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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States District Court
For the Northern District of California

SKYE ASTIANA,

Plaintiff,

No. C 10-4387 PJH

v.

**ORDER DENYING MOTIONS TO
DISMISS AND MOTIONS TO STRIKE**

BEN & JERRY'S HOMEMADE, INC.

Defendant.

RELATED CASES

CHANEE THURSTON, et al.,

Plaintiff,

No. C 10-4937 PJH

v.

CONOPCO, INC.,

Defendant.
_____ /

Defendants' motions for an order dismissing the first amended complaint in each of the above-entitled related actions, and motions to strike the class averments, came on for hearing before this court on April 6, 2011. Plaintiffs appeared by their counsel Janet Linder Spielberg and Joseph Kravec, Jr., and defendants appeared by their counsel Janelle Sahouria and William Stern. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby DENIES the motions.

BACKGROUND

1
2 Plaintiffs allege that defendants Ben & Jerry’s Homemade, Inc. (“Ben & Jerry’s”) and
3 Conopco, Inc., d/b/a Unilever (formerly Good Humor-Breyers) d/b/a Breyers (“Breyers”)
4 misrepresented ice cream containing “Dutch” or “alkalized” cocoa as “all natural.” Plaintiffs
5 assert that the alkalized cocoa used in Ben & Jerry’s and Breyers’ ice cream is processed
6 with potassium carbonate, a man-made ingredient that is “synthetic,” not “natural.”

7 The cocoa bean is a seed that grows on trees native to South America. The
8 fermented and dried cocoa seed produces “chocolate,” which is a product that is derived
9 from cocoa mixed with some sort of fat (cocoa butter, oil) and finely powdered sugar.
10 Cocoa powder is the end product from a pressing or extraction process that removes a
11 significant portion of the fat or cocoa butter from the cocoa bean.

12 Unsweetened cocoa powder is typically rendered in two forms – unalkalized cocoa,
13 or Dutch-process/alkalized cocoa. Unalkalized cocoa results from pressing cocoa beans
14 with no additional modifications. The resulting natural cocoa powder is usually a light
15 brown color. It is somewhat acidic, with a strong chocolate flavor.

16 Alkalized cocoa powders, sometimes referred to as “Dutched,” come from cocoa
17 nibs and/or chocolate liquor that has been treated with mild alkali solutions in order to raise
18 the pH (to make it less acidic). This alkalizing or dutching process is considered a safe
19 process for cocoa, used to modify the color, taste, and functionality of cocoa powder in
20 food products.

21 Alkalization can be used to create a range of dark brown and red-brown colors that
22 add desirable appearances to some food products that contain cocoa powders. While
23 alkalization can improve taste by reducing some of the sourness and bitterness associated
24 with natural cocoa powders, and can also improve the solubility of cocoa powder in certain
25 beverage applications, it also destroys many of the flavonols (water-soluble pigments that
26 are believed to contribute health benefits).

27 On August 12, 2010, the Center for Science in the Public Interest (“CSPI”) sent a
28 letter to Unilever, the parent company of Ben & Jerry’s and Breyers, identifying

1 approximately 50 products it claimed were improperly labeled. One category of products
 2 was chocolate ice cream and frozen yogurt containing alkalized cocoa, labeled “all natural.”
 3 In September 2010, Ben & Jerry’s agreed to phase out the use of “all natural” on ice
 4 creams and frozen yogurts containing “processed” or “artificial” ingredients – including
 5 alkalized cocoa.¹ CSPI issued a press release to that effect on September 27, 2010.

6 Plaintiffs filed the FACs in December 2010, on behalf of a nationwide class and a
 7 California sub-class. Each FAC alleges a claim of fraud; three claims under California
 8 Business & Professions Code § 17200 (one under the “unlawful” prong – based on violation
 9 of California’s Sherman Food, Drug, and Cosmetic Law (“Sherman Law”), Cal. Health &
 10 Safety Code §§ 109875-111915, which incorporates all relevant regulations of the federal
 11 Food and Drug Administration (“FDA”); one under the “unfair” prong; and one under the
 12 “fraudulent” prong); a claim of false advertising under Business & Professions Code
 13 § 17500; and a claim for restitution based on a theory of unjust enrichment. Plaintiffs seek
 14 compensatory and punitive damages, restitution of all amounts class members “paid to
 15 purchase Ice Cream products,” disgorgement of profits, an accounting, a constructive trust,
 16 and declaratory and injunctive relief.

17 Defendants now seek an order dismissing the FACs pursuant to Federal Rule of
 18 Civil Procedure 12(b)(6), for failure to state a claim; and an order pursuant to Federal Rule
 19 of Civil Procedure 12(f), striking the class averments.

20 DISCUSSION

21 A. Motion to Dismiss for Failure to State a Claim

22 1. Legal Standard

23 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
 24 alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003).
 25 Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen.
 26 Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for
 27

28 ¹ It appears that Breyers still uses the phrase “all natural” on its ice cream packaging.

1 failure to state a claim, a complaint generally must satisfy only the minimal notice pleading
2 requirements of Federal Rule of Civil Procedure 8.

3 Rule 8(a)(2) requires only that the complaint include a “short and plain statement of
4 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Specific
5 facts are unnecessary – the statement need only give the defendant “fair notice of the claim
6 and the grounds upon which it rests.” Erickson v. Pardus, 551 U.S. 89, 93 (2007) (citing
7 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

8 All allegations of material fact are taken as true. Id. at 94. However, legally
9 conclusory statements, not supported by actual factual allegations, need not be accepted.
10 See Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009). A plaintiff’s obligation to provide the
11 grounds of his entitlement to relief “requires more than labels and conclusions, and a
12 formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at
13 555 (citations and quotations omitted). Rather, the allegations in the complaint “must be
14 enough to raise a right to relief above the speculative level.” Id.

