Marketing of Beauty/Cosmetics Products

CLE Materials

November 11, 2024

Presented by: Jeff Warshafsky, Partner, Proskauer Rose LLP

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Reasonable Consumer Analysis Leads to Dismissal of Claims of Greenwashing



By **Baldassare Vinti**, **Jeff Warshafsky** and **Jessica Griffith** on June 13, 2024

Posted in **Class Actions, Deceptive Trade Practices, Labeling Claims**

Many brands have reformulated beloved products with "cleaner" ingredients, while others have curated a special selection of "clean" products to offer their customers. Advertisers' efforts, however, can run into trouble if consumers reasonably believe the "clean" labeling does not match what is contained in the product. Sephora recently faced this issue in a purported class action challenging its "Clean at Sephora" seal. However, Judge David Hurd of the Northern District of New York dismissed the claims, finding the plaintiff had failed to adequately allege what exactly a reasonable consumer would find misleading about the seal. *Finster v. Sephora USA, Inc.*, No. 22-cv-1187 (N.D.N.Y. Mar. 15, 2024).

Sephora, a cosmetic goods retailer, labels certain of its brands and products with the "Clean at Sephora" seal if they meet certain criteria set by Sephora. According to information on Sephora's website, the "Clean at Sephora" seal signifies that a product complies with certain requirements focused on transparency in formulation and sourcing, as well as the avoidance of certain ingredients. For example, all "Clean at Sephora" products are formulated without parabens, sulfates, SLS and SLES, phthalates, mineral oil, formaldehyde, and other undesirable ingredients.

In *Finster*, the plaintiff claimed she bought certain products from Sephora in reliance on the "Clean at Sephora" seal believing that the products were "clean." However, plaintiff claimed that Sephora's representation mislead her because, contrary to her understanding, some "Clean at Sephora" products nonetheless contain alleged synthetic and harmful ingredients. In support of this allegation, plaintiff cited a laundry list of synthetic ingredients found in "Clean at Sephora" cosmetics she alleged were known to cause irritation or other human harm.

Judge Hurd disagreed, finding that plaintiff had failed to allege that a reasonable consumer would understand the "Clean at Sephora" label to mean that the products contained no synthetic or harmful ingredients whatsoever. The Court noted that none of the "Clean at Sephora" marketing materials cited by the plaintiff made any representation that those products were free of *all* synthetic or harmful ingredients—indeed, the advertising cited by the plaintiff explicitly said that products bearing the "Clean at Sephora" seal were formulated without *specific* ingredients known to be harmful to human health or the environment. Further, the Court found that the plaintiff had not alleged the purported harmful ingredients she claimed were in "Clean

at Sephora" products were among those Sephora said were excluded. As such, the plaintiff had failed to allege Sephora materially misled consumers by selling "Clean at Sephora" products.

This case serves as a reminder to carefully scrutinize claims of consumer deception which rely on interpretations of advertising that run counter to definitions provided by marketers. Courts will dismiss claims of consumer deception where a plaintiff relies solely on his or her unreasonable understanding of a challenged term.

Summer Associate, Gabriella Lee, assisted with writing this post.

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Amid Rise in Forever Chemicals Cases, Courts Dismiss PFAS Claims Which Rely on Inadequate Product Testing




By **Baldassare Vinti**, **Jessica Griffith**, **Nicole Sockett** and **Michael Beckwith** on July 29, 2024

Posted in **Class Actions, Deceptive Trade Practices**

As chemicals of concern litigation continues to surge across the nation, companies increasingly find their products under scrutiny for alleged contamination of these "forever chemicals." These "forever chemicals" have become a focal point for environmental and consumer protection lawsuits, as plaintiffs' attorneys increasingly target companies to leverage the frequent media attention surrounding per- and polyfluoroalkyl substances ("PFAS") chemicals. However, a closer examination of these allegations often reveals that they hinge on speculative claims or flawed testing methodologies. Indeed, plaintiffs frequently rely on inconclusive or misinterpreted data, leading to cases built more on sensationalism than on solid scientific evidence. Courts have dismissed such cases in recent months on grounds that such claims are inadequately supported.

For example, in *Brown v. Coty*, Judge Analisa Torres of the Southern District of New York dismissed a proposed class action alleging Coty, Inc. failed to disclose the presence of PFAS in two of their CoverGirl waterproof mascara products, Lash Blast and Clump Crusher. *Brown v. Coty, Inc.*, No. 22-cv-2696 (S.D.N.Y. Mar. 1, 2024). The plaintiffs argued Coty misled consumers by failing to disclose the alleged presence of PFAS in light of Coty's self-professed use of "strict quality control measures" and "rigorous testing."

