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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RONALD PATRICK KLINE, et al.,
12 Plaintiffs,
13 v.
14 IOVATE HEALTH SCIENCES U.S.A.,
15 INC.,
16 Defendant.

Case No.: 3:15-cv-02387

**ORDER DENYING IN PART AND
GRANTING IN PART
DEFENDANT’S MOTION TO
DISMISS [DOC. 20] WITH LEAVE
TO AMEND**

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18 Pending before the Court is Defendant’s motion to dismiss the first amended
19 complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs filed an
20 opposition and Defendant replied. The Court decides the matter on the papers submitted
21 and without oral argument. *See* Civ. L. R. 7.1 (d)(1). For the reasons stated below, the
22 Court **DENIES** in part and **GRANTS** in part Defendant’s motion. Plaintiffs are granted
23 leave to amend.

24 **I. BACKGROUND**

25 Ronald Patrick Kline and Yamil Caraballo (“Plaintiffs”) are residents of California
26 and New York, respectively. (Compl. ¶¶ 12-13.) Plaintiffs filed this putative class action
27 alleging false advertising under California state law along with other California and New
28 York state consumer protection claims. Iovate Health Sciences U.S.A., Inc. (“Iovate” or

1 “Defendant”) is a Delaware corporation that manufactures a variety of protein powder
2 products. (*Id.* ¶ 14.)

3 Plaintiffs allege violations of state and federal laws that prohibit nonfunctional
4 slack-fill in packaging. Under federal law, “[s]lack-fill is the difference between the
5 actual capacity of a container and the volume of product contained therein.” 21 C.F.R. §
6 100.100(a). “Nonfunctional slack-fill is the empty space in a package that is filled to less
7 than its capacity for reasons other than” specified in the statute. *Id.* A package
8 containing nonfunctional slack-fill is misleading if consumers are unable to fully view the
9 contents. *Id.* A food is misbranded “if its container is so made, formed, or filled as to be
10 misleading.” *Id.* § 100.100. Under California's slack-fill statute, no container should be
11 constructed or filled “as to facilitate the perpetration of deception or fraud.” Cal. Bus. &
12 Prof. Code § 12606(a). A container is “misleading if it contains nonfunctional slack fill,”
13 which is “empty space in a package that is filled to substantially less than its capacity for
14 reasons other than” those specified in the statute. Cal. Bus. & Prof. Code § 12606(b).

15 According to the complaint, Iovate intentionally packages its products in opaque
16 containers comprised of more than 40% empty space to mislead consumers. (Compl. ¶
17 1.) If Plaintiffs had known about the slack-fill at the time of purchase, they would not
18 have bought the products. (*Id.* ¶ 6.) Plaintiffs claim there is no functional reason for the
19 slack-fill contained in Iovate’s products. (*Id.* ¶ 28.) They contend the empty space is
20 nonfunctional slack-fill in violation of both C.F.R. §100.100 and Cal. Bus. & Prof. Code
21 §12606.

22 Plaintiffs assert five causes of action: (1) violation of California's False Advertising
23 Law (“FAL”), Cal. Bus. & Prof. Code § 17500 et seq.; (2) violation of the California
24 Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 et seq.; (3) violation
25 of California's Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 et
26 seq.; (4) violation of New York Deceptive Trade Practices Act (“DTPA”), New York
27 Gen. Bus. Law § 349; and (5) negligent misrepresentation. The Court has jurisdiction
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1 pursuant to 28 U.S.C. § 1332(a). Defendant filed a motion to dismiss pursuant to Federal
2 Rule of Civil Procedure 12(b)(6).

3 **II. DISCUSSION**

4 A motion under Rule 12(b)(6) tests the sufficiency of the complaint. *Navarro v.*
5 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted where the complaint
6 lacks a cognizable legal theory. *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d
7 1035, 1041 (9th Cir. 2010) (internal quotation marks and citation omitted). Alternatively,
8 a complaint may be dismissed where it presents a cognizable legal theory, yet fails to
9 plead essential facts under that theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749
10 F.2d 530, 534 (9th Cir. 1984).

11 In reviewing a Rule 12(b)(6) motion, the Court must assume the truth of all factual
12 allegations and construe them most favorably to the nonmoving party. *Huynh v. Chase*
13 *Manhattan Bank*, 465 F.3d 992, 997, 999 n.3 (9th Cir. 2006). Even if doubtful in fact,
14 factual allegations are assumed to be true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
15 (2007). “A well-pleaded complaint may proceed even if it strikes a savvy judge that
16 actual proof of those facts is improbable, and that a recovery is very remote and
17 unlikely.” *Id.* at 556 (internal quotation marks and citation omitted). On the other hand,
18 legal conclusions need not be taken as true merely because they are couched as factual
19 allegations. *Id.* at 55; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009).

