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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 ARCHI'S ACRES, INC., a California  
12 corporation; and ARCHIPLEY'S  
13 FAMILY FARM, INC., a California  
14 corporation,

14 Plaintiffs,

15 v.

16 WHOLE FOODS MARKET SERVICE,  
17 INC., a Delaware corporation; WHOLE  
18 FOODS MARKET CALIFORNIA, INC.,  
19 a California corporation; and DOES 1–50,  
20 inclusive,

20 Defendants.

Case No.: 19-CV-2478 JLS (MSB)

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS  
PLAINTIFFS' FIRST AMENDED  
COMPLAINT**

(ECF No. 15)

21 Presently before the Court is Defendants Whole Foods Market California, Inc. and  
22 Whole Foods Market Service, Inc.'s Motion to Dismiss for Failure to State a Claim  
23 ("Mot.," ECF No. 15). Also before the Court is Plaintiffs Archi's Acres, Inc. and  
24 Archipley's Family Farm, Inc.'s Opposition to ("Opp'n," ECF No. 16) and Defendants'  
25 Reply in Support of ("Reply," ECF No. 17) the Motion. The Court took the matter under  
26 submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). See ECF No.  
27 18. Having carefully reviewed Plaintiffs' First Amended Complaint ("FAC," ECF No.  
28 11), the Parties' arguments, and the law, the Court **GRANTS** the Motion.

## BACKGROUND

1  
2 Plaintiffs Archi’s Acres, Inc. and Archipley’s Family Farm, Inc. are farmers and  
3 growers of high-quality living organic basil. FAC ¶ 1. In 2007, Defendants began  
4 purchasing small quantities of basil from Plaintiffs and selling the product in Whole Foods  
5 Market stores in the San Diego area. *Id.* ¶ 14. Defendants allegedly approached Plaintiffs  
6 in 2012 with an offer for Plaintiffs to supply basil products for Defendants’ stores in the  
7 entire southwest region. *Id.* ¶ 15. On or around June 6, 2012, Plaintiffs allege Defendants  
8 signed a contract committing to purchase \$573,000 in basil from Plaintiffs per year. *Id.*  
9 ¶ 16. Plaintiffs claim the contract contained “all material terms required of an agreement,”  
10 including “the price per unit, number of weekly units, units per year, number of units per  
11 case, and quality requirements.” *Id.* ¶ 16. Plaintiffs allege that as part of this contract,  
12 Defendants “recruit[ed] Plaintiffs for a partnership and joint venture.” *Id.* ¶ 15.

13 Plaintiffs planned to increase basil production by building a greenhouse to meet the  
14 needs of the contract. *Id.* ¶ 17. Plaintiffs estimated the greenhouse project would cost a  
15 total of \$870,000. *Id.* ¶ 18. Defendants gave Plaintiffs a “local producer loan” application,  
16 and Plaintiffs subsequently applied for and secured the loan through Defendants to help  
17 fund the “purchase of a hydroponic greenhouse to provide organic living basil to the  
18 southwest region of Whole Foods Market.” *Id.* Defendants issued Plaintiffs the “local  
19 producer loan” on January 25, 2013 for \$100,065. *Id.* ¶ 19.

20 On February 25, 2013, Defendants presented Plaintiffs with an oversized check for  
21 \$100,000 at the opening of Defendants’ store location in Del Mar, California. *Id.* ¶ 20.  
22 Plaintiffs allege that Defendants used and continue to use a photograph of this event in  
23 Defendants’ advertising materials “to show Defendants’ purported commitment to local  
24 farms and giving back to the local community.” *Id.* Plaintiffs obtained additional financing  
25 from other sources and completed the greenhouse project in late 2017 at a cost of  
26 \$1,260,000, plus interest. *Id.* ¶¶ 18, 21–22.

27 Plaintiffs allege that after completing the greenhouse project, “Defendants  
28 abandoned Plaintiffs, purchased from other suppliers and reduced their orders from

1 Plaintiffs.” *Id.* ¶ 23. Defendants purchased \$76,000 in basil from Plaintiffs in 2018, and  
2 subsequently “purchased even less in 2019 and have now ceased ordering from Plaintiffs.”  
3 *Id.* ¶ 25. Plaintiffs allege damages in excess of \$2 million. *Id.* ¶ 26. Plaintiffs assert causes  
4 of action for breach of contract, promissory estoppel, fraud, negligent misrepresentation,  
5 breach of fiduciary duty, and violation of the Lanham Act. *Id.* ¶¶ 30–92.