The plaintiffs relied on two studies to support their allegations. The "Notre Dame Study," published by two Notre Dame scientists in 2021, found that certain beauty products from a variety of brands contain high proportions of fluorine, to which the plaintiffs pointed as a "scientifically valid, widely used method to investigate whether PFAS are present" in cosmetics. The plaintiffs also commissioned their own study, which found that Lash Blast and Clump Crusher each contained up to five different types of PFAS.

The Court found the cited studies did not support plaintiffs' claims that the challenged products contained PFAS. As to the Notre Dame study, the Court found the plaintiffs did not allege the total number of mascara products tested, whether the presence of fluorine in those products necessarily indicated the presence of PFAS, or whether Lash Blast or Clump Crusher were even among the products tested. The Court similarly found the plaintiffs' study did not establish that the PFAS found in the tested tubes of Lash Blast and Clump Crusher—which were *not* those purchased by the plaintiffs—supported an inference that PFAS contamina-

tion was so "systemic" in the products that the tubes purchased by the plaintiffs must also have contained PFAS.

In *Onaka v. Shiseido Americas Corporation*, Judge Loretta Preska of the Southern District of New York likewise dismissed a putative class action alleging Shiseido deceptively labeled its bareMinerals beauty products as "clean" and "natural" when the products allegedly contained PFAS. *Onaka v. Shiseido Americas Corporation*, No. 1:21-cv-10665-PAC (S.D.N.Y. Mar. 19, 2024). In dismissing the suit, the Court found plaintiffs lacked standing because they failed to plausibly allege that any of the products they purchased did, in fact, contain PFAS.

To support their allegations, plaintiffs tested two samples of five products within the same product line as the items they bought (rather than testing their own items) for the presence of PFAS. The Court found plaintiffs failed to "meaningfully link the results of their independent test to Plaintiffs' actual Purchased Products" because plaintiffs did not allege they tested the products near in time to their purchases of those products. The plaintiffs alleged the testing was conducted in September and October 2021, but did not allege that they purchased any of the tested products reasonably near that time period.

Moreover, the Court found it could not extrapolate plaintiffs' isolated testing broadly to Shiseido's products. Plaintiffs' reliance on the same Notre Dame study as the *Brown* plaintiffs was insufficient because it did not specify which line of products were tested, and only tested products purchased well before any of plaintiffs' alleged purchases. The Court noted that other courts considering the same study in relation to similar claims found it to be unhelpful for standing purposes—for reasons including that the plaintiffs in those cases failed to allege whether the Notre Dame study detected the same type of PFAS as detected in plaintiffs' own testing, as well as how many of the products tested in the Notre Dame study were found to have high fluorine levels.

Most recently, Judge Margo Brodie of the Eastern District of New York dismissed claims that Keurig Dr. Pepper's Nantucket Nectars and Snapple product lines were misbranded as "all natural" because they allegedly contained PFAS. *Walker v. Keurig Dr. Pepper, Inc.*, No. 22-cv-5557 (E.D.N.Y. July 16, 2024). Citing to *Brown* and *Onaka* (among other decisions), the Court found the plaintiff failed to allege he suffered an injury in fact because his allegations detailing his independent testing of the products was too vague to conclude he purchased and consumed products containing PFAS. Among other things, the plaintiff did not allege that he tested the actual products he purchased, nor did he claim the testing was performed reasonably close in time to his own actual purchase of the tested products.

The Court also rejected the plaintiff's assertion that the products were "systematically contaminated." Though the plaintiff claimed his independent testing revealed "the Products all contain PFAS in amounts that dramatically exceed" the EPA recommended limit for PFAS in drinking water, the plaintiff's allegations did not confirm "how many of each type of Product was tested, when they were tested, or which Products are within the bucket of the 'some Products'" the plaintiff claimed contained PFAS in excess of the EPA's recommended limit for drinking water. The plaintiff also failed to specify which types or flavors of the products he had purchased. The Court found that without more information regarding the testing performed or the actual products the plaintiff purchased, it could not conclude it was plausible the plaintiff had purchased a contaminated product.

These decisions demonstrate that courts will reject allegations of deception that rely on inadequate testing and speculative inferences regarding alleged product contamination. Companies faced with such lawsuits should demand that plaintiffs perform a reasonable pre-suit investigation and meet their pleading burden by providing specific facts which support a plausible inference that the products at issue contain the alleged chemical of concern. It is crucial to hire defense counsel with strong scientific backgrounds capable of scrutinizing and contesting the methodologies, data interpretation, and statistical analyses presented by plaintiffs.

