

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

PHYLLIS GUSTAVSON, individually	)	Case No.: 12-CV-01861-LHK
and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART DEFENDANTS'
	)	MOTION TO DISMISS
WRIGLEY SALES COMPANY, WM.	)	
WRIGLEY JR. COMPANY, MARS, INC., and	)	
MARS CHOCOLATE NORTH AMERICA,	)	
LLC,	)	
Defendants.	)	
	)	
	)	
	)	

Plaintiff Phyllis Gustavson (“Gustavson”) brings this putative class action against Defendants Wrigley Sales Company and Wm. Wrigley Jr. Company, Mars, Inc., and Mars Chocolate North America, LLC (collectively, “Defendants”), alleging that Defendants’ package labeling is “misbranded” because it is unlawful and misleading under federal and state law. Defendants move to dismiss Gustavson’s First Amended Complaint, ECF Nos. 27, 29; Gustavson opposes, ECF Nos. 39, 41, and Defendants replied, ECF No. 46. Having considered the submissions of the parties, the parties’ oral arguments, and the relevant law, the Court hereby

1 GRANTS in part and DENIES in part Defendants’ Motions to Dismiss the First Amended  
2 Complaint.

3 **I. BACKGROUND**

4 **A. Factual Allegations**

5 Defendants Wrigley Sales Company and Wm. Wrigley Jr. Company (collectively,  
6 “Wrigley”), are among the leading producers of gum, breath mints, and hard candies. First Am.  
7 Compl. (“FAC”) ¶ 2. Mars Chocolate North America, LLC (with Mars, Inc., “Mars”) is one of the  
8 leading producers of chocolate candy and other types of confectionary. *Id.* Mars, Inc. is the parent  
9 company of Mars Chocolate North America, LLC, Wrigley Sales Company, and Wm. Wrigley Jr.  
10 Company. *Id.* Defendants sell their products to consumers through grocery and other retail stores  
11 throughout California and promote their products throughout California through their websites.  
12 FAC ¶ 33.

13 Gustavson is a California consumer who “cares about the nutritional content of food and  
14 seeks to maintain a healthy diet.” FAC ¶ 212. Over the past four years, she purchased more than  
15 \$25.00 worth of Defendants’ food products, which she contends are “[m]isbranded” in violation of  
16 federal and California law. FAC ¶¶ 25, 28. Specifically, Gustavson contends that she purchased the  
17 following food products: (1) Eclipse sugar free gum, Winterfrost, 18pcs; (2) Eclipse sugar free  
18 gum, Polar Ice, 12 pcs; (3) Altoid sugar free small mints, peppermint and wintergreen, 50 mint tins;  
19 (4) Orbit sugar free gum, peppermint and spearmint, 14 pcs; (5) Lifesavers sugar free hard candy, 5  
20 flavors, 2.75 oz; (6) M&M chocolate candy, 1.69 oz.; (7) Twix chocolate candy, 1.79 oz.; (8) Dark  
21 Chocolate Dove Bar, 3.3 oz.; (9) Milk Chocolate Dove Bar, 3.3 oz.; and (10) Snickers Fun Size,  
22 11.8 oz. FAC ¶ 213.

23 Gustavson alleges that she “read the labels on Defendants’ products . . . before purchasing  
24 them.” FAC ¶ 214. Gustavson further alleges that she relied on Defendants’ package labeling,  
25 “based and justified the decision to purchase Defendants’ products in substantial part on  
26 Defendants’ package labeling,” and “would have foregone purchasing Defendant’s [*sic*] products  
27 and bought other products readily available at a lower price.” FAC ¶ 215. Gustavson claims that  
28 she “did not know, and had no reason to know, that Defendants’ products were misbranded” and

1 states that she would not have purchased the products “had she known the truth about them.” FAC  
2 ¶ 216. Although the FAC largely fails to distinguish between the Mars and Wrigley Defendants—  
3 despite the fact that the entities are legally distinct and do not appear to be involved in one  
4 another’s labeling decisions—the various allegedly deceptive statements identified in the FAC  
5 appeared either only on Mars or only on Wrigley products. Specifically, the allegedly deceptive  
6 statements appearing on Mars products include: (1) nutrient content claims regarding flavanols,  
7 FAC ¶¶ 70-83; (2) calorie-related claims stating that a product contains a certain percentage of  
8 one’s daily value of calories, FAC ¶¶ 84-100; (3) failure to identify the ingredient “polyglycerol  
9 polyricinoleic acid” (“PGPR”) by its common name, FAC ¶¶ 138-155; and (4) failure to comply  
10 with the standard of identity for milk chocolate, FAC ¶¶ 156-161. The allegedly deceptive  
11 statements appearing on Wrigley products include: (1) “low calorie” claims, FAC ¶¶ 101-105; (2)  
12 “sugar free” claims, FAC ¶¶ 106-128; and (3) “serving size” claims, FAC ¶¶ 129-137. Gustavson  
13 separately alleges that both sets of Defendants make a series of unlawful “health” claims on their  
14 websites. FAC ¶¶ 155-185.

15 **1. Claims Against Mars**

16 **a. Flavanol Nutrient Content Claims**

17 Gustavson first challenges Mars’s use of statements such as “natural source of cocoa  
18 flavanols,” “flavanols [are] found in cocoa,” and “[o]ur special patented and proprietary  
19 COCOAPRO® process helps retain much of the naturally occurring cocoa flavanols,” on the labels  
20 of Mars chocolate products—specifically, Dove Dark Chocolate. FAC ¶¶ 72, 75, 77; Exs. L, O.  
21 Gustavson alleges that these claims are “nutrient content claims,” *i.e.*, claims about specific  
22 nutrients contained in a product that, pursuant to Section 403 of the Food, Drug, and Cosmetic Act  
23 (“FDCA”), 21 U.S.C. § 343(r), must be made in accordance with federal regulations. FAC ¶ 70  
24 (citing 21 C.F.R. §§ 101.13, 101.54 (identifying the requirements for making lawful nutrient  
25 content claims)); *see also* 21 U.S.C. § 343(r)(1)(A) (defining “nutrition levels and health-related  
26 claims” as pertaining to “a food intended for human consumption which is offered for sale and for  
27 which a claim is made in the label or labeling of the food which expressly or by implication . . .  
28 characterizes the level of any nutrient”).

1 According to the FAC, Mars’s flavanol “source” claims are unlawful because under  
2 applicable federal regulations, a food may only be described as a “source” of a given nutrient if it  
3 contains at least 10% of the established daily value for that nutrient. FAC ¶ 72. Mars chocolate  
4 cannot possibly contain adequate flavanols to meet this requirement, Gustavson alleges, because  
5 the Food and Drug Administration (“FDA”) has not established a daily value for flavanols. FAC ¶¶  
6 70-72, 77-78. Alternatively, the FAC alleges that Mars’s flavanol source claims are unlawful  
7 because the term “source” is not specifically defined by FDA regulation and therefore may not be  
8 used in food labeling. FAC ¶¶ 70, 73.

9 **b. Calorie-Related Nutrient Content Claims**

10 Gustavson next alleges that Mars makes unlawful nutrient content claims regarding the  
11 calories in their chocolate products. Specifically, each chocolate product identified in the FAC  
12 states in a colored box appearing on the front of the package that the product contains a “certain  
13 percentage of the Daily Value (“DV”) of calories.” FAC ¶¶ 85, 89, 93. The FAC contends that  
14 these statements are false and unlawful, however, because “there is no DV for calories and food  
15 manufacturers are precluded from making such claims unless a DV actually exists.” FAC ¶ 85.  
16 Gustavson additionally alleges that Mars’s calorie-related claims are unlawful, because FDA  
17 regulations require that nutrient content claims made on products whose fat, saturated fat,  
18 cholesterol, or sodium contents exceed certain levels be accompanied by a statement disclosing that  
19 high levels of fat, saturated fat, cholesterol, and/or sodium are present in the food. FAC ¶ 88  
20 (quoting 21 C.F.R. 101.13(h)(1)). Although Mars chocolate products allegedly contain levels of fat  
21 and/or saturated fat that are sufficient to trigger disclosure, none of the chocolate products  
22 mentioned in the FAC complies with the FDA’s disclosure requirements. FAC ¶ 93; *see also* Exs.  
23 J-N (reproducing the product labels).

24 **c. PGPR**

25 Gustavson next objects to Mars’s practice of identifying the ingredient “polyglycerol  
26 polyricinoleic acid” by the acronym “PGPR” on the ingredient list for Twix bars. FAC ¶ 148.  
27 According to the FAC, federal regulations require that ingredients be identified by their “common  
28 or usual name[s],” 21 C.F.R. § 101.4(a)(1), which the regulations state “shall accurately identify or

1 describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing  
2 properties or ingredients,” 21 C.F.R. § 102.5(a), and which “may be established by common usage  
3 or by . . . regulation,” 21 C.F.R. § 102.5(d). Gustavson alleges that PGPR is not the common or  
4 usual name for polyglycerol polyricinoleic acid, and that its use on Twix labels is unlawful and  
5 deceptive. *See* FAC ¶¶ 148, 150.

6 **d. Milk Chocolate Standard of Identity**

7 Gustavson’s final claim directed at Mars challenges its unqualified use of the term “milk  
8 chocolate” on the front of its product labels for M&Ms, Twix, and Dove Milk Chocolate. FAC ¶¶  
9 156-161. The FAC alleges that the FDA has established a “standard of identity” for milk chocolate  
10 that requires food manufacturers to disclose the use of certain processing techniques or the  
11 inclusion of certain ingredients when identifying their products as “milk chocolate.” FAC ¶¶ 157,  
12 159. According to Gustavson, Mars chocolate products are subject to these disclosure  
13 requirements, because Dove Milk Chocolate is processed with alkali, while M&Ms, Twix, and  
14 Dove Milk Chocolate all contain the artificial flavor vanillin. FAC ¶¶ 159-160 (citing 21 C.F.R.  
15 § 163.130 (standard of identity for milk chocolate)). Gustavson further alleges that the standard of  
16 identity requires these disclosures to appear on the front of the package, immediately preceding or  
17 following the “milk chocolate” claim, and not just in the ingredient list on the back of the package.  
18 FAC ¶ 159 (quoting 21 C.F.R. § 163.130(c)(5) (“Whenever the name of the food appears on the  
19 label so conspicuously as to be easily seen under customary conditions of purchase, the statements  
20 prescribed in this paragraph showing optional ingredients used shall precede or follow such name  
21 without intervening printed or graphic matter.”)). The FAC asserts that Mars fails to comply with  
22 these regulations, as the front labels of Dove Milk Chocolate, M&Ms, and Twix products do not  
23 contain any disclosures regarding either alkali or vanillin. FAC ¶ 160.

