

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

SARAH SAMET and JAY PETERS, individually and on behalf of all others similarly situated,)	Case No. 5:12-cv-01891-PSG
)	ORDER GRANTING-IN-PART
)	DEFENDANTS’ MOTIONS TO
)	DISMISS
Plaintiffs,)	
v.)	(Re: Docket Nos. 92, 94)
)	
PROCTER & GAMBLE COMPANY, KELLOGG COMPANY and KELLOGG SALES COMPANY,)	
)	
Defendants.)	

Plaintiffs Sarah Samet and Jay Peters (collectively, “Plaintiffs”) bought chip, riblet, and fruit snack products made and sold by Defendants Procter & Gamble Company (“P&G”) and Kellogg Company and Kellogg Sales Company (“Kellogg”) (collectively, “Defendants”). Each product Plaintiffs bought had labels with various nutritional content claims, such as the amount of trans fat, the use of evaporated cane juice, and a description of the product as “healthy.” Plaintiffs now seek to hold Defendants accountable for what they say are misleading representations in these

1 content claims and others. P&G and Kellogg each have moved to dismiss Plaintiffs’ second
2 amended complaint (“SAC”). Having reviewed the papers, the court GRANTS-IN-PART
3 Defendants’ motion.

4 I. BACKGROUND

5 Except where otherwise noted, the court draws the following facts, taken as true for the
6 purposes of a motion to dismiss, from Plaintiffs’ SAC.¹

7
8 P&G is a multinational company that manufactures and sells a variety of packaged food
9 products, including Pringles potato chip snacks. Kellogg also sells packaged food products. Since
10 the initial filing of this suit, on June 1, 2012, Kellogg acquired from P&G the Pringles brand and
11 business.

12 Plaintiffs are California consumers who purchased Defendants’ food products, including
13 Pringles snack chips, Kellogg’s MorningStar Farms Hickory BBQ Riblets (10 oz. box) and
14 Kellogg’s Fruity Snacks Mixed Berry (8 oz. box).² Plaintiffs allege that in purchasing the above
15 products, they reasonably relied on various nutritional content claims on Defendants’ website and
16 packaging labels, and had they known that these products were “misbranded,” they would not have
17 purchased them.³

18
19 On August 24, 2012, Plaintiffs filed an amended complaint (“AC”) on behalf of consumers
20 who purchased products in the following categories:⁴

- 21 (1) Potato chip snacks labeled “0 Grams Trans Fat,” but containing more than 13 grams of
22 fat per 50 grams (“Pringles claim”);
23 (2) Products labeled with the ingredient “evaporated cane juice” (“ECJ claim”);

24 ¹ See Docket No. 90.

25 ² See *id.* ¶¶ 29-30.

26 ³ See *id.* ¶¶ 55, 120, 133.

27 ⁴ See Docket No. 25 at 1-2.

- 1 (3) Products labeled or advertised as “healthy” despite disqualifying under 21 C.F.R. 101.65 (“ ‘healthy’ and ‘wholesome’ claim”);
- 2 (4) Fruit and fruit-flavored snacks (“fortification claim”); and
- 3 (5) Products sold in a slack-filled container.

4 In the AC, Plaintiffs asserted the following: violations of California’s Unfair Competition
5 Law (“UCL”);⁵ violations of California’s Fair Advertising Law (“FAL”);⁶ violations of
6 California’s Consumer Legal Remedies Act (“CLRA”);⁷ restitution based on unjust
7 enrichment/quasi-contract; violations of California’s Beverly-Song Act; and violations of
8 California’s Magnuson-Moss Act. On June 18, 2013, this court dismissed the restitution/unjust
9 enrichment claims, the claims under the Magnuson-Moss Act, the claims under the FAL for the use
10 of fruit vignettes and “made with Real Fruit,” and the claims under the Beverly-Song Act, all with
11 prejudice and without leave to amend.⁸ The court also dismissed the claims targeting the use of
12 “0g Trans Fat,” “healthy,” and “wholesome” to describe Pringles, the claims targeting the
13 description of Fruity Snacks as “fortified,” and all the “evaporated cane juice claims.” These
14 claims were dismissed without prejudice and with leave to amend.⁹ The slack-fill claims
15 survived.¹⁰

19 ⁵ See Cal. Bus. & Prof. Code §§ 17200 *et. seq.* The UCL “borrows” violations of other laws as
20 unlawful practices and then provides an independent action. See *Farmers Ins. Exch. v. Superior*
21 *Court*, 2 Cal. 4th 377, 383 (1992).