15 A motion to dismiss should be granted if the complaint does not proffer enough facts
16 to state a claim for relief that is plausible on its face. See id. at 558-59. “[W]here the
17 well-pleaded facts do not permit the court to infer more than the mere possibility of
18 misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is
19 entitled to relief.’” Iqbal, 129 S.Ct. at 1950.

20 In addition, when resolving a motion to dismiss for failure to state a claim, the court
21 may not generally consider materials outside the pleadings, although the court may
22 consider a matter that is properly the subject of judicial notice. Lee v. City of Los Angeles,
23 250 F.3d 668, 688-89 (9th Cir. 2001); see also Mack v. South Bay Beer Distributors, Inc.,
24 798 F.2d 1279, 1282 (9th Cir. 1986) (on a motion to dismiss, a court may properly look
25 beyond the complaint to matters of public record and doing so does not convert a Rule
26 12(b)(6) motion to one for summary judgment). Additionally, the court may consider
27 exhibits attached to the complaint, see Hal Roach Studios, Inc. V. Richard Feiner & Co.,
28 Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), and documents referenced by the complaint

1 and accepted by all parties as authentic. See Van Buskirk v. Cable News Network, Inc.,
2 284 F.3d 977, 980 (9th Cir. 2002).

3 Finally, in actions alleging fraud, “the circumstances constituting fraud or mistake
4 shall be stated with particularity.” Fed. R. Civ. P. 9(b). Under Rule 9(b), the complaint
5 must allege specific facts regarding the fraudulent activity, such as the time, date, place,
6 and content of the alleged fraudulent representation, how or why the representation was
7 false or misleading, and in some cases, the identity of the person engaged in the fraud. In
8 re GlenFed Sec. Litig., 42 F.3d 1541, 1547-49 (9th Cir.1994).

9 2. Defendants’ Motions

10 Defendants argue that plaintiffs have not alleged a plausible legal theory of liability
11 or a cognizable injury; that plaintiffs’ claims are preempted; and that the court should
12 abstain in deference to the FDA. They also assert that plaintiffs have no claim for unjust
13 enrichment and have failed to adequately plead fraud. In addition, with regard to the
14 Astiana case only, defendant contends that plaintiffs are not entitled to injunctive relief.

15 a. Whether the FACs allege a plausible legal theory

16 First, defendants argue that plaintiffs have not alleged a plausible legal theory of
17 liability. Defendants contend that plaintiffs’ claims are entirely based on the premise that
18 the use of potassium carbonate renders the cocoa-making process “not natural,” and that
19 the inclusion of this “not natural” ingredient means that defendants’ representation that their
20 ice cream products are “all natural” is false and misleading. Defendants assert, however,
21 that plaintiffs’ definition of “natural” in the FACs differs from the definition they used in the
22 original complaints. Defendants also contend that the FACs fail to establish a violation of
23 FDA policy.

24 In opposition, plaintiffs argue that the FACs are now the operative complaints in
25 each case, and that the fact that the original complaints defined “natural” one way, and that
26 the FACs define “natural” in a somewhat different way, is beside the point. Moreover,
27 plaintiffs assert, they have pursued the same theory of liability since filing the cases – that
28 defendants’ ice cream products are not “natural” because they contain synthetic

1 substances, and that the label “all natural” is therefore misleading.

2 Plaintiffs also contend that defendants have willfully misread the FDA’s policy; and
3 assert that their burden in this case is to prove that the use of “all natural” on the ice cream
4 labels was false and misleading in violation of state law – not to prove what FDA policy
5 might or might not say.

6 The court finds that the motion must be DENIED. While defendants’ argument
7 regarding the implausibility of the claim that plaintiffs (including the class) were deceived is
8 somewhat persuasive, the issue as to the named plaintiffs involves questions of fact, and is
9 therefore beyond the scope of this Rule 12(b)(6) motion. Further, as to the members of the
10 proposed class, the issue involves questions that should be considered in a class
11 certification motion as part of the discussion of commonality and typicality.

12 b. Whether the FACs adequately allege standing

13 Defendants contend that the court should dismiss the case for lack of Article III
14 standing, for failure to plead injury. In addition, they assert that the § 17200 and § 17500
15 claims should be dismissed because those claims require proof of “injury in fact” and “loss
16 of money or property” and plaintiffs have alleged neither.

17 To establish standing under Article III, a plaintiff must allege facts showing an “injury
18 in fact,” causation, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61
19 (1992). “Injury in fact” requires damage to “a legally protected interest which is both
20 concrete and particularized, and actual or imminent, not conjectural or hypothetical. Id. at
21 560 (citations and quotations omitted).

22 Here, defendants assert that plaintiffs cannot satisfy these requirements. They
23 argue that plaintiffs’ claimed injury appears to be that they overpaid for certain flavors of ice
24 cream labeled “all natural,” but that plaintiffs have not alleged that the products they
25 purchased used potassium carbonate, and they admit that sodium carbonate is another
26 “commonly used” alkali. At best, defendants assert, plaintiffs have pled a contingent or
27 hypothetical injury.