24 **2. Claims Against Wrigley**

25 **a. Low Calorie Claims**

26 Gustavson alleges that Wrigley falsely and unlawfully claims that its sugar free gums are  
27 “low calorie.” FAC ¶¶ 101-105. For instance, in a promotional publication entitled “Benefits of  
28 Chewing,” Wrigley purportedly states that its sugar free gums are “a very low-calorie option” and

1 that “the FDA has allowed the claim ‘Low-calorie [sugar free chewing gum] may be useful in  
2 weight control.’” FAC ¶ 101. In addition, the “International Chewing Gum Association,” an  
3 organization for which Defendants are “prominent members of the board of directors,” has  
4 allegedly claimed that “chewing gum provides a low-calorie snack.” FAC ¶ 102 (internal quotation  
5 marks omitted). Gustavson contends that the phrase “low calorie” is a nutrient content claim  
6 governed by 21 C.F.R. § 101.60(b)(2). FAC ¶ 108. Under Section 101.60(b)(2), a food may be  
7 labeled “low-calorie” only when that food contains 40 or fewer calories per 50-gram basis. FAC  
8 ¶¶ 108-109. According to Gustavson, Wrigley sugar free gums are ineligible for “low-calorie”  
9 labeling, because “they provide more than 40 calories per 50 gram basis. For example, Wrigley’s  
10 Eclipse Winterfrost sugar free gum has 83 calories per 50 grams.” FAC ¶ 102.

11 **b. Sugar Free Nutrient Content Claims**

12 Gustavson also challenges claims made on labels, “websites[,] and advertising” that  
13 Wrigley hard candies, gum, and breath mints are “sugar free.” FAC ¶¶ 109-119. Federal  
14 regulations enumerate specific requirements that must be met in order to label a food “sugar free.”  
15 FAC ¶ 107. Specifically, a food may not be labeled “sugar free” unless: a) “[it] contain[s] less than  
16 0.5 grams of sugars [as defined] per reference amount customarily consumed and per labeled  
17 serving,” b) it “contains no ingredient that is a sugar or that is generally understood by consumers  
18 to contain sugars unless” certain disclosures are made adjacent to the label ingredient statement,  
19 *and* c) one of the following is provided: (1) the food is labeled “low calorie” or “reduced calorie”  
20 in compliance with federal regulations, (2) the food “bears a relative claim of special dietary  
21 usefulness” in compliance with federal regulations, or (3) “[s]uch term is immediately  
22 accompanied . . . by either the statement ‘not a reduced calorie food,’ ‘not a low calorie food,’ or  
23 ‘not for weight control.’” 21 C.F.R. § 101.60(c)(1).

24 Gustavson claims that Wrigley’s products do not meet federal requirements for foods  
25 labeled as “sugar free,” because: (1) as discussed *supra* Part I.A.2.a, Wrigley makes low calorie  
26 claims in its promotional materials that are erroneous because the products contain more than 40  
27 calories per 50 grams, FAC ¶¶ 109-10, 113-14; (2) the labels “omit” a disclaimer that the products  
28 are not “low-calorie,” “reduced calorie,” or “not for weight control,” FAC ¶ 115; and (3) any

1 “claim of special dietary usefulness” that is provided on the labels does not meet the requirements  
2 for “placement and conspicuousness” required by federal regulations but is instead “hidden” on the  
3 back of the label, FAC ¶¶ 110-11, 120 (quoting a 2007 FDA Guidance Letter to the food industry);  
4 *see also* 21 C.F.R. § 101.60(c)(1)(iii). Gustavson further claims that Wrigley fails to meet federal  
5 requirements for labeling a food “sugar free,” because Wrigley’s website lists “artificial  
6 sweeteners” including maltitol, sorbitol, and xylitol as “noncaloric,” when all three are actually  
7 “nutritive, caloric sweeteners.” FAC ¶ 112.

8 **c. Serving Size Claims**

9 Finally, Gustavson challenges the single mint (0.2 gram) serving size Wrigley uses for  
10 sugar free breath mints such as Altoids Smalls. FAC ¶¶ 129-30, 132. She claims that Wrigley’s use  
11 of the 0.2 gram serving size violates the “legally mandated serving size” for breath mints by a  
12 magnitude of ten. FAC ¶¶ 129-32 (“21 C.F.R. § 101.9(b)(2) provides that serving size . . . shall be  
13 determined from the ‘Reference Amounts Customarily Consumed Per Eating Occasion’ . . . that  
14 appear in [21 C.F.R.] § 101.12(b). . . . 21 C.F.R. § 101.12 provides that the serving size for breath  
15 mints is 2 grams.” (alteration in original)). Gustavson asserts that the FDA’s serving size  
16 restrictions are necessary because, “[i]n order for this nutrition information to be useful to  
17 consumers, it must be accurate and based on a meaningful amount of food.” FAC ¶ 133 (quoting a  
18 March 2004 FDA Guidance Letter to the food industry).

19 The FAC contends that “Defendants ignored this FDA guidance and engaged in the exact  
20 unlawful serving size practices the FDA sought to eliminate” by failing to adopt the 2-gram breath  
21 mint serving size. FAC ¶¶ 132, 134. Because Defendants underrepresented the serving size by a  
22 magnitude of ten, they similarly understated calories per serving by a magnitude of ten; thus, when  
23 accurately reported, according to the FAC, the breath mints contain “calories at levels that require[]  
24 a disclaimer or disclosure.” FAC ¶¶ 132, 137.

25 **B. Putative Class Claims**

26 Gustavson seeks to bring this putative class action, pursuant to Federal Rule of Civil  
27 Procedure 23(b)(2) and (b)(3), on behalf of the following proposed class:  
28

1 All persons in California who purchased either: (1) Wrigley “sugar free” gum,  
2 breath mints or hard candy products; or (2) a food product manufactured or  
3 distributed by Defendants that (a) bears a flavanol claim or a percentage daily value  
4 claim for carbohydrates on its label, or (b) lists PGPR as an ingredient, or (c) that  
purports to be but fails to adhere to the standard of identity for milk chocolate or  
sweet chocolate, or (d) a product with an unlawful serving size, in the last four  
years.

5 FAC ¶ 220.

6 Gustavson alleges that by manufacturing, advertising, distributing, and selling misbranded  
7 products, Defendants have violated California Health & Safety Code Sections 109885, 110390,  
8 110395, 110398, 110660, 110665, 110670, 110705, 110725, 110740, 110760, 110765, and  
9 110770. *See* FAC ¶¶ 187-198. In addition, Gustavson asserts that Defendants have violated the  
10 standards set by 21 C.F.R. §§ 101.2, 101.3, 101.13, 101.4, 101.9, 101.12, 101.18, 101.22, 101.54,  
11 101.60, 102.5, 105.66, 163.123, and 163.130, which have been adopted by reference into the  
12 Sherman Food, Drug, and Cosmetic Act (“Sherman Law”), Cal. Health & Safety Code §§ 109875  
13 *et seq.* *See* FAC ¶¶ 199-205. Consequently, Gustavson’s First Amended Complaint alleges the  
14 following causes of action: (1) violation of California’s Unfair Competition Law (“UCL”), Cal.  
15 Bus. & Prof. Code §§ 17200 *et seq.*, for unlawful, unfair, and fraudulent business acts and practices  
16 (claims 1, 2, and 3); (2) violation of California’s False Advertising Law (“FAL”), Cal. Bus. & Prof.  
17 Code §§ 17500 *et seq.*, for misleading, deceptive, and untrue advertising (claims 4 and 5); (3)  
18 violation of the Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 *et seq.* (claim  
19 6); (4) restitution based on unjust enrichment/quasi-contract (claim 7); (5) violation of the Song-  
20 Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790 *et seq.* (claim 8); and (6) violation of the  
21 Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* (claim 9). *See* FAC ¶¶ 231-313.

22 **C. Procedural History**

23 Gustavson filed an Original Complaint against Wrigley on April 13, 2012. ECF No. 1.  
24 Wrigley filed a Motion to Dismiss on July 2, 2012. ECF No. 18. Rather than responding to  
25 Defendants’ Motion to Dismiss, Gustavson filed the FAC on July 23, 2012. ECF No. 21. The FAC  
26 added claims against Mars Chocolate North America, LLC and Mars, Inc. *Id.*

27 On September 14, 2012, Wrigley filed a Motion to Dismiss the Amended Complaint for:  
28 (1) lack of subject matter jurisdiction; (2) failure to state a claim upon which relief may be granted,

1 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; and (3) failure to plead claims  
2 grounded in fraud with sufficient particularity, as required by Rule 9(b) of the Federal Rules of  
3 Civil Procedure. (“Wrigley Mot.”) ECF No. 27. Likewise, on September 14, 2012, Mars filed a  
4 Motion to Dismiss the Amended Complaint on the same bases. (“Mars Mot.”) ECF No. 29.  
5 Wrigley and Mars accompanied their Motions to Dismiss with requests that the court take judicial  
6 notice of certain documents. ECF Nos. 28, 30. On September 19, 2012, Wrigley filed a Notice of  
7 Withdrawal of its initial Motion to Dismiss in light of the FAC. ECF No. 32.

8 On November 21, 2012, Gustavson filed an Opposition to Wrigley’s Motion to Dismiss,  
9 (“Wrigley Opp’n”) ECF No. 39, as well as an Opposition to Mars’s Motion to Dismiss, (“Mars  
10 Opp’n”) ECF No. 41. Gustavson also filed a request for judicial notice along with her Oppositions.  
11 ECF No. 40.<sup>1</sup> All Defendants then filed a joint Reply on December 21, 2012. (“Reply”) ECF No.

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12  
13 <sup>1</sup> While a district court generally may not consider any material beyond the pleadings in ruling on a  
14 Rule 12(b)(6) motion, a court may take judicial notice of documents referenced in the complaint, as  
15 well as matters in the public record, without converting a motion to dismiss into one for summary  
16 judgment. *See Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001). A matter may be judicially  
17 noticed if it is either “generally known within the territorial jurisdiction of the trial court” or “can  
18 be accurately and readily determined from sources whose accuracy cannot reasonably be  
19 questioned.” Fed. R. Evid. 201(b). In addition, under the “incorporation by reference” doctrine, a  
20 district court may consider “documents whose contents are alleged in a complaint and whose  
21 authenticity no party questions, but which are not physically attached to the [plaintiff’s] pleading.”  
22 *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (alteration in original) (internal quotation  
23 marks omitted). The Court finds Exhibits A, B, C, D, E, F, and G (attached to Wrigley Mot.), as  
24 well as Exhibits J, K, L, M, and N (attached to Mars Mot.) to be appropriate for judicial notice, as  
25 they are packaging labels for twelve Wrigley or Mars products that the FAC specifically references  
26 and quotes. In addition, the Court takes judicial notice of Exhibits O, P, Q, and R (attached to Mars  
27 Mot.), which are screenshots taken from the website [www.cocoavia.com](http://www.cocoavia.com), and which are referenced  
28 in the FAC. *See* FAC ¶ 164.