22 ⁶ Cal. Bus. & Prof. Code §§ 17500 *et. seq.*

23 ⁷ Cal. Civ. Code §§ 1750 *et. seq.*

24 ⁸ See Docket No. 89 at 23.

25 ⁹ See *id.* at 23-24.

26 ¹⁰ Defendants do not present any arguments challenging Plaintiffs’ slack fill claims in the pending
27 motion to dismiss that were not and could not have been raised in their earlier motions, and so the
28 court will not address them further.

1 On July 2, 2013, Plaintiffs filed the SAC, asserting six causes of action against Defendants'
2 products: an action under the UCL's unlawful conduct prong, an action under the UCL's unfair
3 prong, an action under the UCL's fraudulent conduct prong, an action for misleading and deceptive
4 advertising under the FAL, an action for untrue advertising under the FAL, and an action under the
5 CLRA.¹¹ On August 16, 2103, Defendants filed the motions to dismiss currently before the
6 court.¹² The gist of Defendants' present challenge is that Plaintiffs again have failed to state claims
7 that pass muster under either Fed. R. Civ. P. 8 or 9.¹³ Consistent with Civ. L. R. 7-6, the court took
8 the motion under submission on the papers.
9

10 II. PRELIMINARY MATTERS

11 A. Requests for Judicial Notice

12 As a preliminary matter, Plaintiffs and Kellogg have each asked the court to take judicial
13 notice of documents pursuant to Fed. R. Evid. 201. Kellogg asks that the court take judicial notice
14 of two letters sent to the U.S. Food and Drug Administration ("FDA") regarding its proposed
15 ruling regarding evaporated cane juice.¹⁴ Plaintiffs oppose that request as outside the scope of
16 items properly judicially noticed, and they independently ask that the court take judicial notice of
17 two screenshots of Kellogg's website during the time period in question.¹⁵
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21 ¹¹ See Docket No. 90.

22 ¹² See Docket Nos. 92, 94.

23 ¹³ Defendants also argue that Plaintiffs claims are preempted by federal law. However, as the court
24 already opined in its previous order, they are mistaken. See Docket No. 89 at 9-16. With one
25 exception, discussed below, Defendants' arguments do not persuade the court that Plaintiffs'
current claims are distinct from those addressed in the court's previous order. The court therefore
holds, as before, that Plaintiffs' claims are not preempted.

26 ¹⁴ See Docket No. 93.

27 ¹⁵ See Docket No. 98.

1 A court may take judicial notice of a document on which the complaint “necessarily relies”
2 if: (1) “the complaint refers to the document,” (2) “the document is central to the plaintiff’s claim,”
3 and (3) “no party questions the authenticity of the copy attached to the 12(b)(6) motion.”¹⁶ The
4 website screenshots meet these requirements and so they are deemed subject to judicial notice.¹⁷
5 However, the court will not take judicial notice of the letters sent to the FDA. The letters address
6 the food industry’s view on the use of “evaporated cane juice” as a label to describe sugar in
7 ingredient lists, specifically noting that the industry disagrees with a proposed government
8 regulation. Plaintiffs rely on that regulation in their complaint. The letters are therefore “offered to
9 dispute the merits of [Plaintiffs’] allegations rather than to establish whether [Plaintiff] has stated a
10 claim,” rendering them inappropriate for judicial notice.¹⁸

11
12 **B. Statutory Framework**

13 Congress passed the Federal Food, Drug, and Cosmetic Act (“FDCA”), and in so doing
14 established the Food and Drug Administration (“FDA”) to “promote the public health” by ensuring
15 that “foods are safe, wholesome, sanitary, and properly labeled.”¹⁹ The FDA has implemented
16 regulations to achieve this objective.²⁰ The FDA enforces the FDCA and accompanying
17 regulations; “[t]here is no private right of action under the FDCA.”²¹
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21 ¹⁶ *Daniels-Hall v. Natl. Educ. Assn.*, 629 F.3d 992, 998 (9th Cir. 2010).

22 ¹⁷ *See* Docket No. 90, ¶ 129.

23 ¹⁸ *Burton v. Gerber Products Co. and Nestle, Inc.*, Case No. 5:12-cv-02412-LHK (N.D. Cal. 2012),
24 Docket No. 57 at 6.