28 Defendants contend that this is fatal to plaintiffs’ case, as even named plaintiffs who

1 represent a class must allege and show that they personally have been injured, not that
2 injury has been suffered by other, unidentified members of the class to which they belong
3 and which they purport to represent. Defendants assert further that plaintiffs do not allege
4 that they got something different or that the products were defective or inedible. Rather,
5 they received the benefit of their bargain.

6 Defendants contend that claims of “economic injury” are especially suspect where,
7 as here, the plaintiffs have already consumed the product. Defendants note that the label
8 says, “Your satisfaction guaranteed or your money back,” and argue that if plaintiffs were
9 unhappy, they could have availed themselves of this remedy. However, they do not allege
10 that they did, despite the multiple occasions on which they purchased defendants’ ice
11 cream.

12 In opposition, plaintiffs assert that they have sufficiently met the test for standing
13 under existing case law. They contend that they have adequately alleged that the ice
14 cream products they purchased contained potassium carbonate, and have also adequately
15 alleged “actual particularized injury” to themselves, by asserting that defendants sold
16 numerous flavors of ice cream that were labeled “all natural,” but which contained what
17 plaintiffs assert were “undisclosed synthetic ingredients.” They contend that over the past
18 several years, the named plaintiffs have purchased many pints of this ice cream each year,
19 and that had they known that this ice cream contained cocoa that was not “natural,” they
20 would not have purchased it. Plaintiffs argue that allegations that plaintiffs did not receive
21 what was advertised and what they paid for have routinely been found to have established
22 injury.

23 As for UCL standing, plaintiffs assert that under Kwikset Corp. v. Superior Court, 51
24 Cal. 4th 310 (2011), they have sufficiently alleged injury-in-fact under the UCL simply by
25 asserting that they spent money on the allegedly mislabeled product. With regard to the
26 argument that they could simply have asked for their money back when they realized that
27 the cocoa was alkalized, plaintiffs respond that they have clearly registered a complaint
28 about the ice cream products by filing the present actions, and defendants have not offered

1 to return their money to them and instead are defending the lawsuits.

2 The court finds that the motion must be DENIED. Plaintiffs have adequately alleged
3 standing. Assuming all facts alleged in the FACs to be true, the court must accept that at
4 least the named plaintiffs suffered a concrete and particularized injury because they bought
5 ice cream labeled “all natural” which contained some allegedly synthetic substance. The
6 injury alleged is that they were deceived, and paid money they would not otherwise have
7 paid had they known about the potassium carbonate in the cocoa.

8 It may ultimately prove true, as defendants claim, that plaintiffs have no actionable
9 claims. However, that is not the same as finding no standing. If the plaintiffs did indeed
10 purchase the ice cream based on the representation that it was “all natural” and if that
11 representation proves to be false, then they arguably have suffered an injury in fact.

12 c. Whether the FACs allege the UCL and fraud claims with particularity

13 Defendants assert further that plaintiffs have not alleged the elements of injury or
14 deception with sufficient particularity. Under Rule 9(b), claims of fraud, as well as claims of
15 deceptive advertising brought under the UCL and the false advertising law must be pled
16 with particularity. Kearns v. Ford Motor Co., 567 F.3d 1120, 1125-26 (9th Cir. 2009).

17 Thus, a plaintiff must “articulate the who, what, when, where, and how of the misconduct
18 alleged.” Id.

19 Defendants note that plaintiffs assert that they are “willing to and ha[ve] paid a
20 premium for foods that are all natural and ha[ve] refrained from buying their counterparts
21 that were not all natural,” that they “relied” on the representation that Breyers ice cream
22 was “all natural,” and that products using cocoa processed with potassium carbonate are
23 not “natural.”

24 However, defendants argue, under this theory, the words “all natural” on the product
25 label constitute a term of art. Thus, defendants contend, to be deceived, a consumer
26 would have to be someone who is (i) intimately familiar with the FDA’s “natural” policy and
27 the USDA regulations about what constitutes a “synthetic,” (ii) saw the words “all natural,”
28 (iii) concluded that those words amounted to a representation by the manufacturer that the

1 alkali used in the Dutch cocoa process is “not synthetic” as defined by the USDA
2 regulations (i.e., it is sodium carbonate), and (iv) made his or her purchase decision in
3 reliance on that belief

4 Defendants note further that plaintiffs allege that all class members shared their
5 belief. Defendants contend, however, that the law of false advertising focuses on a
6 reasonable consumer who is a member of the target population, which requires that
7 plaintiffs show that members of the public are “likely to be deceived.” Defendants contend
8 that plaintiffs have failed to allege a plausible claim that a reasonable consumer would
9 assume the words “all natural” on the label meant “alkalized with sodium carbonate and not
10 potassium carbonate.”

11 In opposition, plaintiffs argue that they have pled facts with sufficient particularity, as
12 they have alleged the “who, what, when, where, and how” of the alleged deception. The
13 “who” is Ben & Jerry’s, Breyers, and Unilever. The “what” is the statement that ice cream
14 containing alkalized cocoa is “all natural.” The “when” is alleged as “since at least 2006,”
15 and “throughout the class period.” The “where” is on the ice cream package labels. The
16 “how the statements were misleading” is the allegation that defendants did not disclose that
17 the alkalizing agent in the alkalized cocoa was potassium carbonate, which plaintiffs allege
18 is a “synthetic.”

19 As for defendants’ argument that the FACs fail to establish a plausible claim that
20 reasonable consumers would be deceived, plaintiffs respond that the FACs assert that the
21 effect of mislabeling the ice cream cartons would be to mislead consumers into believing
22 that they were getting something that they were not.