This approach ensures that only well-substantiated claims proceed, protecting companies from speculative litigation. At Proskauer, we routinely advise clients on PFAS-related matters, ensuring they are well-prepared to challenge and defend against such claims with the necessary scientific and legal expertise.

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Eco-Friendly Claims Under Fire: The Legal Risks of Greenwashing for Businesses



By **Baldassare Vinti**, **Jessica Griffith** and **Peter Angelica** on June 24, 2024

Posted in **Deceptive Trade Practices**

In today's market, eco-friendly claims can serve as a tool for companies looking to attract environmentally conscious consumers. However, this surge in green marketing has also caught the attention of the plaintiffs' bar, which is increasingly scrutinizing these claims for lucrative opportunities in potential lawsuits. As demonstrated by recent legal actions, companies must tread carefully to avoid the pitfalls of greenwashing and the ensuing legal challenges. In one such action, the Northern District of California affirmed its refusal to dispose of claims challenging the use of eco-friendly labeling on Rust-Oleum's KRUD KUTTER products. *Bush v. Rust-Oleum Co.*, No. 20-cv-3268 (N.D. Cal. Jan. 26, 2024). At the center of the case are the Green Guides—guidance published by the FTC which provides direction on the use of environmental marketing claims in connection with "green" products and services.

The plaintiff alleged Rust-Oleum improperly labeled its KRUD KUTTER products as "Non-Toxic" and "Earth Friendly," allegedly contradicting warnings on the packaging stating the products were eye and skin irritants. In support, the plaintiff cited the Safety Data Sheets for each product, which outlined hazards associated with the products including "serious eye damage," "skin irritation," and harm "if inhaled . . . or swallowed." Rust-Oleum moved to dismiss, arguing that a reasonable consumer would not understand "non-toxic" to mean that the product "did not pose any risk to humans, animals or the environment"—as argued by the plaintiff—because the plaintiff's proposed understanding differed from the dictionary definition of the word "toxic," as well as FTC guidance on the term "non-toxic" in the Green Guides. The Court denied that motion in 2021.

The Court revisited these issues on Rust-Oleum's motion for summary judgment, and denied that motion too. Like at the pleading stage, the Court found it could not say as a matter of law that the plaintiff's proffered definitions of "non-toxic" and "earth friendly" were unreasonable, and Rust-Oleum had failed to show that no reasonable consumer would be misled. The Court noted that while the Green Guides were not dispositive under the reasonable consumer test, Rust-Oleum's reliance on deposition testimony from the plaintiff and his expert acknowledging that it was impossible to reduce all toxic risk was insufficient to show there was no risk of consumer deception. The Court also rejected Rust-Oleum's argument that "earth friendly" was puffery, finding the term was not so general or nonspecific as to make it "extremely unlikely" that a consumer would rely on it, and that any puffery argument was undermined by California statutory law defining the term.

As seen in this case, "going green" isn't as simple as it might seem. While not binding, the Green Guides can play a key role in shaping the contours of both how environmental claims are made and how they may be in-

terpreted. Advertisers can avoid costly legal battles by carefully reviewing relevant guidance before touting the environmental benefits of their products. It's crucial to engage experienced trial counsel knowledgeable in the Green Guides and environmental sciences to meticulously review advertising claims and to defend against overaggressive enforcement by the plaintiffs' bar. Our team is equipped to provide the expertise needed to navigate these complex issues and protect your business from allegations that threaten your business and its reputation.

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What's in a Word? The Legal Battle over "Natural" in False Advertising


By **Baldassare Vinti**, **Jennifer Yang** and **Evelyn Blanco** on June 19, 2024

Posted in **Class Actions, Deceptive Trade Practices, Labeling Claims**

While class actions centered around "natural" claims remain popular with the plaintiffs' bar, this past year has seen some growing skepticism from courts towards such lawsuits, particularly where plaintiffs fail to adequately explain what is deceptive about the term.