6 Plaintiffs filed their Complaint on December 24, 2019. *See generally* ECF No. 1.  
7 Defendants filed a Motion to Dismiss for failure to state a claim and lack of subject matter  
8 jurisdiction on February 5, 2020. ECF No. 5. Instead of opposing the motion, Plaintiffs  
9 filed the operative First Amended Complaint on February 26, 2020. ECF No. 11. The  
10 Court denied Defendants’ first Motion to Dismiss as moot. ECF No. 12. Defendants then  
11 filed the instant Motion. *See* ECF No. 15.

## 12 LEGAL STANDARD

13 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the  
14 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”  
15 generally referred to as a motion to dismiss. The Court evaluates whether a complaint  
16 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil  
17 Procedure 8(a), which requires a “short and plain statement of the claim showing that the  
18 pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual  
19 allegations,’ . . . it [does] demand more than an unadorned, the-defendant-unlawfully-  
20 harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
21 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to  
22 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
23 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
24 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A  
25 complaint will not suffice “if it tenders ‘naked assertion[s]’ devoid of ‘further factual  
26 enhancement.’” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

27 To survive a motion to dismiss, “a complaint must contain sufficient factual matter,  
28 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting

1 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible  
2 when the facts pled “allow the court to draw the reasonable inference that the defendant is  
3 liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at  
4 556). That is not to say that the claim must be probable, but there must be “more than a  
5 sheer possibility that a defendant has acted unlawfully.” *Id.* Facts “‘merely consistent  
6 with’ a defendant’s liability” fall short of a plausible entitlement to relief. *Id.* (quoting  
7 *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true “legal conclusions”  
8 contained in the complaint. *Id.* This review requires context-specific analysis involving  
9 the Court’s “judicial experience and common sense.” *Id.* at 678 (citation omitted).  
10 “[W]here the well-pleaded facts do not permit the court to infer more than the mere  
11 possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the  
12 pleader is entitled to relief.’” *Id.*

13 Where a complaint does not survive 12(b)(6) analysis, the Court will grant leave to  
14 amend unless it determines that no modified contention “consistent with the challenged  
15 pleading . . . [will] cure the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655,  
16 658 (9th Cir. 1992) (quoting *Schriber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d  
17 1393, 1401 (9th Cir. 1986)).

## 18 ANALYSIS

### 19 I. Lanham Act Claim

20 Defendants argue that Plaintiffs’ sixth cause of action fails to state a claim under the  
21 Lanham Act. Section 43(a) of the Lanham Act provides for civil liability against

22 (1) Any person who, on or in connection with any goods or  
23 services, or any container for goods, uses in commerce any word,  
24 term, name, symbol, or device, or any combination thereof, or  
25 any false designation of origin, false or misleading description of  
26 fact, or false or misleading representation of fact, which—

26 (A) is likely to cause confusion, or to cause mistake, or to  
27 deceive as to the affiliation, connection, or association of  
28 such person with another person, or as to the origin,  
sponsorship, or approval of his or her goods, services, or  
commercial activities by another person, or

1 (B) in commercial advertising or promotion,  
2 misrepresents the nature, characteristics, qualities, or  
3 geographic origin of his or her or another person’s goods,  
4 services, or commercial activities[.]

5 15 U.S.C. § 1225(a). Section 43(a) contains two distinct prongs: a “trademark” or “false  
6 association” prong under subsection (1)(A) and a “false advertising” prong under  
7 subsection (1)(B). *See, e.g., Summit Tech., Inc. v. High-Line Medical Instruments, Co.*,  
8 933 F. Supp. 918, 928 (C.D. Cal. 1996) (identifying “trademark infringement/false  
9 designation of origin” prong and false advertising prong); *see also Dastar Corp. v.*  
10 *Twentieth Century Fox Film Corp.*, 539 U.S. 23, 38 (2003) (distinguishing subsection  
11 (1)(A)’s “confusion . . . as to the origin” provision from subsection (1)(B)’s “misrepresents  
12 the nature, characteristics [or] qualities” provision); *Enigma Software Grp. USA, LLC v.*  
13 *Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019) (stating section 1225(a) creates  
14 two bases of liability, false association and false advertising). The Court will address the  
15 sufficiency of Plaintiffs’ pleading regarding the two prongs of Section 43(a) below.