23 The court finds that the motion must be DENIED. As with the arguments in subparts
24 (a) and (b), above, the presence of factual disputes does not render the claims
25 inadequately pled for purposes of the present motion.

26 d. Whether plaintiffs’ claims are preempted

27 Defendants argue that plaintiffs’ claims are preempted by the Federal Food, Drug,
28 and Cosmetic Act, 21 U.S.C. § 301 (“FDCA”). The FDCA governs labeling and related

1 claims that can be made with respect to food, drugs, cosmetic products, and medical
 2 devices. In enacting the FDCA, Congress established a comprehensive federal scheme of
 3 food regulation to ensure that food is safe and is labeled in a manner that does not mislead
 4 consumers. 21 U.S.C. § 341, et seq.

5 In 1990, Congress enacted the Nutrition Labeling and Education Act (“NLEA”) to
 6 amend the FDCA to require uniform food labeling and require the now familiar “Nutrition
 7 Facts” box that appears on food labels. See 21 U.S.C. § 343(q)(1)(A)-(D).² Pursuant to
 8 the NLEA, the Food and Drug Administration (“FDA”) promulgated regulations with respect
 9 to food labeling. See, e.g., 21 C.F.R. § 101.1-101.18.

10 Generally, a food is misbranded if “its labeling is false or misleading in any
 11 particular.” 21 U.S.C. § 343(a)(1). But the NLEA Amendments include a broad express
 12 preemption provision that governs product labeling. 21 U.S.C. § 343-1(a)(3); see Mills v.
 13 Giant of Md., LLC, 441 F. Supp. 2d 104, 106-09 (D.D.C. 2006) (noting the breadth of NLEA
 14 preemption clause), aff’d on other grounds, 508 F.3d 11 (D.C. Cir. 2007). The NLEA
 15 provides that no state may “directly or indirectly establish . . . any requirement for the
 16 labeling of food that is not identical to the requirement of section 403(q) [21 U.S.C.
 17 § 343(q)].” See 21 U.S.C. § 343-1(a)(4). A similar provision applies to section 403(r), 21
 18 U.S.C. § 343(r). See 21 U.S.C. § 343-1(a)(5).

19 Defendants argue that the “not identical” provision (above) is plaintiffs’ “undoing,”
 20 because a court may impose labeling requirements only if “identical to” the FDA’s
 21 requirements. Defendants contend that plaintiffs’ claims here are “indistinguishable” from
 22 the claims made in Chacanaca v. The Quaker Oats Co., 752 F.Supp. 2d 1111 (N.D. Cal.,
 23 2010), where the court found that the plaintiffs’ UCL and other state law claims sought to

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 25 ² Under 21 U.S.C. § 343(q), “[a] food shall be deemed to be misbranded . . . “if it is a
 26 food intended for human consumption and is offered for sale, unless its label or labeling bears
 27 nutrition information that provides” the serving size or the common household unit of measure
 28 that expresses the serving size; the number of servings per container; the total number of
 calories derived from any source and derived from total fat, in each serving size or other unit
 of measure of the food; and the amount of total fat, saturated fat, cholesterol, sodium, total
 carbohydrates, complex carbohydrates, sugars, dietary fiber, and total protein contained in
 each serving size or other unit of measure. 21 U.S.C. § 343(q)(1)(A)-(D).

1 impose labeling requirements that were “not identical” to FDA regulations regarding use of
2 the terms “cholesterol free” and “0g Trans Fat” and therefore were expressly preempted.
3 See id. at 1122.

4 Defendants argue that plaintiffs are seeking to impose disclosure requirements that
5 are different from and “not identical to” the FDA’s policy on “natural” claims. For example,
6 defendants assert, plaintiffs seek to hold defendants liable in fraud for not stating on the
7 label which alkali was used, although they admit that this goes beyond what the FDA
8 requires.

9 Defendants contend that the FDA’s “policy” constitutes an “advisory opinion” under
10 21 C.F.R. § 10.85, and that the FDA is obligated to follow this opinion and may not
11 recommend legal action against a product that is labeled in conformity with it. Defendants
12 assert that plaintiffs seek to impose liability for “natural” claims where the FDA may not
13 recommend legal action – or, put another way, plaintiffs seek to create a “natural” rule
14 where the FDA has not created one – and that as such, they are asking the court for
15 labeling requirements that are not “identical to” the FDA’s requirements.

16 In opposition, plaintiffs argue that their claims are not expressly preempted by the
17 FDCA because the FDA has not regulated the terms “natural” or “all natural.” That is,
18 plaintiffs contend that because the terms are not defined anywhere in NLEA § 343(r) or
19 § 343(q), and are not regulated by the FDA, the court cannot find that the claims asserted
20 here are preempted.

21 Plaintiffs argue that FDCA § 403A(a), 21 U.S.C. § 343-1(a) reflects the intent of
22 Congress to preempt only state law requirements for food and beverage labeling in specific
23 labeling categories, and even then, only when those state law requirements were “not
24 identical” to those established by Congress and the FDA. They cite the Final Rule, at 60
25 Fed. Reg. 57076, 57120 (Nov. 13, 1995), which states that “[t]he only State requirements
26 that are subject to preemption are those that are affirmatively different from the Federal
27 requirements on matters that are covered by section 403A(a) of the act.” Plaintiffs contend
28 that this means that Congress drafted a limited provision that left ample room for state

1 regulation.