25 ¹⁹ *See* 21 U.S.C. § 393.

26 ²⁰ *See, e.g.*, 21 C.F.R. § 101.1 *et. seq.*

27 ²¹ *Ivie*, 2013 WL 685372, at *1 (internal citations omitted).

1 In 1990, Congress passed an amendment to the FDCA, the Nutrition Labeling and
2 Education Act (“NLEA”), which imposed a number of requirements specifically governing food
3 nutritional content labeling.²² The NLEA adds an express preemption provision, which provides
4 that “[e]xcept as provided in subsection (b) of this section, no State or political subdivision of a
5 State may directly or indirectly establish... any requirement” for the labeling of a container for
6 food, or for nutrition labeling, or for nutrient content claims, “that is not identical” to the
7 requirements of that section.²³ In other words, states may not adopt food labeling requirements
8 governed by the NLEA that are different from, or additional to those imposed by the federal
9 statutory scheme.²⁴ The NLEA is clear, however, that preemption does not extend further than
10 “the plain language of the statute itself.”²⁵

11
12 Plaintiffs are not suing under the FDCA, but under California’s Sherman Food, Drug, and
13 Cosmetic Act (“Sherman Law”).²⁶ Under the Sherman Law, California has adopted wholesale the
14 food labeling requirements of the FDCA and NLEA as “the food regulations of this state.”²⁷ The
15 Sherman Law declares any food to be “misbranded” if it is “false or misleading in any particular”
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18 ²² See, e.g., 21 U.S.C. § 343 *et. seq.* While under the FDA and NELA, the FDA stands guard over
19 labeling of most food and nonalcoholic beverages, the United States Department of Agriculture
20 (“USDA”) regulates the labeling of meat, poultry, and certain egg products pursuant to the Federal
21 Meat Inspection Act and the Poultry Products Inspection Act. An important distinction between
22 the two schemes is that while USDA labels are pre-approved, FDA labels are not.

23 ²³ 21 U.S.C. § 343-1(a).

24 ²⁴ See *In re Pepsico, Inc., Bottled Water Mktg. & Sales Practices Litig.*, 588 F.Supp.2d 527, 532
25 S.D.N.Y. 2008); see also *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008).

26 ²⁵ *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1091 (2008) (discussing § 6(c)(1) of the
27 NLEA, which states that the NLEA “shall not be construed to preempt any provision of State law,
28 unless such provision is expressly preempted under section 403A of the FDCA”).

²⁶ See Cal. Health & Safety Code §§ 109875 *et. seq.*

²⁷ Cal. Health & Safety Code § 110100.

1 or if the labeling “does not conform with the requirements for nutrition labeling” set forth in certain
2 provisions of the NLEA.²⁸ The UCL prohibits “any unlawful, unfair . . . or fraudulent business act
3 or practice.”²⁹ “The FAL makes it unlawful to induce the public to enter into any obligation
4 through the dissemination of ‘untrue or misleading’ statements.”³⁰ The CLRA prohibits certain
5 “unfair methods of competition and unfair or deceptive acts or practices” in connection with a sale
6 of goods.³¹

8 III. LEGAL STANDARDS

9 A. Rule 12(b)(6)

10 Under Rule 8, a complaint must contain “a short and plain statement of the claim showing
11 that the pleader is entitled to relief.”³² If a plaintiff fails to proffer “enough facts to state a claim to
12 relief that is plausible on its face,” the complaint may be dismissed for failure to state a claim upon
13 which relief may be granted.³³ A claim is facially plausible “when the pleaded factual content
14 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
15 alleged.”³⁴ Accordingly, under Fed. R. Civ. P. 12(b)(6), which tests the legal sufficiency of the
16 claims alleged in the complaint, “[d]ismissal can be based on the lack of a cognizable legal theory
17 or the absence of sufficient facts alleged under a cognizable legal theory.”³⁵

19 _____
20 ²⁸ Cal. Health & Safety Code §§ 110660, 110665, 110670.

21 ²⁹ Cal. Bus. & Prof. Code § 17200.

22 ³⁰ *Lam v. Gen. Mills, Inc.*, 859 F.Supp.2d 1097, 1103 (N.D. Cal. 2012).

23 ³¹ Cal. Civ. Code. §1770.

24 ³² Fed. R. Civ. P. 8(a)(2).