22 The remaining documents for which the parties request judicial notice include a 2009 FDA  
23 Guidance Document regarding food labeling available on the FDA’s website (Ex. I, attached to  
24 Wrigley Mot.); an FDA response letter also available on the FDA’s website (Ex. S, attached to  
25 Mars Mot.); an amicus brief filed by the Solicitor General’s Office in opposition to a petition for a  
26 writ of certiorari in *Albertson’s, Inc. v. Kanter*, 129 S. Ct. 896 (2009) (Ex. 1, attached to  
27 Gustavson’s Motion); and a table listing the names and citations of a number of other food  
28 “misbranding” cases filed recently within this District (Ex. H, attached to Wrigley Mot.). The  
Court may take judicial notice of materials available on government agency websites, *see, e.g.,*  
*Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-1166, 2009 WL 6597891, at 2 (S.D.  
Cal. Dec. 23, 2009), as well as of proceedings in other courts, *see, e.g., Bias v. Moynihan*, 508 F.3d  
1212, 1225 (9th Cir. 2007). Accordingly, the Court takes judicial notice of these additional  
exhibits, and the parties’ requests for judicial notice are GRANTED in full.

1 46. The Court held a hearing on May 2, 2013. ECF No. 60. Post-briefing, Gustavson filed six  
2 notices of new case law relevant to these Motions, ECF Nos. 47, 51, 57-59, 67; Defendants filed  
3 three similar notices, ECF Nos. 52, 53, 66.

4 **II. LEGAL STANDARDS**

5 **A. Rule 12(b)(1)**

6 A defendant may move to dismiss an action for lack of subject matter jurisdiction pursuant  
7 to Federal Rule of Civil Procedure 12(b)(1). A motion to dismiss for lack of subject matter  
8 jurisdiction will be granted if the Complaint on its face fails to allege facts sufficient to establish  
9 subject matter jurisdiction. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th  
10 Cir. 2003). If the plaintiff lacks standing under Article III of the U.S. Constitution, then the court  
11 lacks subject matter jurisdiction, and the case must be dismissed. *See Steel Co. v. Citizens for a*  
12 *Better Env't*, 523 U.S. 83, 101-02 (1998). In considering a Rule 12(b)(1) motion, the Court “is not  
13 restricted to the face of the pleadings, but may review any evidence, such as affidavits and  
14 testimony, to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v. United*  
15 *States*, 850 F.2d 558, 560 (9th Cir. 1988). Once a party has moved to dismiss for lack of subject  
16 matter jurisdiction under Rule 12(b)(1), the opposing party bears the burden of establishing the  
17 court’s jurisdiction. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir.  
18 2010).

19 **B. Rule 8(a)**

20 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a  
21 short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint  
22 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure  
23 12(b)(6). The Supreme Court has held that Rule 8(a) requires a plaintiff to plead “enough facts to  
24 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
25 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
26 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
27 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a probability  
28 requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

1 (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, a court  
2 “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light  
3 most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d  
4 1025, 1031 (9th Cir. 2008).

5 However, a court need not accept as true allegations contradicted by judicially noticeable  
6 facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and the “[C]ourt may look  
7 beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)  
8 motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).  
9 Nor is the court required to “assume the truth of legal conclusions merely because they are cast in  
10 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per  
11 curiam) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere “conclusory  
12 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.”  
13 *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); accord *Iqbal*, 556 U.S. at 678.  
14 Furthermore, “a plaintiff may plead herself out of court” if she “plead[s] facts which establish that  
15 [s]he cannot prevail on h[er] . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir.  
16 1997) (internal quotation marks and citation omitted).

17 **C. Rule 9(b)**

18 Claims sounding in fraud or mistake are subject to the heightened pleading requirements of  
19 Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud “must state with  
20 particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b); see *Kearns v. Ford Motor*  
21 *Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy Rule’s 9(b)’s heightened standard, the  
22 allegations must be “specific enough to give defendants notice of the particular misconduct which  
23 is alleged to constitute the fraud charged so that they can defend against the charge and not just  
24 deny that they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.  
25 1985). Thus, claims sounding in fraud must allege “an account of the time, place, and specific  
26 content of the false representations as well as the identities of the parties to the misrepresentations.”  
27 *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (internal quotation marks  
28 omitted). The plaintiff must set forth what is false or misleading about a statement, and why it is

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

3 **D. Leave to Amend**

4 If the Court determines that the complaint should be dismissed, it must then decide whether  
5 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend  
6 “should be freely granted when justice so requires,” bearing in mind that “the underlying purpose  
7 of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or  
8 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation  
9 marks omitted). Nonetheless, a court “may exercise its discretion to deny leave to amend due to  
10 ‘undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure  
11 deficiencies by amendments previously allowed, undue prejudice to the opposing party. . . , [and]  
12 futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir.  
13 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

14 **III. DISCUSSION**

15 Defendants seek to dismiss Gustavson’s FAC for four reasons: (1) Gustavson’s claims are  
16 preempted by the Federal Food, Drug, and Cosmetic Act (“FDCA”); (2) Gustavson lacks standing  
17 to pursue her claims; (3) Gustavson’s claims are neither plausible nor sufficiently particular; and  
18 (4) several of Gustavson’s claims state a viable cause of action for various, claim-specific reasons.  
19 *See Mars Mot.* at i-ii; *Wrigley Mot.* at i-ii. For the reasons stated herein, the Court GRANTS in part  
20 and DENIES in part Defendants’ Motions to Dismiss the FAC.

21 **A. Preemption**

22 Defendants contend that all of Gustavson’s claims are impliedly preempted because there is  
23 no private right of action to enforce regulations promulgated by the FDA. *See Mars Mot.* at 13. In  
24 addition, Defendants argue that the Sherman Law, Cal. Health & Safety Code §§ 109875 *et seq.*,  
25 cannot be used to enforce FDA regulations, *see id.* at 13-17, and that Gustavson’s attempts to  
26 impose requirements “not identical” to FDA regulations are expressly preempted, *see id.* at 18-23;  
27 *Wrigley Mot.* at 12-18. Even if the Court does not find that Gustavson’s claims are preempted,  
28

1 Defendants urge the Court to dismiss the case under the doctrine of primary jurisdiction. *See*  
2 Wrigley Mot. at 19-21.

3 The Court concludes that the FDA regulations do not impliedly preempt Gustavson’s state-  
4 law claims brought pursuant to the Sherman Law. However, the Court further finds that  
5 Gustavson’s claims concerning: (1) calorie-related statements on chocolate; (2) the standard of  
6 identity for milk chocolate; and (3) low calorie statements about sugar free gum are expressly  
7 preempted, as they seek to impose labeling requirements that either add to or deviate from existing  
8 FDA regulations. Finally, the Court finds that Gustavson’s breath mint serving size claim is  
9 appropriately dismissed under the doctrine of primary jurisdiction, but declines to dismiss her  
10 remaining claims on this ground.

11 **1. Federal and Statutory Framework**

12 The FDCA, codified at 21 U.S.C. §§ 301 *et. seq.*, “gives the FDA the responsibility to  
13 protect the public health by ensuring that ‘foods are safe, wholesome, sanitary, and properly  
14 labeled.’” *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1030 (N.D. Cal. 2009) (citing  
15 21 C.F.R. § 393(b)(2)(A)). Section 331 expressly prohibits the misbranding of food in interstate  
16 commerce, *see* 21 U.S.C. § 331 (a)-(c), (k), and Section 343 sets forth conditions under which food  
17 is considered “misbranded,” *see* 21 U.S.C. § 343. In general, a food is “misbranded” if its labeling  
18 is “false or misleading in any particular.” 21 U.S.C. § 343(a)(1).

19 In 1990, Congress amended the FDCA in the Nutrition Labeling and Education Act of 1990  
20 (“NLEA”), which imposed additional food labeling requirements. Pub. L. No. 101-535, 104 Stat.  
21 2353 (1990); *see also* H.R. Rep. No. 101-538, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3336,  
22 3337 (stating that the purpose behind the NLEA was “to clarify and to strengthen the Food and  
23 Drug Administration’s legal authority to require nutrition labeling on foods, and to establish the  
24 circumstances under which claims may be made about nutrients in foods.”).

25 In addition, through the Sherman Law, California has expressly adopted the federal labeling  
26 requirements as its own and indicated that, “[a]ll food labeling regulations and any amendments to  
27 those regulations adopted pursuant to the federal act . . . shall be the food labeling regulations of  
28 this state.” Cal. Health & Safety Code § 110100. California has also enacted a number of laws and

1 regulations that adopt and incorporate specific enumerated federal food laws and regulations. *See*,  
2 *e.g.*, Cal. Health & Safety Code § 110660 (“Any food is misbranded if its labeling is false or  
3 misleading in any particular.”); Cal. Health & Safety Code § 110665 (“Any food is misbranded if  
4 its labeling does not conform with the requirements for nutrition labeling as set forth in . . . 21  
5 U.S.C. § 343(q)”).

6 All of the alleged misbranding violations at issue in this case are covered by FDA  
7 regulations and policies, including regulations for “nutrient content” claims, 21 C.F.R. § 101.13;  
8 “sugar free” claims, 21 C.F.R. § 101.60(c); “serving size” claims, 21 C.F.R. § 101.12(b); “common  
9 name” claims, 21 C.F.R. §§ 101.4(a)(1), 102.5; and the standard of identity for milk chocolate, 21  
10 C.F.R. § 163.130.

## 11 2. Preemption and Private Rights of Action

12 Defendants allege that all of Gustavson’s claims are preempted because the FDCA bars  
13 private enforcement of its provisions. *See Mars Mot.* at 13. The FDCA provides that, in general,  
14 “proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the  
15 name of the *United States*.” 21 U.S.C. § 337(a) (emphasis added).<sup>2</sup> Therefore, there is no federal  
16 private right of action to enforce the FDCA. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S.  
17 341, 349 n.4 (2001) (noting, in the context of the medical device provisions of the FDCA that, due  
18 to 21 U.S.C. § 337(a), “[t]he FDCA leaves no doubt that it is the Federal Government rather than  
19 private litigants who are authorized to file suit for noncompliance with the [FDCA]”).

20 Gustavson does not dispute that private litigants are expressly prohibited from suing to  
21 enforce compliance with the FDCA and its accompanying regulations. However, Gustavson  
22 contends that she is not attempting to enforce the FDCA but rather to enforce California’s legal  
23 requirements, pursuant to the Sherman Law, which are identical to FDA regulations. *See Mars*  
24 *Opp’n* at 11. Defendants counter that this distinction is immaterial, arguing that the FDCA equally  
25 bars efforts to enforce the FDCA “indirectly” through state law. *Mars Mot.* at 13.

26  
27 <sup>2</sup> The NLEA preemption provision also permits a state to bring proceedings, “in its own name and  
28 within its jurisdiction,” to enforce certain food-labeling provisions of the FDCA if the State  
complies with specified procedural requirements. 21 U.S.C. § 337(b).