2 The court finds that the motion must be DENIED. Federal law preempts state law
3 where any of the three forms of preemption are found: (1) express preemption; (2) field
4 preemption; and (3) and implied preemption. Hillsborough County, Florida v. Automated
5 Med. Labs. Inc., 471 U.S. 707, 713 (1985). Put another way, federal preemption occurs
6 when Congress enacts a statute that explicitly preempts state law; when state law actually
7 conflicts with federal law; or when federal law occupies a legislative field to such an extent
8 that it is reasonable to conclude that Congress left no room for state regulation in the field.
9 Chae v. SLM Corp., 593 F.3d 936, 941 (9th Cir. 2010).

10 Consumer protection laws (such as the UCL) are preempted if they seek to impose
11 requirements that contravene the requirements set forth by federal law. See Wyeth v.
12 Levine, 555 U.S. 555, 129 S.Ct. 1187, 1200 (2009); see also Chacanaca, 752 F.Supp. 2d
13 at 1118-19. Even if a federal law contains an express preemption clause, it does not
14 immediately end the inquiry because the question of the substance and scope of Congress'
15 displacement of state law still remains. Altria Group, Inc. v. Good, 555 U.S. 70, 129 S.Ct.
16 538, 543 (2008).

17 When determining the existence of preemption, courts are guided by two major
18 principles. Wyeth, 129 S.Ct. at 1194. First, the purpose of Congress "is the ultimate
19 touchstone" in every preemption case; second, in areas of traditional state regulation, the
20 court assumes that a federal law does not supplant state law unless Congress has made
21 such an intention clear and manifest. Id. at 1194-95 (citations and quotations omitted).
22 Accordingly, defendants' preemption arguments must overcome the presumption against
23 preemption because food labeling has been an area historically governed by state law.
24 See Plumley v. Massachusetts, 155 U.S. 461, 472 (1894).

25 As noted above, the NLEA, which was enacted as an amendment to the FDCA,
26 provides that no state "may directly or indirectly establish under any authority . . . any
27 requirement for nutrition labeling of food that is not identical to the requirement of section
28 343(q) of this title," or "any requirement respecting any claim of the type described in

1 section 343(r)(1) of this title, made in the label or labeling of food that is not identical to the
2 requirement of section 343(r) this title.” 21 U.S.C. § 343-1(a)(4)-(5).

3 From this, it appears clear that Congress intended to preempt non-identical
4 requirements in the field of food labeling. The purpose of the NLEA, however, is not to
5 preclude all state regulation of nutritional labeling, but to “prevent State and local
6 governments from adopting inconsistent requirements with respect to the labeling of
7 nutrients.” H. Rep. No. 101-538, at 10 (1990). Moreover, Congress declared that the
8 NLEA “shall not be construed to preempt any provision of State law, unless such provision
9 is expressly preempted under section [343-1(a)] of the [FDCA].” Pub.L. No. 101-535, 104
10 Stat. 2353, 2364 (Nov. 8, 1990).

11 In Wyeth, the Court addressed drug labeling under the FDCA and held that state
12 failure-to-warn claims against the manufacturer of an antihistamine were not preempted by
13 the FDCA. Id., 129 S.Ct. at 1200. The Court noted that Congress' purpose was not to
14 preempt state lawsuits with respect to drug labels. Id. The FDCA did not contain any
15 express preemption provisions until the 1976 enactment of an express preemption
16 provision relating to medical devices and the 1990 enactment of the NLEA relating to food
17 labels. Id.; Holk, 575 F.3d at 337. Here, unlike the drug labeling at issue in Wyeth, there is
18 an express preemption provision regarding the subject of the present action, food labeling.

19 The NLEA prohibits non-identical “requirements.” 21 U.S.C. § 343-1(a)(4)-(5). In
20 Holk v. Snapple Beverage Co., 575 F.3d 329, 341-42 (3rd Cir. 2009), the court held that
21 the NLEA did not preempt the state consumer fraud claims challenging the use of the word
22 “natural” on defendant’s drink products, as neither the statute nor the regulations contained
23 any requirement regarding the word “natural,” and the FDA had stated that it was
24 disinclined to define “natural” because there were “still many facets of the issue that the
25 agency will have to carefully consider if it undertakes a rulemaking to define the term
26 ‘natural.’”

27 In a number of recent cases, federal district courts in California have ruled that
28 claims brought under state consumer protection laws involving labels stating that the food

1 in the package contained “0 Grams of Trans Fat” were preempted by the FDA’s “express
2 nutrient content” regulations, which contain a definition of “trans fat.” In other words, where
3 manufacturers are in compliance with FDA requirements regarding express nutrient content
4 labeling – such as those for trans fats – requiring those manufacturers to add or change
5 something on the label regarding that trans fat content would necessarily impose a state-
6 law requirement for disclosure of trans fats. See, e.g., Chacanaca, 752 F.Supp. 2d at
7 1118-23; Peviani v. Hostess Brands, Inc., 750 F. Supp. 2d 1111, 1119-20 (C.D. Cal.,
8 2010); Red v. The Kroger Co., 2010 WL 4262037 at *4-7 (C.D. Cal., Sept. 2, 2010).

9 By contrast, in Red v. Kraft Foods, Inc., 754 F.Supp. 2d 1137 (C.D. Cal., 2010), the
10 court held that state law claims regarding the use of the phrases “made with real
11 vegetables” and “made with real ginger and molasses” on the defendants’ packages of
12 crackers and cookies were not preempted because they did not suggest that a specific
13 nutrient was absent or present in certain amounts. Id. at 1142.