In January, Judge Kimba M. Wood of the Southern District of New York granted summary judgment to Colgate-Palmolive and its subsidiary Tom's of Maine in a putative class action challenging the use of the term "natural" on Tom's toothpaste and deodorant products. *De Lacour v. Colgate-Palmolive Co.*, No.16-cv-8364 (S.D.N.Y. Jan. 3, 2024). The Court found that the plaintiff's evidence was insufficient to demonstrate that a reasonable consumer would understand "natural" to convey that the challenged products do not contain synthetic and/or highly chemically processed ingredients. The Court dismissed the plaintiff's surveys as "fatally flawed" because they defined "natural" and "artificial" only in relation to each other (i.e., "natural" as meaning "not artificial", and "artificial" as meaning "not natural") and failed to provide respondents with adequate definitions of those otherwise ambiguous terms. Additionally, when asked *what other things* the word "natural" communicated, respondents gave responses as varied as "certified organic," "earthy," "[n]o animal testing, recyclable," "[n]o aluminum," and, "natural." Looking at these surveys and other evidence in the record, including the fact that there is no governmental guidance regarding the use of "natural" labeling on personal care products, the Court found that the evidence demonstrated "that there are many interpretations of the word 'natural,'" and the named plaintiff's subjective interpretation of the term was insufficient to establish evidence of widespread consumer confusion.

Other cases have followed similar reasoning. For instance, in *McGinity v. Proctor & Gamble*, 69 F. 4th 1093 (9th Cir. 2023), consumers sued P&G, alleging that the "Nature Fusion" label on P&G's Pantene Pro-V hair products misled consumers into believing the items were natural, despite containing synthetic ingredients. The district court dismissed the complaint, holding that a reasonable consumer would not be deceived by the label.

The Ninth Circuit affirmed the dismissal, emphasizing the ambiguity of the term "Nature Fusion." The Court found that this ambiguity was resolved by reading the back label, which clarified that the products contain both natural and synthetic components, rendering the labeling of the product not deceptive as a matter of law.

Given the continued prevalence of lawsuits surrounding "natural" claims, companies should continue to exercise caution in assessing the messages conveyed by such claims in context. However, if courts continue to

recognize the potential ambiguity in “natural” claims, as they have increasingly done over the past year, such claims may finally become a less popular target going forward, given their susceptibility to motions to dismiss and the difficulty of certifying a class.

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FTC Finalizes Updates to Endorsement Guides, Reflecting Increased Focus on Online Reviews and Social Media Marketing




By **Baldassare Vinti**, **Jeff Warshafsky**, **Jennifer Yang** and **Anisha Shenai-Khatkhate** on July 1, 2023

Posted in **Announcements, Deceptive Trade Practices, FTC, Social Media**

This week the FTC announced that it finalized its revisions to the Endorsement Guides, which give advertisers guidance on ensuring that their use of endorsements or testimonials complies with the FTC Act. At the same time, the FTC also announced an updated accompanying guidance document, "FTC's Endorsement Guides: What People are Asking." While the revised Endorsement Guides still require advertisers to comply with the requirements we previously discussed in our On Notice series, they feature several key additions addressing technological changes in how advertising is conducted, and advertisers' increased reliance on online reviews, social media, and influencer endorsements.

Some key updates to the Endorsement Guides are described below.

Increased Focus on Online Consumer Reviews

The updated Endorsement Guides specify that advertisers should refrain from "procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, or editing" consumer reviews of their products in a way that distorts or otherwise misrepresents their products. They also include new guidance on the use of incentivized consumer ratings or reviews. Specifically, the updated Endorsement Guides state that even if an incentivized review is accompanied by a sufficiently clear and conspicuous disclosure, "the practice could still be deceptive if the solicited reviews contain star ratings that are included in an average star rating for the product and including the incentivized reviews materially increases that average star rating." In such cases, the average star rating would also need to include a clear and conspicuous disclosure.

These additions reflect the FTC's increased focus on combating deceptive online reviews – a focus it has made clear in recent years through guides for businesses publishing online reviews (Guide for Marketers, Guide for Platforms) and actions against advertisers alleging they posted false positive reviews or suppressed

negative reviews. For example, earlier this month, the FTC reached a $4.2M settlement with Fashion Nova, an online fashion retailer, in a case alleging that Fashion Nova suppressed negative reviews from its website.

Based on the FTC's past guidance, when soliciting and paying for online reviews, companies should avoid:

(1) asking "for reviews from people who haven't used or experienced the product or services";

(2) asking "your staff to write reviews for your business";

(3) asking family and friends for reviews; and

(4) conditioning any incentive to submit a review on the review being positive.

Further, advertisers should not impose additional barriers to reviews or discourage consumers from submitting a negative review instead of a positive one. For example, if an advertiser does not require a consumer posting a positive review to include their date of purchase, the advertiser should not require a consumer posting a negative review to include their date of purchase either.

Expanded Definitions of "Endorser" and "Endorsement"

The revised Endorsement Guides update the definition of "endorser" to include virtual influencers, such as avatars or digital characters, and update the definition of "endorsement" to include fake reviews, statements by virtual influencers, and tags in social media.