16 **A. Trademark Infringement/False Association**

17 As to the first prong of Section 43(a), Defendants argue that Plaintiffs fail to  
18 adequately allege trademark infringement because Plaintiffs “only allege that [they] own[]  
19 certain marks and that [d]efendants infringed upon [their] marks’ without ever alleging  
20 how [Defendants] used [Plaintiffs’] marks, much less in a manner likely to cause consumer  
21 confusion.” Mot. at 6 (quoting FAC ¶¶ 83, 87–88).<sup>1</sup>

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24 <sup>1</sup> Plaintiffs argue that Defendants’ Motion to Dismiss “failed to address Plaintiffs’ claim for false  
25 association . . . .” Opp’n at 11. Defendants counter that “it was not clear from the complaint that  
26 [Plaintiffs] w[ere] making that distinct claim.” Reply at 2. Plaintiffs’ Sixth Cause of Action is simply  
27 titled “Violation of Lanham Act.” FAC at 16. The Court agrees with Defendants that it was not entirely  
28 clear from the First Amended Complaint that Plaintiffs were making a distinct claim for false association;  
however, the Court considers Plaintiffs’ false association and trademark infringement claims together.  
*See United Tactical Sys., LLC v. Real Action Paintball, Inc.*, No. 14-CV-04050-MEJ, 2014 WL 6788310,  
at \*9 (N.D. Cal. Dec. 2, 2014).

1 “A false association claim is often considered as a trademark infringement claim.”  
2 *United Tactical Sys., LLC*, 2014 WL 6788310, at \*9; *see also Bell v. Harley Davidson*  
3 *Motor Co.*, 539 F. Supp. 2d 1249, 1254 (S.D. Cal. 2008) (“Section 43(a)(1) provides  
4 similar protection to trademarks regardless of registration.” (footnote and citations  
5 omitted)). To state a claim for trademark infringement under the Lanham Act, a plaintiff  
6 “must prove: (1) that it has a protectible ownership interest in the mark; and (2) that the  
7 defendant’s use of the mark is likely to cause consumer confusion.” *Network Automation,*  
8 *Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Dep’t*  
9 *of Parks & Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006)).

10 As to the first factor, “[t]o acquire ownership of a trademark it is not enough to have  
11 invented the mark first or even to have registered it first; the party claiming ownership must  
12 have been the first to actually use the mark in the sale of goods or services.” *Sengoku*  
13 *Works Ltd. v. RMC Int’l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996) (citation omitted).  
14 “Therefore, a party pursuing a trademark claim must meet a threshold ‘use in commerce’  
15 requirement.” *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1203 (9th Cir.  
16 2012). “[R]egistration of the mark on the Principal Register in the Patent and Trademark  
17 Office constitutes prima facie evidence of the validity of the registered mark and of . . .  
18 exclusive right to use the mark on the goods and services specified in the registration.”  
19 *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1047 (9th Cir. 1999).  
20 The opposing party may rebut the presumption of ownership by showing it used the mark  
21 in commerce first. *Id.* Here, Plaintiffs have shown “VSAT Archi’s Acres” is a federally  
22 registered trademark and, as such, is entitled to a presumption of validity. *See* FAC ¶ 83.  
23 Defendants make no argument rebutting this presumption; thus, Plaintiffs have established  
24 a protectable ownership interest in the mark. The Court’s inquiry therefore focuses on  
25 likelihood of confusion.

26 In analyzing whether there is a likelihood of confusion between two marks, courts  
27 consider eight factors, known as the *Sleekcraft* factors. *Rearden LLC*, 683 F.3d at 1209.  
28 These eight factors are: (1) strength of the mark; (2) proximity of the goods; (3) similarity

1 of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of  
2 goods and the degree of care likely to be exercised by the purchaser; (7) defendant’s intent  
3 in selecting the mark; and (8) likelihood of expansion of the product lines. *Id.* (citing *AMF*  
4 *Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979), *abrogated in part by Mattel,*  
5 *Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003)). However, these eight  
6 factors are not exhaustive and “other variables besides the enumerated factors should also  
7 be taken into account based on the particular circumstances.” *Id.*

8 Unlike actual source confusion, initial interest confusion occurs when someone uses  
9 another’s trademark to divert consumers looking for products related to that mark, and that  
10 user “improperly benefits from the goodwill that [the mark’s owner] has developed in its  
11 mark.” *Brookfield Commc’ns, Inc.*, 174 F.3d at 1062. “Initial interest confusion occurs  
12 when the defendant uses the plaintiff’s trademark in a manner calculated to capture initial  
13 consumer attention, even though no actual sale is finally completed as a result of the  
14 confusion.” *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 941 (9th Cir.  
15 2002) (quoting *Brookfield Commc’ns, Inc.*, 174 F.3d at 1062) (internal quotation marks  
16 omitted). Because consumer confusion is an essential element of trademark infringement,  
17 “when we examine initial interest confusion, the owner of the mark must demonstrate  
18 likely confusion, not mere diversion.” *Network Automation, Inc.*, 638 F.3d at 1149.