14 Similarly, in Lockwood v. ConAgra Foods, 597 F.Supp.2d 1028 (N.D. Cal. 2009), the
15 plaintiffs asserted that the defendant had violated the UCL by labeling its pasta sauce as
16 “all natural” when in fact it included high fructose corn syrup as an ingredient. The court
17 held that the plaintiffs’ state law claims were not expressly preempted under the NLEA,
18 because the NLEA preempted only state labeling requirements for artificial flavors, colors,
19 or preservatives that were different from the FDCA requirements; and also held that the
20 NLEA’s preemption provision did not indicate an intent by Congress to occupy the field.
21 The court also noted that the FDA’s articulation of the “policy” regarding the use of “natural”
22 suggested an intent not to occupy the field of food labeling, as did its subsequent refusal to
23 issue regulations regarding the definition of “natural.” Id. at 1031-34.

24 In the present case, plaintiff's claims of misleading and deceptive labeling would
25 require defendants to label their products in a particular way. Plaintiffs do not allege that
26 defendants violated the labeling requirements of the NLEA or that they failed to disclose the
27 presence or amount of a particular ingredient. Rather, plaintiffs allege that defendants
28 violated the UCL and engaged in fraud by describing their ice cream as “all natural” and

1 failing to disclose that the alkalized cocoa in some of their flavors of ice cream is not
2 “natural.” Plaintiffs seek (among other things) a declaration and order enjoining defendants
3 from advertising their products “misleadingly.” This request for relief as to the labeling
4 suggests a requirement relating to the labeling of food.

5 Consequently, the court must consider whether the requirements plaintiffs seek to
6 impose by the present action are identical to the requirements in the NLEA. The
7 subsection of 21 U.S.C. § 343 that governs nutrition levels and health-related claims does
8 not specify what “nutrient” content and health claims can and cannot be made on labels,
9 either expressly or by implication. See 21 U.S.C. § 343(r)(1). Moreover, while the
10 provisions in this subsection apply to representations about nutrients such as fiber and fat,
11 and to representations such as “diet” as applied to soft drinks, there is no indication of any
12 regulation of the use of an adjective such as “natural” on a food label. Accordingly, the
13 court finds that the claims are not preempted.

14 e. Whether the court should abstain in deference to the FDA

15 Defendants contend that the court “could also” abstain in deference to FDA. They
16 assert that courts typically decline equitable relief if adjudicating the claim would entangle
17 them in a complex area that is already subject to oversight by an agency having day-to-day
18 supervisory responsibilities.

19 In opposition, plaintiffs argue that abstention is a “red herring.” They assert that
20 abstention does not apply between a federal court and a federal agency, and that even if it
21 did, there is nothing here to abstain from, as the FDA has made it clear that it does not
22 intend to regulate the meaning of “natural.”

23 The court finds that the motion must be DENIED. Generally, the United States
24 Supreme Court recognizes four federal abstention doctrines – Pullman, Burford, Colorado
25 River, and Younger. See U.S. v. Morros, 268 F.3d 695, 703-09 (9th Cir. 2004). None of
26 these involve “abstention” by a federal court in favor of deferring to a federal agency.
27 Moreover, none of the state court cases cited by plaintiffs concern abstention by a federal
28 court, and the only federal case plaintiffs do cite – In re Paxil Litig., 218 F.R.D. 242, 248

1 (C.D. Cal. 2003) – does not discuss abstention.

2 f. Whether plaintiffs have a valid claim for unjust enrichment

3 Defendants argue there is no such thing in California as a cause of action for unjust
4 enrichment. They assert that unjust enrichment is simply a basis for obtaining restitution,
5 and does not lie where an enforceable, binding agreement exists that governs the rights of
6 the parties.

7 In opposition, plaintiffs accuse defendants of trying to “confuse the court.” They
8 contend that irrespective of whether there is a stand-alone cause of action for unjust
9 enrichment (apparently conceding that there is not), under California law a plaintiff may
10 plead in the alternative claims for restitution based on quasi-contract and unjust
11 enrichment.

12 Plaintiffs argue that they have pled in the alternative a claim in quasi-contract for
13 restitution on a theory of unjust enrichment. The 6th cause of action in the FACs is labeled
14 “Restitution Based on Quasi-Contract/Unjust Enrichment.” Plaintiffs concede that this claim
15 may ultimately be incompatible with a tort recovery, or superfluous to a UCL recovery, but
16 assert that since the claim is pled in the alternative, it would be premature to dismiss it at
17 this stage, as plaintiffs in federal court are permitted to plead inconsistent causes of action.

18 The court finds that the motion must be DENIED. Unjust enrichment is “not a cause
19 of action . . . or even a remedy, but rather a principle, underlying various legal doctrines
20 and remedies. It is synonymous with restitution.” McBride v. Boughton, 123 Cal. App. 4th
21 379, 387 (2004) (citing Melchior v. New Line Prods., Inc., 106 Cal. App. 4th 779, 793
22 (2003)). Thus, unjust enrichment is not a stand-alone claim under California law; it is a
23 fall-back theory that would come into play only in the event of a finding of liability on some
24 other non-contractual claim.

25 Here, however, plaintiffs assert the “claim” of unjust enrichment as part of a claim of
26 restitution based on quasi-contract. In California, unjust enrichment is typically alleged in
27 connection with a “quasi-contractual” claim in order to avoid unjustly conferring a benefit
28 upon a defendant where there is no valid contract. McBride, 123 Cal. App. 4th at 388; see

1 also Paracor Finance, Inc. v. General Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir.
2 1996) (under California law, “unjust enrichment is an action in quasi-contract”); McKell v.
3 Washington Mut., Inc., 142 Cal. App. 4th 1457, 1490 (2006) (“unjust enrichment is a basis
4 for obtaining restitution based on quasi-contract”).