25 ³³ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 ³⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

27 ³⁵ *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1990).

1 On a motion to dismiss, the court must accept all material allegations in the complaint as
2 true and construe them in the light most favorable to the non-moving party.³⁶ The court’s review is
3 limited to the face of the complaint, materials incorporated into the complaint by reference, and
4 matters of which the court may take judicial notice.³⁷ However, the court need not accept as true
5 allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences.³⁸

6 “Dismissal with prejudice and without leave to amend is not appropriate unless it is clear...
7 that the complaint could not be saved by amendment.”³⁹

8
9 **B. Rule 9(b)**

10 Claims alleging fraud must comply with the heightened pleading requirements of Rule 9(b)
11 by pleading with particularity the circumstances surrounding the fraud. The allegations must be
12 “specific enough to give defendants notice of the particular misconduct which is alleged to
13 constitute the fraud charged so that they can defend against the charge.”⁴⁰ This includes “the who,
14 what, when, where, and how of the misconduct charged.”⁴¹

15 “It is well-settled that the Federal Rules of Civil Procedure apply in federal court,
16 ‘irrespective of the course of the subject matter jurisdiction, and irrespective of whether the
17 substantive law at issue is state or federal.’”⁴² The Ninth Circuit has made it clear that when

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20 ³⁶ See *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

21 ³⁷ See *id.* at 1061.

22 ³⁸ See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see also *Twombly*,
23 550 U.S. at 561 (“a wholly conclusory statement of [a] claim” will not survive a motion to
dismiss).

24 ³⁹ *Eminence Capital, LLC v. Asopeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

25 ⁴⁰ *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

26 ⁴¹ *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

27 ⁴² See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 25 (9th Cir. 2009) (citing *Vess v. Ciba-Geigy*
28 *Corp. USA* 317 F.3d 1097 (9th Cir. 2003)).

1 pleading claims under the fraudulent conduct prong of the UCL, a plaintiff is required to meet Rule
2 9(b)'s heightened requirements.⁴³ When a plaintiff instead pleads under the unfair or unlawful
3 conduct prong, the heightened requirements will sometimes, but not always, apply. To make this
4 determination, a plaintiff must account for the underlying conduct alleged to be unlawful. If that
5 conduct is unfair or unlawful because it relies entirely on a uniform course of fraudulent conduct,
6 the Ninth Circuit has found that it "sounds in fraud" and must therefore rise to Rule 9(b)'s level of
7 specificity.⁴⁴ To assess the fraudulent nature of the conduct at issue, a plaintiff must consider the
8 traditional California elements of fraud: a false representation, knowledge of falsity, intent to
9 defraud, justifiable reliance, and damage.⁴⁵ If these elements are present in the allegations, the
10 conduct may properly be construed as "sounding in fraud," even if the word "fraud" does not
11 appear. If the conduct underlying a UCL unfair or unlawful prong claim does not sound in fraud
12 and is not part of an underlying course of fraudulent conduct, but the plaintiff nonetheless include
13 "averments of fraud," then Rule 9(b) will apply to those averments alone, but not to the rest of the
14 allegations associated with the unlawful claim. If the averments of fraud fail to withstand Rule
15 9(b) scrutiny, then they should be stripped from the complaint, and the remaining allegations are
16 subject only to standard Rule 8 scrutiny.⁴⁶

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19 As with the UCL claims, where a plaintiff claims under the FAL are grounded in fraud, the
20 claims must meet Rule 9(b)'s heightened specificity requirements, but where they require no
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22 ⁴³ See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009).

23 ⁴⁴ See *id.*

24 ⁴⁵ See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009) (citing *Vess v. Ciba-*
25 *Geigy Corp. USA* 317 F.3d 1097 (9th Cir. 2003)).

26 ⁴⁶ See *id.*; see also *In re Actimmune Mktg. Litig.*, Case No. 08-cv-02376-MHP, 2009 WL 3740648
27 (N.D. Cal. Nov. 6, 2009) *aff'd*, 464 F. App'x 651 (9th Cir. 2011).