1           When analyzing the scope of a preemption statute, a court’s analysis must “start with the  
2 assumption that the historic police powers of the States [are] not to be superseded by the Federal  
3 Act unless that was the clear and manifest purpose of Congress.” *Medtronic, Inc. v. Lohr*, 518 U.S.  
4 470, 485 (1996) (internal quotation marks omitted). This approach “is consistent with both  
5 federalism concerns and the historic primacy of state regulation of matters of health and safety.” *Id.*  
6 Therefore, “[p]arties seeking to invalidate a state law based on preemption ‘bear the considerable  
7 burden of overcoming ‘th[is] starting presumption that Congress does not intend to supplant state  
8 law.’” *Stengel v. Medtronic*, 704 F.3d 1224, 1227-28 (9th Cir. 2013) (en banc) (quoting *De Buono*  
9 *v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997)).

10           The presumption against preemption in this case is a strong one. The regulation of health  
11 and safety, including laws regulating the proper marketing of food, are traditionally within states’  
12 historic police powers. *See Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144 (1963)  
13 (“States have always possessed a legitimate interest in ‘the protection of (their) people against  
14 fraud and deception in the sale of food products’ at retail markets within their borders.”) (citing  
15 *Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894), which similarly states, “If there be any  
16 subject over which it would seem the states ought to have plenary control, and the power to  
17 legislate in respect to which . . . it is the protection of the people against fraud and deception in the  
18 sale of food products.”).

19           This presumption notwithstanding, Defendants press ahead with their preemption argument.  
20 For support, they rely on the Ninth Circuit’s decision in *Pom Wonderful LLC v. Coca-Cola*  
21 *Company*, 679 F.3d 1170 (9th Cir. 2012). Mars Mot. at 14. In *Pom Wonderful*, the manufacturer of  
22 a pomegranate juice beverage sued Coca-Cola under the federal Lanham Act, alleging that Coca-  
23 Cola’s competing product, “Pomegranate Blueberry,” was false both in name and label because it  
24 consisted of 99.4% apple and grape juice. *Id.* at 1174. As in this case, the *Pom Wonderful* plaintiff  
25 also brought state-law claims under the Sherman Law, the UCL, and the FAL, alleging that those  
26 state laws incorporate FDA labeling standards and prohibitions. *Id.* The *Pom Wonderful* Court  
27 ultimately held that, based on the “particular circumstances of th[e] case,” “the FDCA and its  
28

1 regulations bar pursuit of both the name and labeling aspects of [plaintiff's] Lanham Act claim.”  
2 *Id.* at 1176 (citing with approval *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 922 (9th Cir. 2010)).

3 As this Court discussed in *Brazil v. Dole Food Co.*, --- F.Supp.2d ----, 2013 WL 1209955  
4 (N.D. Cal. Mar. 25, 2013), the Court is “not persuaded that *Pom Wonderful* stands for the sweeping  
5 proposition Defendants set forth.” *Id.* at \*7; *see also Bruton v. Gerber Prods. Co.*, No. 12-2412,  
6 2013 WL 4833413, at \*8-11 (N.D. Cal. Sept. 6, 2013) (rejecting a near-identical implied  
7 preemption argument in mislabeling case against a different food company). Significantly, the  
8 Court in *Pom Wonderful* limited its ruling to the federal Lanham Act and explicitly declined to  
9 address whether plaintiff's state-law claims were also preempted. *See Pom Wonderful LLC*, 679  
10 F.3d at 1179 (vacating the summary judgment to the extent it ruled that plaintiff lacked statutory  
11 standing on its UCL and FAL claims and “remand[ing] so that the district court can rule on the  
12 state claims”). As a result, the Ninth Circuit did not specifically address the impact of the FDCA on  
13 states' historic power to protect their people against fraud and deception in the sale of food  
14 products. Nor did it grapple with the presumption that Congress did not intend to supplant state  
15 law. *Cf. Stengel*, 704 F.3d at 1227-28. Thus, the Court finds that *Pom Wonderful* is distinguishable  
16 from this case. *Accord Delacruz v. Cytosport, Inc.*, No. 11-3532, 2012 WL 2563857, at \*7 n. 3  
17 (N.D. Cal. June 28, 2012) (“The Ninth Circuit's preemption ruling [in *Pom Wonderful*] was limited  
18 to a finding that the FDCA preempted Pom's claims under the Lanham Act.”); *cf. Ivie v. Kraft*  
19 *Foods Global, Inc. (Ivie I)*, No. 12-2554, 2013 WL 685372, at \*6-7 (N.D. Cal. Feb. 25, 2013)  
20 (construing *Pom Wonderful* as “dismiss[ing] federal Lanham act claims implicitly on the basis of  
21 primary jurisdiction with the FDA,” and subsequently finding that “where FDA policy is clearly  
22 established with respect to what constitutes an unlawful or misleading label, the primary  
23 jurisdiction doctrine is inapplicable because there is little risk that the courts will undermine the  
24 FDA's expertise.”).

25 Defendants also rely on *Buckman*, 531 U.S. 341, in which the Supreme Court held that a  
26 state-law tort claim for injuries allegedly caused (in the “but for” sense) by Defendant's fraudulent  
27 representations to the FDA in the course of obtaining regulatory approval for its orthopedic bone  
28 screws was impliedly preempted by the FDCA, as amended by the Medical Device Amendments

1 of 1976 (“MDA”), 21 U.S.C. § 360c, *et seq.* See *id.* at 344, 348. As with *Pom Wonderful*, however,  
2 *Buckman* is distinguishable from the present case, and the Court is not persuaded that its logic can  
3 be stretched to dismiss Gustavson’s claims under the doctrine of implied preemption.

4 Initially, it bears emphasizing that *Buckman*, is factually distinguishable from this case,  
5 because it arose in the context of “Class III medical devices.” See *id.* at 344. As the Supreme Court  
6 explained, medical devices are regulated under the MDA, which divides devices into three  
7 categories. *Id.* Class III devices are subject to the FDA’s strictest regulation because they “presen[t]  
8 a potential unreasonable risk of illness or injury.” *Id.* (internal quotation marks omitted).  
9 Consequently, before a Class III device comes to market, its manufacturer must complete a  
10 “thorough” review process with the FDA. *Id.* The parties here do not assert that the dangers arising  
11 out of food mislabeling are even remotely equivalent to the “unreasonable risk of illness or injury”  
12 presented by Class III medical devices, nor do they allege that food labeling is subjected to a  
13 comparably rigorous review process that requires premarket approval. *Cf. id.* at 344-45 (noting that  
14 “[t]he PMA process is ordinarily quite time consuming because the FDA’s review requires an  
15 average of 1,200 hours [for] each submission”) (internal quotation marks omitted). Thus, while the  
16 Court finds that the broad principles regarding preemption espoused in *Buckman* are relevant to the  
17 Court’s analysis here, the Court bears in mind the distinct factual scenarios in which the two cases  
18 arose.

19 Next, in the context of food labeling—an area traditionally within the purview of the states’  
20 police powers, *see, e.g., Florida Lime & Avocado Growers*, 373 U.S. 132 at 144—the Court finds  
21 it significant that Congress has not set forth a “clear and manifest” statement that it intended state  
22 food labeling claims to be subject to implied preemption. See *Chae v. SLM Corp.*, 593 F.3d 936,  
23 944 (9th Cir. 2010) (“We must be cautious about conflict preemption where a federal statute is  
24 urged to conflict with state law regulations within the traditional scope of the state’s police powers.  
25 When we deal with an area in which states have traditionally acted, the Supreme Court has told us  
26 to start with the assumption that a state’s historic police powers will not be superseded absent a  
27 ‘clear and manifest purpose of Congress.’” (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009))).  
28 Indeed, the NLEA explicitly states that the Act “shall *not* be construed to preempt any provision of

1 State law, unless such provision is *expressly* preempted under [21 U.S.C. § 343-1].” NLEA  
2 § 6(c)(1) (emphasis added); *see also Wyeth* , 555 U.S. at 575 (“The case for federal pre-emption is  
3 particularly weak where Congress has indicated its awareness of the operation of state law in a  
4 field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate  
5 whatever tension there [is] between them.” (alteration in original) (internal quotation marks  
6 omitted)). By contrast, in *Buckman*, the presumption against preemption was not in play: the Court  
7 specifically noted that Plaintiffs’ “fraud-on-the-FDA” claim did *not* implicate “a field which the  
8 States have traditionally occupied . . . such as to warrant a presumption against finding federal pre-  
9 emption of a state-law cause of action.” 531 U.S. at 347 (internal quotation marks and citation  
10 omitted).

11 Finally, to the extent that the Ninth Circuit’s recent decisions in *Perez v. Nidek Co.*, 711  
12 F.3d 1109 (9th Cir. 2013), and *Stengel v. Medtronic Inc.*, 704 F.3d 1224 (9th Cir. 2013) (en banc),  
13 establish a “narrow gap” through which Plaintiff’s claims must fit in order to escape preemption,  
14 *see Perez*, 711 F.3d at 1120 (quoting *In re Medtronic Inc., Sprint Fidelis Leads Products Liability*  
15 *Litig.*, 623 F.3d 1200, 1204 (8th Cir. 2010)), Gustavson’s claims that seek to impose labeling  
16 requirements identical to current FDA regulations succeed in squeezing through that gap. With  
17 regard to these claims, Gustavson is suing for conduct that violates the FDCA, so her claims are  
18 not expressly preempted. But Gustavson is not suing *because* Defendants’ conduct violates the  
19 FDCA; rather, she is suing because Defendants’ conduct allegedly violates California’s Sherman  
20 Law, which could have imposed the exact same regulations even if the FDCA was never passed.<sup>3</sup>

21  
22  
23 <sup>3</sup> This fact distinguishes this case from *Loreto v. Procter & Gamble Co.*, 515 F. App’x 576 (6th  
24 Cir. Feb. 22, 2013) (unpublished), a case involving the alleged mislabeling of products with  
25 Vitamin C upon which Defendants also rely. In *Loreto*, the Sixth Circuit held that a claim brought  
26 under the New Jersey Consumer Fraud Act was impliedly preempted by federal law. As there was  
27 no mention of any New Jersey counterpart to the Sherman Law adopting the federal regulations as  
28 state law, “the *only* reason [defendant’s] products were allegedly ‘illegal’ was because they failed  
to comply with FDCA labeling requirements.” *Id.* at 579. In contrast, Gustavson alleges that the  
products at issue in this case are illegal because they fail to comply with various provisions of the  
Sherman Law.

1 The Court is not persuaded that Defendants have overcome the presumption against  
2 preemption. *See Lohr*, 518 U.S. at 485; *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365,  
3 373 (N.D. Cal. 2010) (“In view of the Supreme Court’s determination in *Wyeth* that Congress did  
4 not intend FDA oversight to be [the] exclusive means of ensuring drug safety and effectiveness,  
5 and in the absence of authority to the contrary in the food labeling regulatory scheme, defendants  
6 have not persuaded the court that plaintiff’s state-law claims obstruct federal regulation of food  
7 labeling.”); *see also Samet v. Proctor & Gamble Co.*, No. 12-1891, 2013 WL 3124647, at \*6-7  
8 (N.D. Cal. June 18, 2013) (rejecting a very similar implied preemption argument against a different  
9 food company). Accordingly, the Court DENIES Defendants’ Motions to Dismiss the FAC on the  
10 basis of implied preemption as to Gustavson’s claims that seek to impose labeling requirements  
11 identical to current FDA regulations. However, as will be discussed below, *see infra* Part III.A.3,  
12 the Court finds that Gustavson’s claims that attempt to impose requirements that are not identical  
13 to FDA regulations— calorie-related claims on chocolate, the standard of identity for milk  
14 chocolate, and low calorie claims on sugar free gum—are expressly preempted and are dismissed  
15 for that reason.