5 g. Whether plaintiffs have a valid claim for common law fraud

6 Defendants argue that the FACs do not plead facts sufficient to support a claim of
7 fraud. To state a claim for common law fraud, plaintiffs must allege a misrepresentation,
8 knowledge of falsity, intent to defraud, justifiable reliance, and resulting damages. Gil v.
9 Bank of Am., Nat'l Ass'n, 138 Cal. App. 4th 1371, 1381 (2006). In addition, under Rule
10 9(b), the facts supporting the claim must be alleged with particularity. See Vess v.
11 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003) (plaintiff must include “the
12 who, what, when, where, and how” of the alleged fraud).

13 Here, defendants assert, plaintiffs have failed to adequately plead the required
14 misrepresentation, and have also failed to plead facts showing knowledge of falsity
15 (scienter), or facts sufficient to show reasonable reliance by themselves – let alone class
16 members.

17 Defendants’ primary argument is that plaintiffs’ claim that they acted knowingly and
18 with intent to deceive is implausible. They contend that to accept this theory, the court
19 would have to assume that defendants used the words “all natural” on the label, that they
20 complied with FDA labeling regulations by disclosing that the cocoa was alkalized cocoa,
21 but deliberately did not disclose that the alkali used was potassium carbonate (if it was),
22 because it intended to dupe consumers into believing that they were getting cocoa
23 alkalized with sodium carbonate, in order to exact a premium price.

24 In opposition, plaintiffs argue that they have adequately alleged facts supporting
25 their claim of common law fraud. Plaintiffs contend that the claim that they failed to allege
26 the elements of fraud was also addressed in the section in which defendants argued that
27 plaintiffs had failed to allege a cognizable injury (subsection (b), above).

28 Plaintiffs assert that the argument that they have not pled sufficient facts to make the

1 element of “knowledge of falsity” plausible is without merit, as they have alleged that
2 defendants “knew or recklessly disregarded” the fact that their ice cream was not “all
3 natural,” and that they knew that the products were misleadingly labeled.

4 Plaintiffs contend that the argument that they have not pled facts sufficient to show
5 reliance is also without merit, as they have alleged that the named plaintiffs relied on the
6 representation that the ice cream was “all natural,” and paid “premium prices” for the
7 product because they believed it was “all natural,” and would not have purchased it if they
8 had known it was filled with synthetic ingredients.

9 The court finds that the motion must be DENIED. Plaintiffs have alleged facts
10 sufficient to withstand a 12(b)(6) motion on the fraud claim. Moreover, there are a number
11 of factual disputes here, which cannot be resolved at this stage of the case. In particular,
12 the issues of reliance and materiality are too fact-dependent to be resolved on the present
13 12(b)(6) motion.

14 Moreover, the fundamental dispute – what is a “natural” product – will likely present
15 some factual disputes. The only FDA guidance appears to be a distinction between
16 “natural” and “synthetic” in the “policy,” but that definition in the Federal Register is qualified
17 as meaning something that would “not normally be expected to be in food.” Surely, that
18 characterization raises multiple linguistic and philosophical questions, not to mention factual
19 questions.

20 h. Whether the Astiana plaintiffs are entitled to injunctive relief

21 Defendants contend that the Astiana plaintiffs cannot show any entitlement to
22 injunctive relief, because defendants discontinued the use of “all natural” before plaintiffs
23 filed the complaints in the present action.

24 Defendants note that after Ben & Jerry’s filed its motion to dismiss, plaintiffs
25 amended the complaint to allege that Ben & Jerry’s did not recall all ice cream products
26 containing the “all natural” label, and that an injunction is necessary to prevent Ben & Jerry
27 from putting the “all natural” label back on the ice cream packages any time it decides to.
28 Defendants claim that the burden is on plaintiffs to show that the alleged wrongful conduct

1 is likely to recur, not that it might or conceivably could recur.

2 In opposition, plaintiffs assert that they are still entitled to injunctive relief because
3 there is no knowing when they might put the label back on the ice cream. Plaintiffs also
4 object to the “evidence” submitted by Ben & Jerry, in the form of the ice cream labels
5 attached as exhibits to defendants’ Request for Judicial Notice.

6 The motion is DENIED. While it is true that if Ben & Jerry’s is no longer using the
7 term “all natural” on its labels, there will be nothing to enjoin, the availability of injunctive
8 relief cannot be determined until the parties have developed the factual record.

9 B. Motion to Strike

10 1. Legal Standard

11 Under Federal Rule of Civil Procedure 12(f), the court “may order stricken from any
12 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous
13 matter.” Fed. R. Civ. P. 12(f). The function of a motion to strike under Rule 12(f) is to
14 “avoid the expenditure of time and money that must arise from litigating spurious issues by
15 dispensing with those issues prior to trial.” Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d
16 970, 973 (9th Cir. 2010) (quotation and citation omitted). To determine whether to grant a
17 motion to strike under Rule 12(f), the court must determine whether the matter the moving
18 party seeks to have stricken is (1) an insufficient defense; (2) redundant; (3) immaterial; (4)
19 impertinent; or (5) scandalous. Id. at 973-74.