1 allegations of fraud elements, Rule 8(a) will suffice. Allegations regarding the CLRA will be
2 subject to Rule 9(b)'s heightened pleading standards if they sound in fraud or stem from a uniform
3 course of fraudulent conduct; otherwise, simple Rule 8(a) standards will suffice.⁴⁷

4 IV. DISCUSSION

5 The court considers the sufficiency of each of Plaintiffs' claims in light of the pleading
6 standards established above. In light of the broad allegations of the complaint, the court assumes
7 for purposes of this motion that each cause of action is asserted against each product, unless
8 Plaintiffs give some indication otherwise in their papers.
9

10 1. "0g Trans Fat" Claim

11 Defendants bring three challenges against Plaintiffs' UCL unlawful conduct claim against
12 Pringles. First, they argue that Plaintiffs are required but have failed to allege reliance and
13 deception for an unlawful claim. Second, they argue that they have not alleged any economic
14 injury suffered, and thus lack standing to pursue this claim. Finally, they argue that the claim is
15 preempted by federal law.⁴⁸
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17 The court first addresses Defendants' argument that Plaintiffs have insufficiently alleged
18 reliance and deception in their UCL unlawful claim. As an initial matter, the California Supreme
19 Court has settled the question of whether reliance and deception must be pleaded. They must.⁴⁹ As
20 for the sufficiency of Plaintiffs' allegations, Plaintiffs allege that the Pringles labels are unlawful
21 because they are marked "0g Trans Fat" but "fail to bear the mandatory disclosure statement
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23 ⁴⁷ See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003)).

24 ⁴⁸ Defendants also argue that the "0g Trans Fat" statement is not misleading as a matter of law, but
25 the court has already rejected this argument. See Docket No. 89 at 18-19.

26 ⁴⁹ See *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 327 (2011); see also *Brazil v. Dole Food Co., Inc.*, 935 F. Supp. 2d 947, 965 (N.D. Cal. 2013); *Wilson v. Frito-Lay N. Am., Inc.*, Case No. 12-1586-SC, 2013 WL 1320468 (N.D. Cal. Apr. 1, 2013).
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1 required to inform consumers that the products contained deleterious ingredients at levels deemed
2 by regulators to pose a risk of a ‘diet related’ ‘disease or health condition,’” in violation of 21
3 C.F.R. § 101.13(h) (as incorporated by the Sherman Law). 21 C.F.R. § 101.13(h) requires that
4 food manufacturers whose products contain more than 13g of fat per 50g serving to provide
5 consumers with a notice reading, “See nutrition information for fat content.”⁵⁰ Plaintiffs
6 specifically state that they read the front of the package where the 0g Trans Fat representation was
7 made and relied on that representation in believing that Pringles was a healthier choice than other
8 potato snack products.⁵¹ Plaintiffs also specifically state that they were otherwise unaware of the
9 total fat that the Pringles contained.⁵² Whether or not Plaintiffs were reasonable in their reliance
10 remains to be seen, but these allegations themselves are sufficient.⁵³

11
12 Defendants further complain that Plaintiffs have failed to allege facts indicating that P&G
13 had a duty to disclose its misbranding to Plaintiffs. But Plaintiffs’ entire unlawful claim is based
14 on Defendants’ violation of a regulatory duty of disclosure.⁵⁴

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17 ⁵⁰ See Cal. Health & Safety Code § 110280.

18 ⁵¹ See Docket No. 90 ¶¶ 82-83, 85.

19 ⁵² See *id.*

20 ⁵³ See, e.g., *Astiana v. Ben & Jerry’s Homemade, Inc.*, Case No. 10-cv-4387-PJH, 2011 WL
21 2111796, at *4 (N.D. Cal. May 26, 2011) (holding in an “all natural” food case that the issues of
22 reliance and materiality are too fact-dependent to be resolved on [a] 12(b)(6) motion.”).

23 ⁵⁴ Plaintiffs attach fourteen Pringles labels to their SAC as Exhibit 8. On the labels, the nutritional
24 information is presented per 18 or 28g serving. Plaintiffs assert that “all the Pringles snack
25 products ... contain fat in excess of 13 grams,” without providing the relevant conversions, but
26 once those conversions are completed, it becomes clear that Plaintiffs are correct with respect to
27 ten of the snack products. The snacks appearing on pages 1-6 and 9-12 of Exhibit 8 have 15.84g of
28 fat per 50 g serving, according to the nutrition information presented on the label, but they do not
contain the required disclosure statement. P&G points out, however, that the reduced fat versions
of the snacks, however, appearing on pages 7-8, have only 12.32g of fat per 50g serving, and the
100 Calorie Packs have 12.5g per 50g serving, placing them outside of the statute’s reach. Based
on this information, Plaintiffs have successfully plead facts demonstrating that ten of Defendants’
products run afoul of the Sherman Act.