16 **3. Preemption Based on Claims that are “Not Identical” to Federal**  
17 **Requirements**

18 Defendants next contend that Gustavson is attempting to impose requirements that differ  
19 from or are in addition to FDA regulations, and thus that her claims are subject to express  
20 preemption. Mars Mot. at 18-23; Wrigley Mot. at 12-18. Pursuant to 21 U.S.C § 343-1(a), “no state  
21 . . . may directly or indirectly establish . . . any requirement . . . made in the . . . labeling of food  
22 that is not identical to” certain FDA requirements, such as 21 U.S.C. § 343(q), which applies to  
23 nutrition information, and 21 U.S.C. § 343(r), which applies to “Nutrition levels and health-related  
24 claims.” Per FDA regulations, “[n]ot identical to” . . . means that the State requirement directly or  
25 indirectly imposes obligations or contains provisions concerning the composition or labeling of  
26 food, or concerning a food container, that: (i) [a]re not imposed by or contained in the applicable  
27 provision . . . or (ii) [d]iffer from those specifically imposed by or contained in the applicable  
28 provision.” 21 C.F.R. § 100.1(c)(4). Gustavson responds that she seeks only to enforce labeling

1 requirements identical to those imposed by the FDA. Mars Opp’n at 15; Wrigley Opp’n at 19. The  
2 Court discusses whether each of Gustavson’s specific claims is subject to express preemption  
3 below.

4 **a. Claims Against Mars**

5 **i. Flavanol Nutrient Content Claims**

6 As explained in Part I.A.1.a, Gustavson contends that Mars’s statements concerning the  
7 presence of flavanols in certain Mars chocolate products violate FDA regulations governing when  
8 a food may be described as a source of a given nutrient. *See* FAC ¶¶ 70-83 (citing 21 C.F.R.  
9 101.54(c)(1) (“(1) The terms ‘good source,’ ‘contains,’ or ‘provides’ may be used on the label and  
10 in the labeling of foods . . . *provided* that the food contains 10 to 19 percent of the RDI or the DRV  
11 per reference amount customarily consumed.”) (emphasis added)). Although none of Mars’s  
12 statements use the exact terms “good source,” “contains,” or “provides,” Gustavson argues that the  
13 terms “natural source” and “found” are synonymous with these FDA-defined terms, and that to the  
14 extent they are not, they may not appear on food labels. FAC ¶¶ 72, 75.

15 Mars asserts that Gustavson’s flavanol claims are expressly preempted, because its  
16 statements concerning flavanols are not “nutrient content claims” subject to FDA regulation. Mars  
17 Mot. at 18-19. Because flavanol claims are not subject to FDA regulation, Mars contends, any  
18 finding that Mars chocolate is misbranded based on statements regarding flavanols would impose a  
19 requirement not found in federal law and would thus fall afoul of the NLEA’s express preemption  
20 provision. *See id.* at 18.

21 In support of its argument, Mars reasons that the FDA defines “nutrient content claims” as  
22 “claim[s] that expressly or implicitly characterize[] the level of a nutrient of the type required to be  
23 in nutrition labeling under § 101.9 or under § 101.36[,] 21 C.F.R. § 101.13(b),” but that neither  
24 Section 101.9 nor Section 101.36 lists flavanols as one of the nutrients required to be in nutrition  
25 labeling. Mars Mot. at 19. Mars further argues that its statements concerning flavanols “do not  
26 ‘expressly or implicitly characterize[] the level’ of flavanols” in Mars chocolate, because the  
27 claims do not involve “any ‘direct statement about the level (or range)’ of flavanols in the  
28 product;” do not describe “‘the food or an ingredient therein in a manner that suggests that a

1 nutrient is absent or present in a certain amount;” and do not suggest that “the food, because of its  
2 nutrient content, may be useful in maintaining healthy dietary practices.” *Id.* (alteration in  
3 original) (quoting 21 C.F.R. § 101.13(b)(2)).

4 Gustavson responds by citing various FDA Warning Letters, in which the FDA has  
5 expressed its views on the use of the terms “source,” and “flavonoid antioxidants.” *See* Mars Opp’n  
6 at 17-18. Specifically, in a March 24, 2011 Warning Letter sent to a producer of sprouts, the FDA  
7 took the position that the term “source” is a nutrient content claim that characterizes the level of a  
8 nutrient in a food. *See* FAC ¶ 73 (quoting the Warning Letter’s statement: “Your Organic Clover  
9 Sprouts products label bears the claim ‘Phytoestrogen Source[.]’ . . . These claims are nutrient  
10 content claims subject to [21 U.S.C. § 343(r)(1)(A)] because they characterize the level of nutrients  
11 of a type required to be in nutrition labeling . . . by use of the term ‘source.’”); *see also* Mars Opp’n  
12 Ex. 2 at 10 (reproducing the Warning Letter). In another Warning Letter, this one dated August 23,  
13 2010, the FDA admonished Unilever for using the term “flavonoid antioxidants” (which describes  
14 a category of antioxidants of which flavanols are a subset) on its Lipton iced tea products, “because  
15 no RDI has been established for flavonoids.” *See* Mars Opp’n Ex. 2 at 1-3 (reproducing the  
16 Warning Letter); *see also* Mars Opp’n at 18-19. In the Letter, the FDA warned that, by using the  
17 term “flavonoid antioxidants,” Unilever was violating 21 C.F.R. § 101.54(g)(1). *See* Mars Opp’n  
18 Ex. 2 at 3.

19 The Court finds that Gustavson has alleged sufficient facts to show, for purposes of a  
20 motion to dismiss, that Mars’s flavanol claims are subject to FDA regulation and that the flavanol  
21 claims may plausibly violate those regulations. Mars concedes that flavanols are a type of  
22 antioxidant, and claims regarding antioxidants are regulated by 21 C.F.R. § 101.54(g) (“A nutrient  
23 content claim that characterizes the level of antioxidant nutrients present in a food may be used on  
24 the label or in the labeling of that food when” certain requirements are met). Although Mars’s  
25 labels do not specifically use the term “antioxidant” in connection with the flavanol claims, Mars  
26 identifies no authority to establish that Section 101.54(g) ceases to govern merely because a food  
27 product’s label refers to the antioxidant by its precise name, rather than by a generic umbrella term.  
28 Accordingly, the Court is unable to conclude at this time that Section 101.54(g) does not apply. In

1 addition, despite Mars’s assertion that the terms “source” and “found” do not characterize the level  
2 of flavanols present in their chocolate, the only relevant authority presented at this stage indicates  
3 that the FDA disagrees with Mars’s position. *See* Mars Opp’n Ex. 2 at 10 (“These claims are  
4 nutrient content claims subject to [21 U.S.C. § 343(r)(1)(A)] because they characterize the level of  
5 nutrients of a type required to be in nutrition labeling . . . by use of the term ‘source.’”). While  
6 Mars disputes whether the March 24, 2011 Warning Letter is a binding statement of the FDA’s  
7 position on the term “source,” Mars Mot. at 20, it has not identified any other FDA statements that  
8 contradict this letter. Because the Court is not currently persuaded that Gustavson seeks to impose  
9 labeling requirements that are not identical to those required by federal regulation, it declines to  
10 find that the flavanol claims are expressly preempted.

11 **ii. Calorie-Related Nutrient Content Claims**

12 As discussed in Part I.A.1.b, Gustavson alleges that Mars makes false and unlawful calorie-  
13 related nutrient content claims on the front labels of its chocolate products. Gustavson claims that  
14 by stating the number of calories in the package and listing the percentage by which that number of  
15 calories contributes to a 2000-calorie-per-day diet, Mars falsely suggests that 2000 calories is the  
16 appropriate number of calories for individual consumers. FAC ¶ 85. Gustavson further contends  
17 that Mars unlawfully fails to accompany its calorie claims with a disclosure that its products  
18 contain high levels of fat and/or saturated fat, in violation of 21 C.F.R. § 101.13(h)(1), FAC ¶ 89.

19 Mars argues that Gustavson’s calorie-related claims are expressly preempted, because the  
20 front-of-package calorie labels comply with the FDA’s regulations. Mars Mot. at 20-21.  
21 Specifically, Mars observes that 21 C.F.R. § 101.13(i)(3) expressly provides that “the label or  
22 labeling of a product may contain a statement about the amount *or percentage* of a nutrient if . . .  
23 [t]he statement does not in any way implicitly characterize the level of the nutrient in the food and  
24 [] is not false or misleading in any respect (e.g., ‘100 calories’ or ‘5 grams of fat’).” *Id.* Mars  
25 argues that this section permits its calorie claims, because the claims do not implicitly characterize  
26 the *level* of calories in the products (in that they do not imply, for instance, that the products are  
27 low calorie). *Id.* at 21. It further argues that listing a percentage DV based on a 2,000 calorie diet  
28 could not possibly be false or misleading within the meaning of the FDA’s regulations, because the

1 FDA *itself* uses a 2,000 calorie day baseline to calculate nutrient DVs. *Id.*; *see also, e.g.*, 21 C.F.R.  
2 § 101.9(c)(9) (requiring that labeling containing nutrient percentages be based on a 2,000 calorie  
3 diet); 101.9(d)(9) (same). Mars also asserts that it is not required to accompany its calorie claims  
4 with disclosure statements concerning fat and/or saturated fat, since Section 101.13(i)(3) contains  
5 no such requirement. Mars Mot. at 21.

6 Gustavson does not directly respond to Mars’s arguments regarding 21 C.F.R.  
7 § 101.13(i)(3). Instead, Gustavson points to FDA guidance stating that the “‘FDA views the  
8 Nutrition Keys Basic Icons . . . and Optional Icons as nutrient claims subject to all the requirements  
9 of the FDCA and the Agency’s regulations.’” Mars Opp’n at 22 (quoting December 13, 2011 FDA  
10 Warning Letter, Mars Opp’n Ex. 3). The implication seems to be that Gustavson believes that  
11 Mars’s front-of-package calorie claims are examples of the “Icons” to which this FDA guidance  
12 refers, but the FAC makes no mention of these Icons, and Gustavson’s briefing is sufficiently  
13 vague that the Court is unable to discern what “Nutrition Keys Basic Icons” or “Optional Icons”  
14 even are, let alone whether Mars’s calorie claims qualify as Icons. Given that these “Icon”  
15 allegations do not appear in the FAC, the Court will not consider Gustavson’s arguments regarding  
16 them. *See, e.g., Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (in evaluating a motion  
17 to dismiss, “a court *may not* look beyond the complaint to a plaintiff’s moving papers, such as a  
18 memorandum in opposition to a motion to dismiss”).

