

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 SHERRY HUNTER, on behalf of herself,
12 all others similarly situated, and the general
13 public,

14 Plaintiff,

15 v.

16 NATURE'S WAY PRODUCTS, LLC and
17 SCHWABE NORTH AMERICA, INC.,

18 Defendants.

Case No.: 16-cv-0532-WQH-AGS

ORDER

19 HAYES, Judge:

20 The matters before the Court are four motions filed by Plaintiff Sherry Hunter: a
21 Motion for Class Certification (ECF No. 60), two Motions to File Documents Under Seal
22 (ECF Nos. 61 and 77), and a Motion for Reconsideration (ECF No. 85).

23 **I. Background**

24 On January 28, 2016, Plaintiff Sherry Hunter initiated this action by filing a
25 Complaint against Defendants Nature's Way Products, LLC and Schwabe North America,
26 Inc. (the "Defendants") in the Superior Court of the State of California, County of San
27 Diego. (ECF No. 1-5). On March 2, 2016, Defendants removed the action to this Court
28 pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1332(d)(2)(A). (ECF No. 1).

1 The Complaint alleges that “Defendants have manufactured, distributed, marketed,
2 and sold various Nature’s Way brand coconut oil products . . . for at least the past several
3 years.” (ECF No. 1-5 at ¶ 49). The Complaint alleges that “[t]hrough statements placed
4 directly on the labels of the Nature’s Way coconut oil products, defendants market and
5 advertise the products as both inherently healthy, and healthy alternatives to butter,
6 margarine[] and other oils, even though the products’ total and saturated fat content render
7 them both inherently unhealthy, and less healthy alternatives.” *Id.* at ¶ 57. The Complaint
8 seeks “an order, *inter alia*, compelling defendants to (a) cease marketing its coconut oil
9 products using the misleading an unlawful tactics complained of [t]herein, (b) destroy all
10 misleading, deceptive, and unlawful materials, [and] (c) conduct a corrective advertising
11 campaign.” *Id.* at ¶ 3.

12 On March 14, 2016, Defendants filed a Motion to Dismiss the Complaint. (ECF No.
13 12). On August 12, 2016, the Court issued an Order granting the Motion to Dismiss as to
14 Plaintiff’s claims for injunctive relief and Plaintiff’s claims under the “unfair” prong of the
15 UCL, and denying it in all other respects. (ECF No. 28 at 28). In discussing Plaintiff’s
16 claims for injunctive relief, the Court

17 recognized that courts in this circuit are split over the issue of whether a
18 plaintiff, who is seeking to enjoin a seller or manufacturer from making false
19 or misleading misrepresentations about an item the plaintiff previously
20 purchased, must be able to establish that he would likely purchase the item
again to establish standing.

21 *Id.* at 23 (quotations omitted). The Court concluded that Plaintiff did not have standing to
22 bring her claims for injunctive relief:

23 Plaintiffs^[1] do not allege that they will purchase Defendants’ coconut oil
24 products in the future. Plaintiffs allege that they would not have purchased
25 the products if they knew that it was misbranded or that the labeling claims
26 were false or misleading. These allegations support an inference that now that

27
28 ¹ The Court issued its August 12, 2016 Order before Co-Plaintiff Malia Levin was dismissed from the
case. *See* ECF No. 49 (March 23, 2017) (granting the voluntary dismissal of Co-Plaintiff Malia Levin).

1 Plaintiffs are aware of the alleged misrepresentations on the coconut oil labels,
2 Plaintiffs will not purchase the products in the future. Accordingly, the Court
3 finds that Plaintiffs have failed to allege that they face a ‘real and immediate
4 threat of repeated injury.’ Plaintiffs lack Article III standing to seek injunctive
relief.

5 *Id.* at 24 (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)).

6 On October 18, 2016 United States Magistrate Judge Andrew G. Schopler issued an
7 Order stating “Any motion . . . to amend the pleadings . . . shall be filed by December 16,
8 2016.” (ECF No. 37 at 1). On December 19, 2016, Magistrate Judge Schopler extended
9 the deadline for filing amended pleadings until January 27, 2017. (ECF No. 43). Plaintiff
10 has not filed an amended complaint.

11 On June 2, 2017, Plaintiff filed a Motion for Class Certification and a Motion to file
12 under seal certain documents related to the Motion for Class Certification. (ECF Nos. 60,
13 61). On June 26, 2017, Defendants filed a Response in Opposition to the Motion for Class
14 Certification and a Response in Support of Plaintiff’s Motion to File Documents Under
15 Seal. (ECF Nos. 72, 74). On July 10, 2017, Plaintiff filed a Reply to Defendants’ Response
16 in Opposition to the Motion for Class Certification and a second Motion to File Documents
17 Under Seal. (ECF Nos. 75, 77). Plaintiff’s second Motion to File Documents Under Seal
18 seeks permission to file under seal two documents that she submitted in support of her
19 Reply in Support of the Motion for Class Certification. *See* ECF No. 77. On August 7,
20 2017, Plaintiff a Notice of Supplemental Authority in Support of her Motion for Class
21 Certification. (ECF No. 84).