1 Turning to Defendant’s standing argument, even if a standing challenge were appropriately
2 raised pursuant to Rule 12(b)(6) rather than Fed R. Civ. P. 12(b)(1), the court notes that it already
3 addressed this question at length in its previous order, and it is not persuaded to revise that ruling
4 here. Defendants’ argument that an appropriate label would not plausibly result in a higher price
5 for Pringles demonstrates only that they did not understand the court’s prior order. Although the
6 standard price of Pringles may not have changed at all, had Plaintiffs been appropriately warned of
7 the nutritional problems with Pringles, Pringles could plausibly have been worth less to them. The
8 court therefore finds that standing remains appropriate. Similarly, the court has already addressed
9 preemption in previous orders, and it declines to rehash those arguments here. Plaintiffs’ unlawful
10 claim is not preempted by federal law.

11
12 Because each of the defects proffered by Defendants is in turn defective, the motion to
13 dismiss Plaintiffs’ UCL unlawful claim with respect to Pringles in general is DENIED-IN-PART.
14 The motion is GRANTED only to the extent that the labels of the “reduced fat” Pringles and 100
15 calorie packs demonstrates that those products had insufficient fat content to require the disclosure
16 in question. Because amendment of these claims appears futile, this dismissal is with prejudice.

17
18 a. Misleading and Deceptive Advertising

19 In addition to their attack on Plaintiffs’ unlawful conduct cause of action, Defendants’
20 argue that Plaintiffs have failed to state a cause of action regarding Pringles under the FAL. As
21 discussed above, to state a cause of action under the FAL, “the plaintiff must demonstrate that
22 members of the public are likely to be deceived,”⁵⁵ judged under the “reasonable consumer”
23 standard.⁵⁶ A defendant’s intent to deceive is irrelevant to this claim, and there are no other
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27 ⁵⁵ *Rosal v. First Fed. Bank of California*, 671 F. Supp. 2d 1111, 1134 (N.D. Cal. 2009)

28 ⁵⁶ *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

1 elements of California fraud required to find a violation, so simple Rule 8(a) pleading standards
2 apply.

3 Plaintiffs here allege that the 0g Trans Fat label without the required disclosure lead them to
4 believe that Pringles were a healthier alternative to other potato snacks, which is precisely the type
5 of misdirection that the FDA was attempting to prevent in requiring the omitted disclosure.⁵⁷
6 Although the court expresses its skepticism that any reasonable consumer could be misled by the
7 representations identified by Plaintiffs, the Ninth Circuit has made it clear that such questions are
8 issues of fact and inappropriate for resolution on a motion to dismiss.⁵⁸ Defendants' motion to
9 dismiss Plaintiffs' FAL claims with respect to the "0g Trans Fat" label is therefore DENIED.
10

11 b. "Healthy" and "Wholesome" Claims

12 In its previous order, this court dismissed Plaintiffs' causes of action for the "healthy" and
13 "wholesome" statements relating to Pringles for four reasons: (1) Plaintiffs failed to provide the
14 allegedly improper "healthy" or "wholesome" statement or attach the relevant label; (2) Plaintiffs
15 failed to clarify which of defendants products contained the allegedly improper statement; (3)
16 Plaintiffs failed to specify where the statements were located; (4) Plaintiffs failed to allege facts
17 indicating that the statements constituted "labeling," to the extent that they appeared solely on
18 Defendants' website.⁵⁹
19

20 In their SAC, Plaintiffs have only attempted to remedy the second of these concerns.
21 Plaintiffs *still* do not give a full rendition of the allegedly improper statement characterizing the
22 chips as "healthy" or "wholesome." They do not include screenshots, or copies of labels, providing
23 these statements. They reference the Defendants website, "http://www.pringles.com" as a whole,
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25 ⁵⁷ See Docket No. 94, ¶¶ 68, 82, 85.

26 ⁵⁸ See *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012).