19 Gustavson offers no other persuasive arguments to contradict Mars’s interpretation of the  
20 FDA’s regulations governing their calorie claims. Neither does the Court perceive any. Because  
21 Mars’s calorie-related claims appear to comply with all applicable federal regulations, any finding  
22 that these claims are unlawful and deceptive would impose requirements not identical to the FDA’s  
23 regulations. Accordingly, the Court GRANTS Mars’s Motion to Dismiss the calorie-related claims  
24 involving Mars chocolate products on the basis of express preemption. However, because the  
25 “Icon” arguments alluded to in Gustavson’s opposition suggest that amendment of these claims  
26 may not be futile, this dismissal is without prejudice. *See id.* (“Facts raised for the first time in  
27 plaintiff’s opposition papers *should* be considered by the court in determining whether to grant  
28 leave to amend or to dismiss the complaint with or without prejudice.” (emphasis added)).



1 standard by describing the optional forms or varieties, the packing medium, or  
2 significant characterizing ingredients present in the food.

3 (Emphasis added); *see also* Reply at 27. Mars argues that this general provision overrides Section  
4 160.130's specific requirements, as least where, as here, Mars is not making any statements to  
5 differentiate its milk chocolate from other products bearing the standardized milk chocolate label.  
6 Reply at 27-28. Mars points out that Section 130.11 was added in 1993 precisely because the  
7 NLEA added a requirement that "all ingredients of standardized foods be declared in the ingredient  
8 list," and that, in light of this new requirement, "the declaration of certain optional ingredients in  
9 conjunction with the name would be duplicative and unnecessary." 58 Fed. Reg. 2850-01, 2851  
10 (Jan. 6, 1993); *see also* Reply at 27-28. Because Section 130.11 permits Mars to use the term  
11 "milk chocolate" on the front of its packages without including disclaimers involving alkali,  
12 vanillin, or other optional ingredients, Mars contends that Gustavson's claim that the failure to  
13 include such disclaimers seeks to impose a requirement that deviates from federal law. Mars. Mot.  
14 at 28.

15 The FAC makes no reference to Section 130.11, and Gustavson offers no explanation as to  
16 how her standard of identity claim is consistent with federal law. The Court agrees with Mars's  
17 reading of the FDA's regulations, and accordingly GRANTS the Motion to Dismiss this claim on  
18 express preemption grounds.

19 **b. Claims Against Wrigley**

20 **i. Low Calorie Nutrient Claims**

21 As discussed in Part I.A.2.a, Gustavson challenges Wrigley's claim that its sugar free gums  
22 are "low calorie" on the ground that "low calorie" claims are subject to federal regulations that  
23 prohibit manufacturers from making such claims on food labels if the foods contain more than 40  
24 calories per 50 grams. FAC ¶ 101-02. Gustavson alleges that Wrigley sugar free gums exceed this  
25 limit, noting as an example that Wrigley Eclipse Winterfrost sugar free gum contains 83 calories  
26 per 50 grams. FAC ¶ 102. Although the FAC does *not* allege that Wrigley's labels themselves  
27 contain low calorie claims, Gustavson argues that the websites and publications where the "low  
28 calorie" claims do appear are also governed by 21 C.F.R. § 101.60, because "websites are indeed

1 part of a products’ labeling.” Wrigley Opp’n at 14 (citing an August 23, 2010 FDA Warning Letter  
2 to Unilever, Inc., stating that the www.lipton.com website, and a website linked from it, both  
3 constitute labeling for an iced tea product, because the www.lipton.com website appeared on the  
4 product’s label).

5 Gustavson’s argument misses the point. While the FDA may well take the position that a  
6 manufacturer incorporates statements made on its website by including a reference to that website  
7 on a product’s label, the FAC does not allege that any of Wrigley’s labels contains a reference to  
8 any website on which a low calorie claim might be found. *See also* Reply at 12 (“Plaintiff relies  
9 exclusively on an FDA letter regarding a Lipton label that directed the consumer to a particular  
10 website. But Plaintiff does not allege that the Wrigley labeling directs the consumer to the websites  
11 cited by Plaintiff. Thus . . . the Wrigley publications are not part of the Wrigley labeling.”).  
12 Gustavson offers no support for her theory that the FDA views *all* product-related websites—  
13 whether or not they are referenced on labels—as “labeling” subject to regulation.

14 As Gustavson has failed to explain how low calorie claims made on a website that is not in  
15 any way linked to the product labels at issue in this case constitute “labeling” for purposes of  
16 federal law, the Court concludes that this claim “attempts to impose additional requirements that  
17 are not required by the federal regulations.” Wrigley Mot. at 15. Thus, Gustavson’s claim is  
18 expressly preempted by federal law, and the Court GRANTS Wrigley’s Motion to Dismiss this  
19 claim. However, because Gustavson may be able muster some support for her website-as-labeling  
20 theory, the Court dismisses this claim with leave to amend.

21 **ii. Sugar Free Nutrient Content Claims**

22 As explained *supra* Part I.A.2.b, Gustavson contends that Wrigley’s use of the “sugar free”  
23 label on its hard candies, gum, and breath mints violates federal regulations, because the labels’  
24 disclaimers regarding special dietary usefulness are insufficient, FAC ¶¶ 110-111, and because the  
25 labels do not use the breath mint serving size required by 21 C.F.R. § 101.9, which is “a  
26 prerequisite for making a sugar free claim or a statement of dietary usefulness,” FAC ¶ 109. The  
27  
28

1 Court addresses the first of these arguments in the section; the serving size claims will be addressed  
2 *infra* in Part III.A.3.b.iii.<sup>4</sup>

3 The parties agree that 21 C.F.R. § 101.60(c)(1) requires foods labeled “sugar free” to  
4 display one of the following on their labels: (a) a disclaimer that the food is “low calorie” or  
5 “reduced calorie,” in accordance with federal regulations; (b) a disclaimer that the food “bears a  
6 relative claim of special dietary usefulness” in compliance with federal regulations; or (c) a  
7 disclaimer that the food is “not a reduced calorie food,” “not a low calorie food,” or “not for weight  
8 control.” FAC ¶ 107 (quoting 21 C.F.R. § 101.60(c)(1)). Wrigley argues, however, that its labels  
9 do, in fact, comply with the federal requirements for a “relative claim of special dietary  
10 usefulness”—here, a claim that the products are “reduced calorie,” *see* 21 C.F.R. §§ 101.60(b)(4),  
11 101.60(c)(1)(iii)—and thus that it has fully complied with federal law. Wrigley Mot. at 14-15.  
12 Federal regulation requires that a relative claim of special dietary usefulness declare, “the identity  
13 of the reference food and the percent . . . that the calories differ between the two foods . . . in  
14 immediate proximity to the most prominent such claim.” 12 C.F.R. § 101.60(b)(4)(ii)(A). The  
15 regulation also requires that “[q]uantitative information comparing the level of nutrient per labeled  
16 serving size with that of the reference food that it replaces . . . [be] declared adjacent to the most  
17 prominent claim or to the nutrition label . . . .” 12 C.F.R. § 101.60(b)(4)(ii)(B). Wrigley contends  
18 that the placement of its relative claims of special dietary usefulness on products labeled “sugar  
19 free” complies with federal requirements, because “[t]here is no requirement that the relative claim  
20 be adjacent to the ‘sugar free’ claim. Rather, subsection (b)(4)—the section governing reduced  
21 calorie claims—requires that the reference food and the percent reduction be declared in immediate  
22 proximity to ‘the most prominent such claim,’ which refers to the ‘reduced calorie claim,’ *not* the  
23 sugar-free claim.” Wrigley Mot. at 15 (quoting 21 C.F.R. § 101.60(b)(4)(ii)(A)).

24 \_\_\_\_\_  
25 <sup>4</sup> Gustavson also cursorily alleges that Wrigley’s labels fail to disclose that the “sugar free”  
26 products “are sweetened with nutritive and non-nutritive sweeteners or to detail the percentage of  
27 the product that nonnutritive components comprise as required by regulation.” FAC ¶¶ 110, 112.  
28 The FAC does not identify which regulations this labeling practice allegedly violates, thus  
precluding the Court from evaluating whether the claim is expressly preempted. Regardless, as  
discussed *infra* Part III.C, this claim must be dismissed for failure to state a claim under Rule  
12(b)(6).



1 breath mints to be declared as one mint.” *See id.* at 17 (quoting 62 Fed. Reg. 67,775, 67,776-77  
2 (Dec. 30, 1997) and citing 2012 Regulatory Agenda, 77 Fed. Reg. 7946-01 (Feb. 13, 2012)).

3 Although Wrigley asks the Court to “defer to the FDA’s judgment in interpreting its own  
4 serving size regulations,” *id.* at 18, such deference actually supports *Gustavson’s* interpretation of  
5 the federal regulatory guidelines in this instance. In spite of the FDA’s indications of intent to  
6 change the standard, the controlling regulation for breath mints continues to set the serving size at  
7 two grams. *See* 21 C.F.R. § 101.12(b). Indeed, the very 1997 analysis that Wrigley cites  
8 demonstrates that the FDA understands that the *current* serving size for breath mints is two grams.  
9 *See* 62 Fed. Reg. at 67,776. While the FDA may well be on the brink of revising the mandatory  
10 serving size for small breath mints, it has not yet done so, and so Wrigley’s argument that  
11 *Gustavson* seeks to impose a serving size inconsistent with that provided for by the federal  
12 regulations fails. Accordingly, the Court declines to find that this claim is subject to express  
13 preemption.

#### 14 c. Summary of Express Preemption Findings

15 To summarize, the Court finds that *Gustavson’s* claims regarding: (1) calorie-related  
16 statements on Mars chocolate products; (2) the standard of identity for milk chocolate; and (3) low  
17 calorie claims about Wrigley sugar free gum are subject to express preemption. The Court  
18 therefore GRANTS Defendants’ Motions to Dismiss these claims, but grants *Gustavson* leave to  
19 amend. *Gustavson’s* remaining claims regarding: (1) flavanols; (2) PGPR; (3) “sugar free”  
20 statements; and (4) serving size are not subject to express preemption, and Defendants’ Motions to  
21 Dismiss on this basis is DENIED.<sup>5</sup>

#### 22 4. Primary Jurisdiction

23 Defendants argue that, even if the Court finds that *Gustavson’s* claims are not preempted,  
24 the Court should dismiss the case under the doctrine of primary jurisdiction. The primary

25 \_\_\_\_\_  
26 <sup>5</sup> Elsewhere in their briefs, Defendants argue that *Gustavson’s* claims are barred by the UCL’s  
27 “safe harbor” for conduct authorized by other laws. *See* Wrigley Mot. at 21 (citing *Cel-Tech*  
28 *Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999)). The Court need not address  
this argument in any depth: to the extent Defendants’ conduct is permitted under federal law, it is  
expressly preempted; to the extent it is not, there is no basis for shielding that conduct under a safe  
harbor. Defendants’ Motions to Dismiss on this basis is accordingly DENIED.