22 On November 14, 2017, Plaintiff “move[d] the Court to reconsider that portion of
23 its August 12, 2016 Order . . . dismissing plaintiff’s claims for injunctive relief.” (ECF
24 No. 85 at 2). Plaintiff contends that the Court should reconsider the portion of the August
25 12, 2016 Order dismissing Plaintiff’s claims for injunctive relief in light of the decision of
26 the Court of Appeals in *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103 (9th Cir.
27 October 20, 2017). *Id.* Plaintiff contends that she “already has standing, or at least may
28 be able to plead facts sufficient to have standing to seek injunctive relief” under *Davidson*.

1 (ECF No. 85-1 at 10). Defendants filed a Response to the Motion for Reconsideration on
2 December 4, 2017. (ECF No. 86). Defendants contend that Plaintiff does not have
3 standing to seek injunctive relief under *Davidson* and any amendments to the Complaint
4 would be futile. *Id.* at 13. Plaintiff filed a Reply to Defendants’ Response on December
5 11, 2017. (ECF No. 87).²

6 **II. Motion for Reconsideration**

7 **A. Applicable Law**

8 A “court may relieve a party or its legal representative from a final judgment, order,
9 or proceeding for . . . any . . . reason that justifies relief.” Fed. R. Civ. Pro. 60(b)(6).
10 “Reconsideration is appropriate if . . . there is an intervening change in controlling law.”
11 *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).
12 *Davidson v. Kimberly-Clark Corp.* addressed “an open question in this circuit[:] to
13 what extent a previously deceived consumer who brings a false advertising claim can allege
14 that her inability to rely on the advertising in the future is an injury sufficient to grant her
15 Article III standing to seek injunctive relief.” 873 F.3d 1103, 1113 (9th Cir. 2017).
16 *Davidson* “resolve[d] this [question] in favor of plaintiffs seeking injunctive relief[,]
17 hold[ing] that a previously deceived consumer may have standing to seek an injunction
18 against false advertising or labeling, even though the consumer now knows or suspects that
19 the advertising was false at the time of the original purchase.” *Id.* at 1115. The Court of
20 Appeals found that “[k]nowledge that [an] advertisement or label was false in the past does
21 not equate to knowledge that it will remain false in the future.” *Id.* (quoting *Summers v.*
22 *Earth Island Inst.*, 555 U.S. 488, 493 (2009)). The Court of Appeals concluded that,
23
24
25

26 ² On December 13, 2017, Defendants filed an Objection to Paragraph No. 3 of and Exhibit 1 to the
27 Declaration of Paul K. Joseph included with Plaintiff’s Reply in Support of the Motion for
28 Reconsideration. (ECF No. 88). The Court has not considered this material in its resolution of Plaintiff’s
Motion for Reconsideration. The Court denies Defendants’ Objection as moot.

1 consequently, previously deceived consumers “may suffer an ‘actual and imminent, not
2 conjectural or hypothetical’ threat of future harm.” The Court of Appeals explained that,
3 [in]n some cases, the threat of future harm may be the consumer’s plausible
4 allegations that she will be unable to rely on the product’s advertising or
5 labeling in the future, and so will not purchase the product although she would
6 like to. In other cases, the threat of future harm may be the consumer’s
7 plausible allegations that she might purchase the product in the future, despite
8 the fact it was once marred by false advertising or labeling, as she may
9 reasonably, but incorrectly, assume the product was improved.

8 *Id.*

9 The Court of Appeals held that “a previously deceived plaintiff *may* have standing
10 to seek injunctive relief.” *Id.* at 1116 (emphasis added). The Court of Appeals determined
11 that the plaintiff in *Davidson* “adequately alleged that she face[d] an imminent threat or
12 actual threat of future harm caused by [the defendant’s] allegedly false advertising.”

13 Davidson has alleged that she desires to purchase Kimberly–Clark’s flushable
14 wipes. Her desire is based on her belief that ‘it would be easier and more
15 sanitary to flush the wipes than to dispose of them in the garbage.’ As in
16 *Ries*,³ the FAC is ‘devoid of any grounds to discount [Davidson’s] stated
17 intent to purchase [the wipes] in the future.’ 287 F.R.D. at 533. And ‘[s]hould
18 [Davidson] encounter the denomination [‘flushable’] on a [Kimberly–Clark
19 wipes package] at the grocery store today, [she] could not rely on that
20 representation with any confidence.’ *Id.* We therefore hold that Davidson’s
21 allegation that she has ‘no way of determining whether the representation
22 ‘flushable’ is in fact true’ when she ‘regularly visits stores . . . where
23 Defendants’ ‘flushable’ wipes are sold’ constitutes a ‘threatened injury [that
24 is] certainly impending,’ thereby establishing Article III standing to assert a
25 claim for injunctive relief.