19 Defendants argue that Plaintiffs fail to allege how the marks are used “in a manner  
20 likely to cause confusion.” Mot. at 6. Defendants contend Plaintiffs’ FAC is insufficient  
21 to plead trademark infringement because “it is not related to confusion over marks or  
22 products; no consumer would confuse [Plaintiffs’] product with any other product sold at  
23 Whole Foods, including [Defendants’] own products.” Reply at 3. Instead of actual  
24 confusion, however, Plaintiffs premise their likelihood of confusion allegation on initial  
25 interest confusion. Plaintiffs assert that Defendants’ advertising and website confused  
26 consumers into thinking Defendants were associated with Plaintiffs, and that Plaintiffs’  
27 products were available for sale in Defendants’ stores. FAC ¶ 88. Plaintiffs argue that  
28 Defendants have caused “initial interest confusion whereby consumers were seeking

1 Plaintiffs’ products and were lured to Defendants’ stores, at which they were unable to  
2 purchase Plaintiffs’ products and instead purchased a product sold by Defendants.” *Id.*

3 The Court finds that Plaintiffs have not alleged sufficient likelihood of confusion to  
4 survive Defendants’ Motion to Dismiss and instead only establish the mere possibility of  
5 diversion. *See Network Automation, Inc.*, 638 F.3d at 1149. Plaintiffs allege Defendants’  
6 representations on their website likely confuse consumers “regarding the association of  
7 Plaintiffs with Defendants, Defendants’ purported commitment to local farmers, Plaintiffs’  
8 and Defendants’ status and affiliation, and the availability of Plaintiffs’ basil in  
9 Defendants’ stores.” FAC ¶ 88. The facts Plaintiffs plead as the basis for these assertions  
10 is the use of the “Archi’s Acres” trademark on Defendants’ website in connection with an  
11 article from April 27, 2013 that stated: “A recent Local Producer Loan from Whole Foods  
12 Market™ will help purchase hydroponic greenhouse equipment to outfit a new 30,000  
13 square foot greenhouse and bring Archi’s Acres basil into all Whole Foods Market stores  
14 in Southern California.” *Id.* ¶ 28. Plaintiffs also allege that “Defendants’ website posted  
15 the picture of Plaintiffs receiving the oversized ‘local producer loan’ check and featured  
16 videos of Plaintiffs and their farm, including, without limitation, a video in which  
17 Defendants’ buyer is at Plaintiffs’ farm.” *Id.* ¶ 28. These facts do not tend to mislead  
18 consumers about the association between Plaintiffs and Defendants because Plaintiffs and  
19 Defendants were associated at the time of the article; Defendants did issue Plaintiffs a local  
20 producer loan. Additionally, the article does not make specific representations about when  
21 or in what quantities Plaintiffs’ basil would be available in Defendants’ stores. Defendants  
22 did in fact purchase Plaintiffs’ products. For example, Plaintiffs admit that Defendants  
23 purchased \$76,000 in basil from Plaintiffs in 2018. *Id.* ¶ 25.

24 Furthermore, Plaintiffs have not plausibly alleged that Defendants intended to divert  
25 Plaintiffs’ customers to their stores by trading on the goodwill of Plaintiffs’ marks. This  
26 intent is relevant because the court in *Brookfield* stated that, “in *Dr. Seuss*, the Ninth Circuit  
27 explicitly recognized that the use of another’s trademark in a manner *calculated* ‘to capture  
28 initial consumer attention, even though no actual sale is finally completed as a result of the