20 Generally, the Court does not “require heightened fact pleading of specifics, but
21 only enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550
22 U.S. at 570. Nevertheless, a plaintiff’s obligation to provide the ‘grounds’ of his
23 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
24 recitation of the elements of a cause of action will not do.” *Id.* at 555 (quoting *Papasan*
25 *v. Allain*, 478 U.S. 265, 286 (1986)). Instead, the allegations “must be enough to raise a
26 right to relief above the speculative level.” *Id.* Thus, “[t]o survive a motion to dismiss, a
27 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
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1 relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at
2 570).

3 “Determining whether a complaint states a plausible claim for relief will ... be a
4 context-specific task that requires the reviewing court to draw on its judicial experience
5 and common sense.” *Iqbal*, 556 U.S. at 679. “A claim has facial plausibility when the
6 plaintiff pleads factual content that allows the court to draw the reasonable inference that
7 the defendant is liable for the misconduct alleged.” *Id.* at 678. “The plausibility standard
8 is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that
9 a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556).

10 In support of dismissal, Defendant initially argues Plaintiffs failed to sufficiently
11 allege that the slack-fill contained in the packaging is nonfunctional, and that the Court
12 cannot reasonably infer that Defendant systematically and intentionally packaged its
13 products with nonfunctional slack-fill. The Court disagrees. Plaintiffs sufficiently
14 alleged there is no functional reason for including more than 40% slack-fill in the protein
15 product packages.

16 **A. False Advertising Law and Consumers Legal Remedies Act Claims**

17 First, Defendant argues for dismissal of the FAL and CLRA claims based on the
18 statute of limitations. When a motion to dismiss is based on the statute of limitations, it
19 may be granted if, “[a]ccepting as true the allegations in the complaint, as [the Court]
20 must when reviewing a motion to dismiss under Federal Rule of Civil Procedure
21 12(b)(6), . . . the running of the statute is apparent on the face of the complaint.” *Huynh*,
22 465 F.3d at 997 (internal quotation marks and citations omitted); *see also Seven Arts*
23 *Filmed Entm't Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013).

24 Defendant claims the complaint failed to specify when Plaintiffs purchased
25 Iovate’s products. According to the complaint, Plaintiffs purchased the products within
26 the last four years. (Compl. ¶¶12-13.) Claims under the FAL and CLRA have a three-
27 year statute of limitations period. Cal. Civ. Code §§ 338 and 1783. It therefore appears
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1 that the claims could be time barred. The FAL and CLRA claims are therefore
2 dismissed.

3 The Court must next consider whether the Plaintiffs should be granted leave to
4 amend. *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th
5 Cir. 2004). Rule 15 advises leave to amend shall be freely given when justice so
6 requires. Fed. R. Civ. P. 15(a)(2). “This policy is to be applied with extreme liberality.”
7 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal
8 quotation marks and citation omitted).

9 In the absence of any apparent or declared reason – such as undue delay, bad
10 faith or dilatory motive on the part of the movant, repeated failure to cure
11 deficiencies by amendments previously allowed, undue prejudice to the
12 opposing party by virtue of allowance of the amendment, futility of the
13 amendment, etc. – the leave sought should, as the rules require, be freely
14 given.

15 *Foman v. Davis*, 371 U.S. 178, 182 (1962) (internal quotation marks and citation
16 omitted). Dismissal without leave to amend is not appropriate unless it is clear the
17 complaint cannot be saved by amendment. *Id.* Because it appears Plaintiffs may be able
18 to amend the complaint to avoid the statute of limitations bar, leave to amend is granted.

19 Because the FAL and CLRA claims are dismissed as time barred, the Court need
20 not address Defendant’s other arguments for dismissal of the same claims.

21 **B. Unfair Competition Law Claim**

22 Defendant next argues Plaintiffs' UCL claims are barred by the safe harbor rule.
23 Under the rule, there can be no UCL liability for engaging in conduct that is clearly
24 permitted by a statute. *Alvarez v. Chevron Corp.*, 656 F.3d 925, 933 (9th Cir. 2011); *see*
25 *also Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999).
26 However, Defendant has not established it is entitled to one or more safe harbors
27 contained in either C.F.R. §100.100 or Cal. Bus. & Prof. Code §12606. Defendant's safe
28 harbor argument is therefore unavailing.

1 Defendant further argues Plaintiffs failed to establish standing under UCL. To have
2 standing, a plaintiff must have suffered an economic injury-in-fact. *Hinojos v. Kohl's*
3 *Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013). Plaintiffs allege they would not have
4 purchased the product but for the misrepresentation. (Compl. ¶ 6.) This is sufficient to
5 meet the requirement. *Hinojos*, 718 F.3d at 1104; *Kwikset Corp. v. Superior Court*, 51
6 Cal. 4th 310, 330 (2011).