1 jurisdiction doctrine “allows courts to stay proceedings or to dismiss a complaint without prejudice  
2 pending the resolution of an issue within the special competence of an administrative agency.”  
3 *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). The doctrine applies when: “(1)  
4 [there is a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of  
5 an administrative body having regulatory authority (3) pursuant to a statute that subjects an  
6 industry or activity to a comprehensive regulatory authority that (4) requires expertise or  
7 uniformity in administration.” *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775,  
8 781 (9th Cir. 2002). However, the doctrine of primary jurisdiction “does not require that all claims  
9 within an agency’s purview be decided by the agency. Nor is it intended to secure expert advice for  
10 the courts from regulatory agencies every time a court is presented with an issue conceivably  
11 within the agency’s ambit.” *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172  
12 (9th Cir. 2002) (internal quotation marks omitted). Rather, “[p]rimary jurisdiction is properly  
13 invoked when a claim is cognizable in federal court but requires resolution of an issue of first  
14 impression, or of a particularly complicated issue that Congress has committed to a regulatory  
15 agency.” *Id.*

16 Defendants urge that all Gustavson’s claims should be dismissed on the basis of primary  
17 jurisdiction, but only Wrigley’s argument with regard to Gustavson’s breath mint serving size  
18 claim merits extended discussion. Wrigley asserts that the FDA is in the process of changing the  
19 regulations on breath mint serving size, pointing out that this is on the FDA’s 2013 regulatory  
20 agenda. *See FDA, Food Labeling: Serving Sizes; Reference Amount and Serving Size Declaration*  
21 *for Hard Candies and Breath Mints*, available at <http://federalregister.gov/r/0910-AG82> (accessed  
22 Sept. 13, 2013). Wrigley further notes that the FDA has been expressing dissatisfaction with the  
23 current serving size rules as they apply to small breath mints for many years, which suggests that  
24 Wrigley breath mints are unlikely to be out of compliance with the FDA’s serving size regulations  
25 under an updated rule. *See Wrigley Mot.* at 21.

26 Though the Court views this as a close question, it agrees with Wrigley that Gustavson’s  
27 serving size claims are appropriately dismissed under the doctrine of primary jurisdiction. While  
28 this case is distinguishable from other recent cases that have dismissed food misbranding claims

1 based on primary jurisdiction, in that the FDA has controlling regulations on this issue already in  
2 place, *compare Hood v. Wholesoy & Co, Modesto Wholesoy Co. LLC*, 2013 WL 3553979, at \*5-6  
3 (N.D. Cal. July 12, 2013), and *Astiana v. Hain Celestial Group*, 905 F. Supp. 2d 1013, 1016 (N.D.  
4 Cal. 2012) (no FDA guidance concerning the appropriate use of the term “natural” on cosmetics  
5 labels), in light of the substantial possibility that the FDA may soon change its breath mint serving  
6 requirements, the Court finds it more prudent to step back and allow the FDA regulatory process to  
7 play out. *Accord Ivie I*, 2013 WL 685372, at \*7 (“Because the FDA is currently in the process of  
8 amending its serving size regulations with respect to small breath mints, which includes those at  
9 issue here, the court declines to usurp the FDA’s expertise in this area.”).

10 As to Gustavson’s other remaining claims, however, the Court declines to dismiss based on  
11 primary jurisdiction. While this case does involve issues within the jurisdiction of the FDA, the  
12 Ninth Circuit has made clear that only those claims raising issues of first impression or particular  
13 complexity are appropriately dismissed or stayed based on primary jurisdiction. *See Brown*, 277  
14 F.3d at 1172. Based on the information available at this stage, however, the issues in this case are  
15 neither novel nor especially complex. As should be clear from the Court’s discussion of express  
16 preemption, the FDA has issued extensive regulations governing Gustavson’s claims. *See supra*  
17 Part III.A.3.

18 Likewise, Gustavson’s claims do not raise highly technical issues uniquely within the  
19 FDA’s expertise. As with so many of the other food misbranding cases filed recently within this  
20 district, Gustavson’s case is “far less about science than it is about whether a label is misleading.”  
21 *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d. 889, 898 (N.D. Cal. 2012). “[E]very day courts  
22 decide whether conduct is misleading,” and the “reasonable-consumer determination and other  
23 issues involved in Plaintiff’s lawsuit are within the expertise of the courts to resolve.” *Id.* at 899  
24 (quoting *Lockwood*, 597 F. Supp. 2d at 1035, and *Delacruz*, 2012 WL 2563857, at \*10); *see also*  
25 *Chacanaca v. Quaker Oats Co.*, 752 F.Supp.2d 1111, 1124 (N.D. Cal. 2010) (stating that  
26 “plaintiffs advance a relatively straightforward claim: they assert that defendant has violated FDA  
27  
28

1 regulations and marketed a product that could mislead a reasonable consumer. . . . [T]his is a  
2 question courts are well-equipped to handle”).<sup>6</sup>

3 In sum, the Court GRANTS Wrigley’s Motion to Dismiss Gustavson’s breath mint serving  
4 size claims on the basis of primary jurisdiction without prejudice, but DENIES Defendants’  
5 Motions to Dismiss Gustavson’s other remaining claims on this basis.

6 **B. Standing**

7 Defendants also argue that Gustavson lacks standing—under Article III as well under the  
8 UCL, FAL, and CLRA—because she has not pleaded that she suffered any injury as a result of  
9 Defendants’ alleged mislabeling practices. Mars Mot. at 9; Wrigley Mot. at 9 (each citing *Lujan v.*  
10 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Specifically, Defendants contend that Gustavson  
11 fails to plead either a cognizable legal injury or plausible reliance. *See* Mars Mot. at 9-10; Wrigley  
12 Mot. at 9-10. The Court disagrees.

13 To adequately demonstrate Article III standing at the motion to dismiss stage, a plaintiff  
14 must allege: (1) an injury-in-fact that is concrete and particularized, as well as actual or imminent;  
15 (2) that is fairly traceable to the challenged action of the defendant; and (3) is redressable by a  
16 favorable ruling from the Court. *See Monsanto Co. v. Geertson Seed Farms*, --- U.S. ---, 130 S. Ct.  
17 2743, 2752 (2010); *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167,  
18 180-81 (2000) (same). Meanwhile under California’s UCL and FAL, a private person has standing  
19 only if she “has suffered injury in fact *and* has lost money or property as a result of the unfair  
20 competition.” Cal. Bus. & Prof. Code § 17204 (emphasis added); *see also Kwikset Corp. v.*  
21 *Superior Court*, 51 Cal. 4th 310, 322 (2011). Similarly, to bring a case under the CLRA, “[a]  
22 plaintiff . . . must not only be exposed to an unlawful practice but also have suffered some kind of  
23

24 <sup>6</sup> Other courts in this district have similarly rejected arguments based on primary jurisdiction in the  
25 food labeling context, at least so long as the FDA has made its position on the labels at issue  
26 reasonably clear and is not actively engaged in revising the applicable regulations or policy. *See,*  
27 *e.g., Trazo v. Nestlé USA, Inc.*, No. 12-2272, 2013 WL 4083218, at \*6 n.55 (N.D. Cal. Aug. 9,  
28 2013); *Ivie v. Kraft Foods Global, Inc. (Ivie II)*, No. 12-2554, 2013 WL 3296616, at \*7-8 (June 28,  
2013); *Samet*, 2013 WL 3124647, at \*7; *Janney v. Mills*, No. 12-3919, 2013 WL 1962360, at \*6-7  
(N.D. Cal. May 10, 2013) (same); *Ivie I*, 2013 WL 685372, at \*5-7 (declining to apply primary  
jurisdiction, except as to one claim for which the FDA was in the process of changing the  
applicable regulation).

1 damage.” *Bower v. AT & T Mobility, LLC*, 196 Cal. App. 4th 1545, 1556 (2011) (internal quotation  
2 marks omitted).

3 Defendants argue that Gustavson cannot demonstrate standing, because her claimed injury  
4 is that she purchased products that were “legally worthless” due to Defendants’ violations of  
5 federal labeling regulations. *See, e.g.*, *Wrigley Mot.* at 9 (citing FAC ¶¶ 1, 83). Defendants argue  
6 that such regulatory violations alone do not amount to actual injury, let alone economic injury, as  
7 required by the Constitution and California law. *Id.* Moreover, echoing the arguments they make in  
8 relation to their contention that Gustavson fails to state a claim for purposes of Rules 8 and 9(b),  
9 *see Discussion infra Part III.C*, Defendants assert that it is simply not plausible that Gustavson was  
10 deceived into purchasing their products as a result of any misstatements on the labels. *See id.* at 9-  
11 10. According to Defendants, the alleged regulatory violations are simply too “arcane” to render  
12 the labels misleading to a reasonable consumer. *See id.*

13 At this stage in the litigation, Gustavson’s allegations are sufficient to demonstrate both  
14 constitutional and statutory standing. The FAC specifically alleges that Gustavson “would have  
15 foregone purchasing Defendant’s [*sic*] products and bought other products readily available at a  
16 lower price” had she known they were misbranded. FAC ¶¶ 214-215; *see also* FAC ¶ 216 (stating  
17 that she would not have purchased the products “had she known the truth about them”). By  
18 alleging that she spent money that she would not have spent were it not for Defendants’  
19 misrepresentations, Gustavson has alleged “a quintessential injury-in-fact,” for Article III purposes.  
20 *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011); *see also Sierra Club v. Morton*, 405  
21 U.S. 727, 733 (1972) (“[P]alpable economic injuries have long been recognized as sufficient to lay  
22 the basis for standing.”). Similarly, the loss of money is clearly an “economic injury” for purposes  
23 of the UCL and FAL. *See Kwikset*, 51 Cal. 4th at 322; *see also, e.g., Bruton*, 2013 WL 4833413, at  
24 \*13-15 (rejecting a near identical standing argument in another food misbranding case; *Brazil*,  
25 2013 WL 1209955, at \*11-13 (same).

26 As regards reliance, Gustavson expressly states that she “read the labels on Defendants’  
27 products . . . before purchasing them” and that she “based and justified the decision to purchase  
28 Defendants’ products in substantial part on Defendants’ package labeling.” FAC ¶¶ 214-215. While

1 Defendants’ dispute the plausibility of these statements, arguing that no reasonable consumer  
2 would attach any significance to these alleged labeling violations, the Court recognizes that  
3 whether a practice is “deceptive, fraudulent, or unfair” is generally a question of fact that is not  
4 appropriate for resolution on the pleadings. *See Williams v. Gerber Products Co.*, 552 F.3d 934,  
5 938-39 (9th Cir. 2008) (citation omitted); *see also Khasin v. Hershey Co.*, No. 12-1862, 2012 WL  
6 5471153, at \*7 (N.D. Cal. June 28, 2012) (rejecting a similar plausibility argument because “the  
7 issues Defendant raise[s] ultimately involve questions of fact as to whether Plaintiff was or was not  
8 deceived by the labeling; this argument is therefore beyond the scope of this Rule 12(b)(6)  
9 motion”). Accordingly, the Court finds that Gustavson had adequately alleged both injury and  
10 reliance for purposes of surviving a motion to dismiss, and DENIES Defendants’ Motions to  
11 Dismiss for lack of standing.