20 Motions to strike are not favored and “should not be granted unless it is clear that
21 the matter to be stricken could have no possible bearing on the subject matter of the
22 litigation.” Colaprico v. Sun Microsystem, Inc., 758 F.Supp. 1335, 1339 (N.D. Cal. 1991).
23 When a court considers a motion to strike, it “must view the pleading in a light most
24 favorable to the pleading party.” In re 2TheMart.com, Inc. Sec Lit., 114 F Supp. 2d 955,
25 965 (C.D. Cal. 2000). A court must deny the motion to strike if there is any doubt whether
26 the allegations in the pleadings might be relevant in the action. Id.

27 2. Defendants’ Motion

28 Defendants seek an order striking the class averments. They argue that under

1 Federal Rule of Civil Procedure 23(c)(1), the district court is empowered to determine “at an
2 early practicable time” whether an action is to be maintained as a class action. They
3 contend that motions to strike are a well-recognized means of attacking inadequate class
4 allegations such as those alleged here.

5 Defendants contend that the class averments fail for two reasons. First, they assert
6 that the class, as alleged, is not ascertainable, because the FACs do not plead facts
7 showing that any member of the proposed class knows which alkali (potassium carbonate,
8 or sodium carbonate) would have been used in the ice creams that they actually bought.
9 The class is defined as those class members who bought “Ice Cream products that were
10 labeled ‘all natural’ but contained alkalized cocoa processed with a synthetic ingredient.”
11 Defendants assert that this definition asks consumers to self-identify themselves in order to
12 be part of the class, which means that the membership of the class is not ascertainable.

13 Second, defendants argue that this class action is not superior to other proceedings.
14 The label on the ice cream package states, “Your satisfaction guaranteed, or your money
15 back.” Defendants contend that if plaintiffs were unhappy, they could have easily returned
16 the package and asked for a refund. There is no allegation in the FACs that plaintiffs did
17 so, or that the remedy of seeking a refund was not adequate or was superior to the class
18 action device.

19 In opposition, plaintiffs argue that the class definition is precise, objective, and
20 presently ascertainable, and that there is no basis in the pleadings to conclude that it would
21 not be administratively feasible for the court to determine whether an individual is a
22 member of this class. Thus, they argue, there is no basis to strike the class allegations.
23 They also contend that the defendants’ ascertainability argument is based on a dispute of
24 fact, and as such, should be denied until a more developed record is available.

25 The court finds that the motion must be DENIED. Determining whether to certify the
26 class is normally done through a motion for class certification under Rule 23. While it is
27 true that a few courts have held that Rule 12(f) provides a means of striking class
28 allegations, such a motion appears to allow a determination of the suitability of proceeding

1 as a class action without actually considering a motion for class certification.

2 In Kamm v. California City Development Co., 509 F.2d 205, 212 (9th Cir. 1975), the
3 court affirmed the district court's dismissal of the complaint and "striking" of the class
4 allegations, based on a finding that the class action was not a superior method of resolving
5 the dispute, but the motion to strike appears to have been part of the 12(b)(6) motion to
6 dismiss – not a separate 12(f) motion.

7 District courts within the Ninth Circuit have cited Kamm as authority for striking class
8 averments, and a third has held that the court can do so under Rule 23(c)(1)(A). As one
9 court put it,

10 The parties here do not dispute that the Court may consider this motion at
11 [this] time, even though a motion for class certification has not been filed.
12 Given that the issues involved are pure questions of law, and the record
13 before the Court is undisputed, the Court sees no reason why it cannot
14 consider the merits of the motion, and concludes that it is appropriate now to
15 address the issues raised in the motion.

16 Sheppard v. Capital One Bank, 2007 WL 6894541 at *1-2 (C.D. Cal., July 11, 2007)
17 (finding that both individual and class claims were time-barred); see also Montoya v.
18 Creditors Interchange Receivable Mgmt, LLC, 2011 WL 971341 at *1 (C.D. Cal., Mar. 16,
19 2011) (citing Kamm and Sheppard for the above-stated proposition).

20 However, the court in a more recent decision – Beal v. Lifetouch, Inc., 2011 WL
21 995884 (C.D. Cal., Mar. 15, 2011) – adopted what this court finds to be the preferable
22 approach. Beal was a wage-and-hour case, and the defendant moved to dismiss the
23 complaint for failure to state a claim, and also moved to strike the class allegations. In the
24 motion to strike, the defendants argued that the plaintiff had failed to allege facts sufficient
25 to satisfy the relevant factors under Rule 23(a). The court found defendants' arguments to
26 be "premature at the pleadings stage, as the issue of class certification is not yet before the
27 Court." Id., 2011 WL 995884 at *7 (citing Clark v. State Farm Mut. Auto. Ins. Co., 231
28 F.R.D. 405, 407 (C.D. Cal. 2005)). The court also found that "the class allegations are
clearly relevant to the subject matter of the litigation, and do not amount to redundant,
immaterial, impertinent, or scandalous matters." Id.

1 In this court's view, the questions whether the class is ascertainable and whether a
2 class action is superior should be resolved in connection with a class certification motion.
3 Moreover, under Whittlestone, a party seeking an order under Rule 12(f) must show that
4 the allegations they seek to have stricken are either part of an insufficient defense, or are
5 redundant, immaterial, impertinent, or scandalous. Id., 618 F.3d at 973-74. Defendants
6 have not met this standard.

7 **CONCLUSION**

8 In accordance with the foregoing, defendants' motions to dismiss are DENIED, and
9 the motion to strike class averments is DENIED.

10
11 **IT IS SO ORDERED.**

12 Dated: May 26, 2011



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14 PHYLLIS J. HAMILTON
15 United States District Judge
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