27 ⁵⁹ See Docket No. 89 at 21.
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1 without any indication as to where on that website, on which page, or under which section the
2 offending statement was found. And even if they had, they fail to allege any facts indicating that
3 Defendants referred consumers to the website for nutritional information, such that it could be
4 considered a label. Without these critical pieces of information, Plaintiffs' "wholesome" and
5 "healthy" statement allegations do not meet even the simplest 8(a) pleading standard. All causes of
6 action stemming from and exclusively related to the "healthy" and "wholesome" allegations are
7 dismissed. Because Plaintiffs have already been given leave to amend their complaint on these
8 claims, and in doing so failed to address the court's most basic concerns, the court is persuaded that
9 further amendments would be futile.
10

11 2. Causes of Action Against MorningStar Products⁶⁰

12 Kellogg next argues that Plaintiffs' "ECJ claim" under the FAL should be dismissed. The
13 court dismissed this claim previously because Plaintiffs (1) failed to specify which products
14 deceived them, (2) how Plaintiffs relied on the labels, and (3) why a reasonable consumer would be
15 likely to be deceived.⁶¹ In the SAC, Plaintiffs have now clarified that they were misled as to the
16 nutritional content of several Kellogg's MorningStar products by the ingredient label "evaporated
17 cane juice."⁶² They allege that the plaintiffs in question read the ingredient lists and were lead to
18 believe that the product contained no added sugar, only those sugars naturally occurring in the
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23 ⁶⁰ Defendants again urge the court to refer this case to the FDA, or stay proceedings pending the
24 issuance of a final position on the phrase "evaporated cane juice," under the primary jurisdiction
25 doctrine. However, the court already ruled on this argument in this case, and will not address the
26 matter at length again. *See* Docket No. 89 at 16-17. The court finds the primary jurisdiction
27 doctrine inapplicable.

28 ⁶¹ *See* Docket No. 89 at 21.

⁶² *See* Docket No. 90, ¶¶ 100, 117, 118.

1 food, based on the term evaporated can juice.⁶³ They further allege that they were misled as to the
2 basic nature of the ingredient by the use of this term.⁶⁴

3 Kelloggs hangs its entire motion on the question of reasonableness, alleging many times
4 over that no reasonable consumer would be misled by these labels.⁶⁵ Although Defendants may be
5 correct as a factual matter, once again, the Ninth Circuit has made it clear that such questions are
6 issues of fact and inappropriate for resolution on a motion to dismiss.⁶⁶

7
8 Kelloggs' motion to dismiss Plaintiffs' FAL causes of action against MorningStar products
9 is therefore DENIED.

10 3. Causes of Action Against Fruity Snacks

11 Defendants argue Plaintiffs' causes of action against the vitamin fortification of Fruity
12 Snacks are preempted by federal law because the FDA expressly preempts such claims. As
13 Kellogg points out in its reply, the regulation cited by Plaintiffs merely "urges" parties to follow
14 the guidelines set forth in that section, rather than requiring compliance.⁶⁷ When read in
15 conjunction with 21 C.F.R. §101.9(c)(8), which explicitly articulates that vitamin C may be
16 naturally occurring "or added as a nutrient supplement," it becomes clear that Section 104.20 does
17 not create a legal bar into vitamin fortification. Instead, it sets forth guidelines which parties may
18 elect to follow at their discretion.
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20 Although the court has declined to re-consider preemption arguments generally, in this
21 particular case, Defendants have established that the conduct for which they have been haled to
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23 ⁶³ See *id.*, ¶¶ 118-120.

24 ⁶⁴ See *id.* ¶¶ 121-122.

25 ⁶⁵ See Docket No. 92 at 11-12.

26 ⁶⁶ See *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012).

27 ⁶⁷ See Docket No. 100 at 4.
28


1 court to answer is expressly permitted by the federal agency in charge of regulating their business.
2 Therefore, with respect to this product alone, the court finds that Plaintiffs causes of action are
3 preempted and are therefore DISMISSED. Because the no further amendment could cure this
4 defect, the dismissal is with prejudice.

5 **V. CONCLUSION**

6 Plaintiffs' cause of action under the UCL's unlawful prong against Pringles reduced fat and
7 100 calorie pack labels is dismissed with prejudice and without leave to amend, as are their claims
8 against all Pringles labels that stem from "healthy and wholesome" allegations. All causes of
9 action against Fruity Snacks are dismissed with prejudice and without leave to amend.
10 Defendants' motion to dismiss is denied with respect to all other products and causes of action.

11 **IT IS SO ORDERED.**

12 Dated: December 10, 2013

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16 PAUL S. GREWAL
17 United States Magistrate Judge
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