12 **C. Failure to State a Claim**

13 Defendants allege that, “regardless of whether [their products’] labeling satisfies [the  
14 FDA’s] highly technical regulations, the [FAC] fails to state a claim under the UCL, FAL, and  
15 CLRA,” because the labels are not likely to deceive a reasonable consumer. Wrigley Mot. at 5 *see*  
16 *also* Mars Mot. at 3. Defendants further argue that Gustavson’s allegations regarding Defendants’  
17 supposedly unlawful “health” claims are not pleaded with sufficient particularity for purposes of  
18 Federal Rule of Civil Procedure 9(b). *See* Mars Mot. at 10; Wrigley Mot. at 10. Finally, Defendants  
19 contend that Gustavson cannot state viable claims for restitution or violations of the Song-Beverly  
20 and Magnuson-Moss Warranty Acts. *See* Mars Mot. at 24; Wrigley Mot. at 22-244. While the  
21 Court finds that Gustavson’s allegations that a reasonable consumer would be misled by  
22 Defendants’ alleged mislabeling are sufficient to survive a 12(b)(6) motion to dismiss, it agrees  
23 with Defendants that Gustavson’s unlawful “health” claims lack sufficient particularity and also  
24 that Gustavson cannot bring claims for restitution or violations of the Song-Beverly Consumer  
25 Warranty Act and the Magnuson-Moss Warranty Act.

26 **1. Reasonable Consumer**

27 The standard for establishing a violation of California’s UCL, FAL, and CLRA is the  
28 “reasonable consumer” test, which requires a plaintiff to “show that members of the public are

1 likely to be deceived” by the business practice or advertising at issue. *Williams*, 552 F.3d at 938.  
2 Here, Defendants devote considerable effort to arguing that Gustavson’s claims are facially  
3 implausible because no reasonable customer is likely to be deceived by Defendants’ alleged  
4 misstatements, which Defendants argue are, at most, *de minimus* technical regulatory violations.  
5 See Mars Mot. at 3-4; Wrigley Mot. at 5-6. The Court is not persuaded.

6 Gustavson may or may not be able to prove that a reasonable consumer would have been  
7 misled by Defendants’ alleged mislabeling practices if and when this case ever makes it to trial, but  
8 neither Rule 8(a), nor the Supreme Court’s decisions in *Twombly* and *Iqbal* require a plaintiff to  
9 prove her case the moment she files her complaint. “The plausibility standard is not akin to a  
10 probability requirement,” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted), and this Court  
11 is not convinced that Gustavson’s allegations about what would mislead a reasonable consumer are  
12 so improbable as to be implausible. While Defendants seem to believe that what is or is not  
13 misleading to a reasonable consumer is a matter of self-evident common sense, that question is  
14 actually all but impossible to answer in the abstract. Accordingly, courts recognize that whether a  
15 practice is “deceptive, fraudulent, or unfair” is generally a question of fact that is not appropriate  
16 for resolution on the pleadings. See *Williams*, 552 F.3d at 938-40; see *Colucci v. ZonePerfect*  
17 *Nutrition Co.*, No. 12-2907, 2012 WL 6737800, at \*8 (N.D. Cal. Dec. 28, 2012); see also *Khasin*,  
18 2012 WL 5471153, at \*7 (N.D. Cal. Nov. 9, 2012). As stated by Judge Conti in *Collucci*, “the  
19 Court is not inclined to assume the role of fact-finder in the guise of determining plausibility.”  
20 2012 WL 6737800, at \*8. The Court therefore DENIES Defendants’ Motions to Dismiss on this  
21 basis.<sup>7</sup>

22 \_\_\_\_\_  
23 <sup>7</sup> Gustavson is required to satisfy rule 9(b), because her second, third, fourth, fifth, and sixth causes  
24 of action all sound in fraud. See *Kearns*, 567 F.3d at 1125 (“[W]e have specifically ruled that Rule  
25 9(b)’s heightened pleading standards apply to claims for violations of the CLRA and UCL.”).  
26 Because Gustavson has alleged what a reasonable consumer may find to be false and misleading  
27 about the Defendants’ flavanol, PGPR, and sugar free claims, see FAC ¶¶ 70-83, 106-128, 138-  
28 155, the Court finds that these claims satisfy Rule 9(b)’s heightened pleading requirement. See  
*Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999) (holding that, in addition to the alleged  
time, place, and content of an alleged misrepresentation, a “plaintiff must set forth what is false or  
misleading about a statement, and why it is false. In other words, [a] plaintiff must set forth an  
explanation as to why the statement or omission complained of was false or misleading.”) (internal  
quotation marks omitted).



1 GRANTS Defendants' Motions to Dismiss Gustavson's claim for Restitution Based on Unjust  
2 Enrichment/Quasi Contract with prejudice.

3 **4. Song-Beverly Consumer Warranty Act and Magnuson-Moss**  
4 **Warranty Act**

5 At a hearing on the Motions to Dismiss held on May 2, 2013, Gustavson agreed to concede  
6 her claims under the Song-Beverly Consumer Warranty Act, and the Magnuson-Moss Warranty  
7 Act. *See* ECF No. 60 at 11:18-25. Accordingly, the Court GRANTS Defendants' Motions to  
8 Dismiss these claims with prejudice. The Court notes that even were it not for Gustavson's  
9 concessions, it would dismiss these claims for the reasons stated in the Court's prior food  
10 misbranding orders. *See Bruton*, 2013 WL 4833413, at \*21-22; *Brazil*, 2013 WL 1209955, at \*16-  
11 17.<sup>9</sup>

12 **D. Allegations Against Mars Based On Wrigley's Products And Allegations**  
13 **Against Wrigley Based On Mars Products**

14 Finally, Defendants ask the Court to dismiss claims against Mars based on statements  
15 appearing only on Wrigley products and claims against Wrigley based on statements appearing  
16 only on Mars products. Mars Mot. at 24; Wrigley Mot. at 24-25. Defendants contend that the FAC  
17 fails to allege that Wrigley is involved in producing or selling Mars products or vice versa, *see*  
18 Mars Mot. at 24; Wrigley Mot. at 24-25, and that to the extent Gustavson attempts to hold all  
19 Defendants liable for one another's conduct through allegations that Defendants are engaged in a  
20 common scheme, such allegations are too vague and conclusory to survive a motion to dismiss, *see*  
21 Wrigley Mot. at 24 (citing FAC ¶¶ 34-39). Finally, Defendants argue that the parent-subsidary  
22 relationship between Mars, Inc. and the Wrigley Defendants is an insufficient basis, standing alone,  
23 for holding Mars, Inc. liable for Wrigley's conduct. *See Reply* at 30. The Court agrees with  
24 Defendants on all points.

25 The FAC does not specify how, if at all, Mars has any role in Wrigley's production and  
26 marketing process or vice versa. Accordingly, Gustavson's common scheme allegations provide  
27 the sole basis for linking Mars to Wrigley products and Wrigley to Mars products, and these

28 <sup>9</sup> Despite the fact that the Court has dismissed Gustavson's only federal claim, the Court finds that  
it retains jurisdiction due to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2).

1 allegations are wholly generic and conclusory. *See, e.g.*, FAC ¶ 34 (“Defendants, have pursued a  
2 common plan, design, and course of conduct, acted in concert with, aided and abetted, and  
3 otherwise conspired with each other, in furtherance of their common design or scheme to deceive  
4 and injure Plaintiff and Class members as described herein.”); ¶ 35 (“At all times there has been a  
5 unity of interests between Defendants to carry out the unlawful scheme described herein.”); ¶ 37  
6 (“Defendants were juridically linked through contracts governing their management and control,  
7 through which the scheme described herein has been implemented.”). They are precisely the sort of  
8 “formulaic recitation[s] of the elements of a cause of action,” that the Supreme Court has warned  
9 are insufficient. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

10 Nor is the mere fact of a parent-subsidary relationship between Mars, Inc. and Wrigley  
11 (which is all that the FAC alleges, FAC ¶ 2) sufficient to show that Mars, Inc. controls Wrigley  
12 such that it may be held accountable for Wrigley’s conduct. While various theories—including the  
13 alter ego doctrine and principal-agent relationships—may provide a basis for piercing the corporate  
14 veil that separates a parent from its formally distinct subsidiary, *see, e.g., Rodriguez v. J.P. Morgan*  
15 *Chase & Co.*, 809 F. Supp. 2d 1291, 1299-1300 (S.D. Cal. 2011), the FAC contains no allegations  
16 that would justify piercing the corporate veil in this case. Accordingly, the Court GRANTS  
17 Defendants’ Motions to Dismiss all claims against Mars that relate to Wrigley products and all  
18 claims against Wrigley that relate to Mars products without prejudice. Further, should Gustavson  
19 elect to file an amended complaint, the Court directs Gustavson to file separate complaints against  
20 each set of Defendants (unless, of course, Gustavson can make sufficient particularized, plausible  
21 allegations that would justify holding all Defendants liable for one another’s conduct).

#### 22 **IV. CONCLUSION**

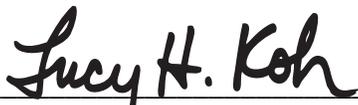
23 For the foregoing reasons, the Court DISMISSES without prejudice Gustavson’s UCL,  
24 FAL, and CLRA claims (causes of action one through six) based on: (1) calorie-related statements  
25 appearing on Mars chocolate products; (2) the standard of identity for milk chocolate; (3) low  
26 calorie claims about Wrigley sugar free gum; (4) the serving size of Wrigley breath mints; and (5)  
27 “health” claims appearing on Defendants’ websites. In addition, the Court DISMISSES without  
28 prejudice Gustavson’s UCL, FAL, and CLRA claims against Mars based on sugar free statements

1 appearing on Wrigley products, as well as Gustavson's UCL, FAL, and CLRA claims against  
2 Wrigley based on the presence of flavanol statements and the use of the acronym "PGPR" on Mars  
3 products. The Court DISMISSES with prejudice Gustavson's seventh, eighth and ninth causes of  
4 action based on Unjust Enrichment, the Song-Beverly Act, and the Manguson-Moss Warranty Act.

5 Should Gustavson elect to file a Second Amended Complaint against each set of  
6 Defendants curing the deficiencies discussed herein, she shall do so within 21 days of the date of  
7 this Order. Failure to meet the 21-day deadline to file an amended complaint or failure to cure the  
8 deficiencies identified in this Order will result in a dismissal with prejudice. Gustavson may not  
9 add new causes of action or parties without leave of the Court or stipulation of the parties pursuant  
10 to Federal Rule of Civil Procedure 15.

11 **IT IS SO ORDERED.**

12  
13 Dated: September 16, 2013

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15 \_\_\_\_\_  
16 LUCY H. KOH  
17 United States District Judge