23 *Id.* (alterations in original).

24 **B. Standing Under Plaintiff’s Current Complaint**

28 ³*Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523 (N.D. Cal. 2012).

1 Plaintiff contends that the allegations in the Complaint are sufficient for her to have
2 standing to bring her claims for injunctive relief under *Davidson*. (ECF No. 85-1 at 10).
3 Defendants contend that Plaintiff does not have standing based on the allegations in her
4 complaint because she “has not alleged that she desires to continue purchasing Nature’s
5 Way extra virgin coconut oil.” (ECF No. 86 at 9).

6 To have standing to seek injunctive relief, a previously deceived consumer who
7 brings a false advertising claim must “adequately allege[] that [he or she] faces an imminent
8 threat or actual threat of future harm caused by [the defendant’s] allegedly false
9 advertising.” *Davidson*, 873 F.3d at 1116. A plaintiff can do so by making “plausible
10 allegations that [he or] she will be unable to rely on the product’s advertising or labeling
11 in the future, and so will not purchase the product although she would like to.” *Id.* at 1115.
12 The Court of Appeals held that the plaintiff in *Davidson* had done so by alleging that (1)
13 she “continues to desire to purchase wipes that are suitable for disposable in a household
14 toilet,” (2) she “would purchase truly flushable wipes manufactured by [the defendant] if
15 it were possible to determine prior to purchase if the wipes were suitable to be flushed,”
16 (3) she has “no way of determining whether the representation ‘flushable’ is in fact true,”
17 and (4) she regularly visits stores . . . where Defendants’ ‘flushable’ wipes are sold.” *Id.*
18 at 1108, 1116 (quoting the plaintiff’s complaint).

19 Plaintiff does not allege (1) that she continues to desire to purchase a healthy
20 alternative cooking oil, (2) that she would purchase coconut oil manufactured by the
21 Defendants if it were possible to determine prior to purchase that the coconut oil was a
22 healthy alternative to other cooking oils, (3) that she has no way of determining whether
23 the any future representation that Defendants might make that their coconut oil is a healthy
24 alternative to other cooking oils is in fact true, or (4) that she visits stores where
25 Defendants’ coconut oil is sold. Plaintiff has not made “plausible allegations that she will
26 be unable to rely on the product’s advertising or labeling in the future, and so will not
27 purchase the product although she would like to.” *Id.* at 1115. Plaintiff does not have
28 standing to assert her claims for injunctive relief based on the allegations in the Complaint.

1 **C. Leave to Amend**

2 Under Federal Rule of Civil Procedure 15(a)(2), “court[s] should freely give leave
3 [to amend] when justice so requires.” Courts should only deny leave to amend when there
4 is an “an apparent or declared reason [to do so] such as undue delay, bad faith or dilatory
5 motive on the part of the movant, repeated failure to cure deficiencies by amendments
6 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
7 amendment, [or] futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

8 Plaintiff contends that the Court should grant Plaintiff leave to amend because none
9 of the “*Foman* factors” apply. (ECF No. 85-1 at 12). Plaintiff contends that amending the
10 Complaint would not be futile because “nothing in the Complaint precludes plaintiff from
11 plausibly alleging that she may be injured in the future by defendants’ false advertising if
12 not corrected.” *Id.* Defendants contend that any amendment to the Complaint would be
13 futile for three reasons: (1) because Defendants have already removed the allegedly
14 misleading claims from the labels at issue, (2) because “Plaintiff has specifically admitted
15 that she is in fact not interested in buying any more coconut oil for consumption,” and (3)
16 because coconut oil is a single ingredient product, Plaintiff is already aware of its alleged
17 health consequences, and any speculation about potential changes Defendants could make
18 to its product cannot support Article III standing. (ECF No. 86 at 8-12).

19 At this stage in the proceedings, the Court cannot conclude that Plaintiff is precluded
20 from alleging facts showing that she faces an imminent or actual threat of future harm that
21 is sufficient for her to have standing to bring claims for injunctive relief.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **III. Conclusion**

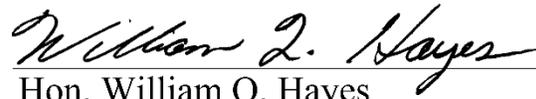
2 IT IS HEREBY ORDERED that

3 (1) Plaintiff's Motion for Reconsideration is GRANTED. Plaintiff may file an amended
4 complaint within twenty days of the date of this Order.

5 (2) Plaintiff's Motion for Class Certification (ECF No. 60) is DENIED as moot.

6 (3) Plaintiff's Motions to File Document's Under Seal (ECF Nos. 61 and 77) are
7 GRANTED.

8 Dated: January 9, 2018


9 Hon. William Q. Hayes
10 United States District Court

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28