7 Lastly, Defendant argues Plaintiffs failed to meet the heightened pleading standard
8 under Rule 9(b). Claims “grounded in fraud ... must satisfy the particularity requirement
9 of Rule 9(b).” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003)
10 (internal quotation marks and citation omitted). Under California law, the elements of a
11 cause of action for fraud are: “(1) misrepresentation, (2) knowledge of the falsity or
12 scienter, (3) intent to defraud—that is, induce reliance, (4) justifiable reliance, and (5)
13 resulting damages.” *Glaski v. Bank of Am., Nat'l Ass'n*, 218 Cal. App. 4th 1079, 1090
14 (2013) (internal quotation marks and citation omitted). The UCL claim involves
15 allegations of fraudulent conduct, deception or misrepresentation. Therefore, Rule 9(b)
16 applies to the extent the UCL claim is based on a misrepresentation. *See Kearns v. Ford*
17 *Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009).

18 In alleging fraud, a plaintiff “must state with particularity the circumstances
19 constituting fraud.” Fed. R. Civ. P. 9(b). Fraud allegations must be “specific enough to
20 give defendants notice of the particular misconduct ... so that they can defend against the
21 charge and not just deny that they have done anything wrong.” *Vess*, 317 F.3d at 1106
22 (internal quotation marks and citation omitted). Therefore, a complaint must include “the
23 who, what, when, where, and how of the misconduct charged.” *Id.* (internal quotation
24 marks and citation omitted).

25 Defendant argues Plaintiffs failed to allege which Iovate products were purchased
26 and when those purchases occurred, as required under Rule 9(b). In *Kearns*, the plaintiff
27 alleged Ford Motor Company “knowingly misrepresent[ed] to the public that [the]
28 vehicles [were] safer and more reliable, with an intent to induce reliance and defraud

1 consumers.” *Kearns*, 567 F.3d at 1127. However, the plaintiff failed to allege which
2 advertisement materials he relied upon, and did not specify when he was exposed to the
3 material. *Id.* at 1126. The Court held the UCL claim did not comply with Rule 9. *Id.* at
4 1127-28.

5 Although Plaintiffs generally allege they purchased Iovate’s products within the
6 last four years, they do not allege which products they purchased or when they purchased
7 them. An allegation that Plaintiffs purchased an unspecified Iovate product sometime
8 during a four year span does not meet the heightened pleading standard required under
9 Rule 9(b). Plaintiffs therefore failed to allege their UCL claim with the required
10 particularity, and the UCL claim is dismissed. However, because they may be able to
11 allege additional facts to meet Rule 9, leave to amend is granted.

12 **C. Negligent Misrepresentation**

13 Defendant claims California’s economic loss doctrine applies to Plaintiffs’
14 negligent misrepresentation claim and bars Plaintiffs’ tort recovery based solely on
15 economic damages. *Jimenez v. Superior Court*, 29 Cal. 4th 473, 483 (2002); *Robinson*
16 *Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988-89 (2004). Defendant argues the
17 negligent misrepresentation claim must be dismissed because Plaintiffs failed to allege
18 any personal injury or property damage in the complaint. In opposition, Plaintiffs argue
19 the rule does not apply because of a special relationship. In determining whether a
20 special relationship exists, courts analyze:

21 (1) the extent to which the transaction was intended to affect the
22 plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree
23 of certainty that the plaintiff suffered injury, (4) the closeness of the
24 connection between the defendant's conduct and the injury suffered,
25 (5) the moral blame attached to the defendant's conduct, and (6) the
policy of preventing future harm.

26 *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979). Plaintiffs did not adequately allege
27 a special relationship. They alleged that because Defendant “is in the unique position of
28 being able to provide accurate information about [the] products,” a special relationship


1 exists. (Compl. ¶ 96.) To the extent Plaintiffs suggest that there is a special relationship
2 between a consumer goods manufacturer and a customer, they failed to cite any authority
3 in support of this proposition. Plaintiffs' negligent misrepresentation claim is therefore
4 dismissed. Because Plaintiffs may be able to allege sufficient facts, dismissal is with
5 leave to amend.

6 **III. CONCLUSION**

7 Defendant's motion to dismiss is **GRANTED** with respect to the FAL, CLRA,
8 UCL and negligent misrepresentation claims, and **DENIED** in all other respects. If
9 Plaintiffs wish to file a second amended complaint, they must do so no later than April
10 20, 2017. Defendant shall file a response, if any, to the second amended complaint
11 within the time set forth in Federal Rule of Civil Procedure 15(a)(3).

12 **IT IS SO ORDERED.**

13 Dated: March 24, 2017

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15 Hon. M. James Lorenz
16 United States District Judge
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