s] with any confidence." *Ries*, 287 F.R.D. at 533. Courts have noted that there are many cases "where a consumer would still be interested in purchasing the product if it were labeled properly – for example, if a food item accurately stated its ingredients." *Mason v. Nature's Innovation, Inc.*, No. 12CV3019 BTM DHB, 2013 WL 1969957, at *4 (S.D. Cal. May 13, 2013); *see also Jou v. Kimberly-Clark Corp.*, No. C-13-03075 JSC, 2013 WL 6491158, at *4 (N.D. Cal. Dec. 10, 2013). Accordingly, such consumers face ongoing harm from mislabeling because they are unable to trust the representations made on the offending products' labels. In keeping with this reasoning, a number of recent decisions have held that "to establish standing in a case such as this one, the plaintiff must allege that he intends to purchase the products at issue in the future." *Swearingen v. Santa Cruz Nat., Inc.*, No. 13-CV-

[4] *Koehler*, 2012 WL 6217635, *supra*, is a notable exception. However, the author of that opinion, Judge Illston, later expressly repudiated its reasoning and held that "to establish standing, plaintiff must allege that he intends to purchase the products at issue in the future." *Rahman v. Mott's LLP*, No. CV 13-3482 SI, 2014 WL 325241, at *10 (N.D. Cal. Jan. 29, 2014).

04291-SI, 2016 WL 4382544, at *13 (N.D. Cal. Aug. 17, 2016).[5]

This line of cases is persuasive. As the Supreme Court has explained, one of the elements constituting the "irreducible constitutional minimum of standing" is the requirement that a plaintiff have suffered (or will suffer) an "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted). "In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).

Where plaintiffs in a deceptive labeling case do not plan ever to purchase the offending product in the future, they lack this sort of personal stake in seeking injunctive relief, as the "alleged misrepresentations cannot do them any injury, and injunctive relief will not provide them with any redress." *In re 5-hour ENERGY Mktg. & Sales Practices Litig.*, No. MDL 13-2438 PSG PLAX, 2014 WL 5311272, at *11 (C.D. Cal. Sept. 4, 2014). Indeed, as the Supreme Court has specifically explained, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488 493 (1974)). Absent any intent to purchase Late July's products in the future, Plaintiffs cannot complain of any "continuing, present adverse effects." But where plaintiffs *do* plan to purchase defendants' products in the future, for the reasons discussed in *Ries*, an injunction can redress the prospect of real injury. In such a case, a finding of standing would be consistent with the familiar purposes of the doctrine, which include "ensuring that litigants are truly adverse and therefore likely to present the case effectively, ensuring that the people most directly concerned are able to litigate the questions at issue, ensuring that a concrete case informs the court of the consequences of its decisions, and preventing the anti-majoritarian federal judiciary from usurping

[5] This precise issue is presented in two cases currently pending before the Ninth Circuit. *See Nancy Lanovaz v. Twinings North America, Inc.*, No. 16-16628, and *Victor v. R.C. Bigelow, Inc.*, No. 16-16639.

the policy-making functions of the popularly elected branches." William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 222 (1988) (citations omitted). This is especially true where the plaintiff in incentivized to vigorously litigate the substantive claim because he/she has at stake both a claim for monetary relief as well as injunctive relief to protect against future injury.

In this case, however, Plaintiffs make no allegation that they plan to purchase Late July's products in the future. Indeed, to the contrary, they repeatedly state that they would not have purchased the products had they been aware that they contained added sugar. *See* SAC ¶¶ 34, 97-98, 139. In light of these allegations, "the Court has difficulty envisioning how plaintiffs could amend their complaint to allege plausibly that, now knowing the products to contain added sugar, they will purchase the products in the future." *Santa Cruz Nat.*, 2016 WL 4382544, at *13. But because that Court cannot say that "the pleading could not possibly be cured by the allegation of other facts," *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000), the Court will allow leave to amend. The Court therefore **GRANTS** Late July's motion with respect to Plaintiffs' request for injunctive relief, and **DISMISSES** Plaintiffs claims with leave to amend.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendant's motion to dismiss Plaintiffs' UCL, FAL, and CLRA claims, and their claim for unjust enrichment, but **GRANTS** the motion as to Plaintiffs' request for injunctive relief and Plaintiffs' claims based on out-of-state purchases; it **DISMISSES** those claims with leave to amend within thirty (30) days.

This order disposes of Docket No. 101.

IT IS SO ORDERED.

Dated: May 5, 2017

EDWARD M. CHEN
United States District Judge