1 confusion, *may* be still an infringement.” *Brookfield Commc’ns, Inc.*, 174 F.3d at 1062  
2 (citing *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997))  
3 (emphasis added). The facts cited by Plaintiffs tend to show publicization of an event—  
4 the issuance of the local producer loan—not a calculated effort by Defendants to capture  
5 initial consumer attention. Plaintiffs make conclusory allegations that “Defendants have  
6 knowingly and intentionally misled consumers as to their association with Plaintiffs and  
7 the availability of Plaintiffs’ basil in Defendants’ stores to capitalize upon Plaintiffs’  
8 valuable goodwill in their names and marks, as well as the military service of Colin  
9 Archipley and the public and charitable works of Colin and Karen Archipley.” FAC ¶ 90.  
10 The only fact Plaintiffs plead relating to the availability of Plaintiffs’ products in  
11 Defendants’ stores is that the article states the loan “will help . . . bring Archi’s Acres basil  
12 into all Whole Foods Market stores in Southern California.” FAC ¶ 28. This statement is  
13 too generalized to plausibly mislead consumers about the availability of Plaintiffs’ products  
14 in Defendants’ stores. Accordingly, Plaintiffs have not pleaded sufficient facts to state a  
15 plausible claim for trademark infringement or false association based on initial interest  
16 confusion.

17       Therefore, the Court finds that Plaintiffs have not satisfactorily alleged trademark  
18 infringement or false association claims and **GRANTS** Defendants’ Motion as to these  
19 claims.

20       ***B. False Advertising***

21       As to the second prong of Section 43(a), Defendants move to dismiss Plaintiffs’ false  
22 advertising claim on the ground that Plaintiffs fail to allege facts “establishing a plausible  
23 claim that [Defendants] made any false statement of fact about the origin or characteristics  
24 of [Plaintiffs’] product or any of [Defendants’] products.” Mot. at 7.

25       To bring a false advertising suit under the Lanham Act, a plaintiff must show “that  
26 a statement made in a commercial advertisement or promotion is false or misleading, that  
27 it actually deceives or has the tendency to deceive a substantial segment of its audience,  
28 that it’s likely to influence purchasing decisions and that the plaintiff has been or is likely

1 to be injured by the false advertisement.” *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d  
2 820, 828 (9th Cir. 2011) (citing *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134,  
3 1139 (9th Cir. 1997)). The parties agree that the Rule 9(b) heightened pleading standard  
4 applies to a false advertising claim under the Lanham Act that is “grounded in” or “sounds  
5 in” fraud. Mot. at 7; Opp’n at 8; *see also Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097,  
6 1106 (9th Cir. 2003) (“Averments of fraud must be accompanied by ‘the who, what, when,  
7 where, and how’ of the misconduct charged.”).

8 Keeping in mind the heightened pleading standard, Plaintiffs’ FAC fails at the first  
9 prong of a false advertising claim because Plaintiffs have not plausibly established that  
10 Defendants made a false or misleading statement in a commercial advertisement or  
11 promotion. Plaintiffs allege that Defendants “posted the picture of Plaintiffs receiving the  
12 oversized ‘local producer loan’ check and featured videos of Plaintiffs on their farm . . .  
13 Defendants’ website also contained articles affiliating themselves with Plaintiffs.” FAC  
14 ¶ 28. None of this information is false or misleading; Plaintiffs did receive a local producer  
15 loan from Defendants to purchase hydroponic greenhouse equipment. *See id.* ¶ 19 (stating  
16 Plaintiffs were to use the loan from Defendants “[t]o purchase hydroponic equipment”).  
17 The single article Plaintiffs reference does not state that Plaintiffs’ products are currently  
18 available for purchase in Defendants’ stores, but that the loan “will help . . . bring Archi’s  
19 Acres basil into all Whole Foods Market stores in Southern California.” *Id.* ¶ 28. The  
20 statements are not false, and it is not likely a substantial segment of consumers would be  
21 misled about what products are available for purchase at Defendants’ stores.

22 Moreover, Plaintiffs do not address Defendants’ argument regarding the false  
23 advertising claim in their Opposition. *See Walsh v. Nev. Dep’t of Human Resources*, 471  
24 F.3d 1033, 1037 (9th Cir. 2006) (finding a plaintiff has “effectively abandoned” a claim  
25 when he fails to respond to arguments in motion to dismiss, and therefore the claim could  
26 not be raised on appeal); *Allen v. Dollar Tree Stores, Inc.*, 475 Fed. Appx. 159, 159 (9th  
27 Cir. 2012) (affirming district court’s dismissal of plaintiff’s claims in which plaintiff’s  
28 “opposition to the motion to dismiss failed to respond to [the defendant’s] argument”);

1 *Toranto v. Jaffurs*, 297 F. Supp. 3d 1073, 1104 (S.D. Cal. 2018) (granting motion to dismiss  
2 on a claim as the plaintiff abandoned the claim because he failed to address the issue in his  
3 opposition). Here, Plaintiffs failed to address the arguments raised by Defendants  
4 regarding the false advertising claim.

5 Accordingly, the Court **GRANTS** Defendants’ Motion as to Plaintiffs’ false  
6 advertising claim.

## 7 **II. Subject Matter Jurisdiction**

8 Federal courts “have an ongoing obligation to be sure that jurisdiction exists.”  
9 *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003) (citing  
10 *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d  
11 1005, 1009 (9th Cir. 2000)). Federal courts are courts of limited jurisdiction and generally  
12 may only exercise jurisdiction based on either diversity jurisdiction or federal question  
13 jurisdiction. Federal courts have diversity jurisdiction “where the amount in controversy”  
14 exceeds \$75,000, and the parties are of “diverse” state citizenship. 28 U.S.C. § 1332.  
15 Federal courts have federal question jurisdiction over “all civil actions arising under the  
16 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

17 Plaintiffs’ FAC alleges this Court “has subject matter jurisdiction over the claims  
18 asserted herein pursuant to 28 U.S.C. §1332(a), since this action is between citizens of  
19 different states and the matter in controversy exceeds the sum or value of \$75,000.00.”  
20 FAC ¶ 2. However, on the face of the FAC, Plaintiffs are both California corporations,  
21 FAC ¶¶ 4–5, and Defendant Whole Foods Market California, Inc. is also a California  
22 corporation, *id.* ¶ 7. Therefore, there is not complete diversity between the parties and this  
23 Court cannot exercise jurisdiction based on diversity. *See Lincoln Prop. Co. v. Roche*, 546  
24 U.S. 81, 89 (2005) (“Since *Strawbridge v. Curtiss*, [the United States Supreme Court] ha[s]  
25 read the statutory formulation ‘between . . . citizens of different States’ to require complete  
26 diversity between all plaintiffs and all defendants.” (citations omitted)).

27 Plaintiffs further allege that this Court “has subject matter jurisdiction over the  
28 Lanham Act claims herein under 15 U.S.C. §1121 and 28 U.S.C. § 1338 and has

1 supplemental jurisdiction over the remaining causes of action pursuant to 28 U.S.C.  
2 § 1367.” Because the Court has granted Defendants’ Motion to Dismiss as to Plaintiffs’  
3 Lanham Act claims, *see supra* Section I, there is no longer a federal question basis for this  
4 Court’s jurisdiction.

5 In light of the dismissal of Plaintiffs’ Lanham Act claims and because this case is  
6 still in its early stages, the Court declines to exercise supplemental jurisdiction over  
7 Plaintiffs’ remaining state law claims against Defendants. *See Carnegie-Mellon Univ. v.*  
8 *Cohill*, 484 U.S. 343, 350 (1988) (“[W]hen the federal-law claims have dropped out of the  
9 lawsuit in its early stages and only state-law claims remain, the federal court should decline  
10 the exercise of jurisdiction by dismissing the case without prejudice.” (footnote omitted));  
11 *Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001) (“A court may decline to exercise  
12 supplemental jurisdiction over related state-law claims once it has ‘dismissed all claims  
13 over which it has original jurisdiction.’” (citing 28 U.S.C. § 1367(c)(3))).

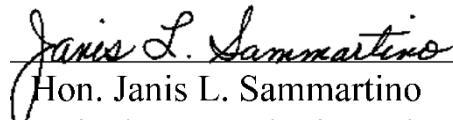
14 Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs’  
15 remaining causes of action.

### 16 CONCLUSION

17 In sum, the court **GRANTS** Defendants’ Motion to Dismiss as to Plaintiffs’ Lanham  
18 Act claims and **DISMISSES WITHOUT PREJUDICE** Plaintiffs’ sixth claim. The Court  
19 sua sponte **DISMISSES WITHOUT PREJUDICE** the remainder of Plaintiffs’ First  
20 Amended Complaint for lack of subject matter jurisdiction. Plaintiffs may file an amended  
21 complaint within thirty (30) days of the date on which this Order is electronically docketed.

22 **IT IS SO ORDERED.**

23 Dated: February 8, 2021

24   
25 Hon. Janis L. Sammartino  
26 United States District Judge  
27  
28