These expanded definitions reflect the rapidly changing technological landscape in which advertising is taking place. The FTC's inclusion of virtual influencers, in particular, will likely become increasingly important as brands continue to explore the use of AI in marketing. While virtual influencers are not all that common yet, many believe this trend may be the future of social media advertising. One particularly famous virtual influencer, Lil Miquela (a brand ambassador for teen retailer PacSun) currently has almost 3 million followers on Instagram, and was named one of Time Magazine's "25 Most Influential People on the Internet."

New Definition for "Clear and Conspicuous"

As in past versions of the Endorsement Guides, the updated Guides also require that material connections be "clearly and conspicuously" disclosed. But unlike in past versions, the updated Guides include a definition for what does (and does not) constitute a "clear and conspicuous" disclosure. Specifically, the updated Guides clarify that for a disclosure to be "clear and conspicuous" it must be "difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers." On social media or the internet, the disclosure must be "unavoidable." The FTC further explains that the disclosure must match the format of the accompanying endorsement. If the endorsement is made visually, the accompanying disclosure must also be made visually; if the endorsement is made audibly, the disclosure must be made audibly. And if the endorsement is made both audibly and visually, the disclosure must be made in the ad's visual and audio portions.

The new Endorsement Guides also instruct that for a visual disclosure to be "clear and conspicuous," it must stand out from accompanying text or other visual elements "by its size, contrast, location, the length of time it appears, and other characteristics," so that it is "easily noticed, read, and understood." For an audio disclo-

sure to be "clear and conspicuous," it must be "delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it."

The new Endorsement Guides further clarify that advertisers may not simply rely on a social media platform's built-in disclosure tool, if the disclosure provided by that tool is not "clear and conspicuous."

All these requirements are consistent with the FTC's past guidance on the use of endorsements on social media. For further discussion of what constitutes a "clear and conspicuous" disclosure under FTC guidance, see our past post on this topic.

Liability for Endorsers and Intermediaries

Though the previous version of the Endorsement Guides made it clear that advertisers could be liable for deceptive advertising by their endorsers or influencers, the updated Guides clarify that the endorsers or influencers, themselves, and intermediaries (like ad agencies and PR firms) may also be liable for making deceptive endorsements. For instance, the FTC added an example in which an influencer who did not limit their statements to their personal experience using a product and did not have a reasonable basis for their broad claim about a product's efficacy would be subject to liability for the misleading or unsubstantiated representation in the endorsement.

This addition perhaps does not come as a surprise, in light of the FTC's recent warning letters to individual influencers accused of making deceptive endorsements, which stated that "[i]ndividual influencers who fail to make adequate disclosures about their connections to marketers are subject to legal enforcement action by the FTC." Nonetheless, it's an important reminder that *everyone* involved in the creation of an ad (marketers, agencies, and influencers, alike) has a responsibility to make sure that material connections have been disclosed, and that the endorsement is not otherwise deceptive or misleading.

Special Guidance for Endorsements Directed at Children

The updated Endorsement Guides contain a new section aimed specifically at endorsements in advertisements addressed to children. The Guides state that such endorsements may be of "special concern," due to the "character of the audience." As a result, "[p]ractices that would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases."

This addition seems to echo recent concerns about the potential effects of social media and influencer advertising on children and teenagers. Marketers whose ads may be aimed at children (or even if not expressly or solely aimed at children, may appeal to children) should be particularly careful with respect to the use of endorsements, reviews, and testimonials.

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While the modernized Endorsement Guides do include many key changes, none are all that surprising in light of the past FTC guidance, warning letters, and actions we have discussed on this blog. Watch this space

for best practices on using endorsements and testimonials in advertising, and for updates on actions brought under the new Endorsement Guides.

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TAGS: DECEPTIVE TRADE PRACTICES, ENDORSEMENTS, FTC, MARKETING, SOCIAL MEDIA

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652 F.Supp.3d 1232
United States District Court, S.D. California.

Heidi ANDERBERG, individually and on behalf of others similarly situated, Plaintiff,
v.
The HAIN CELESTIAL GROUP, INC., a Delaware Corporation, Defendant.

Case No.: 3:21-cv-01794-RBM-NLS
|
Signed January 26, 2023

Synopsis

Background: Buyer filed class action complaint against manufacturer of sunscreen alleging violation of California's Unfair Competition Law (UCL), violation of California's Consumers Legal Remedies Act (CLRA), violation of California's False Advertising Law (FAL), breach of express warranty, and breach of implied warranty, arising from allegation that manufacturer's labeling of its sunscreen products as "reef friendly" was misleading. Manufacturer moved to dismiss for failure to state a claim.

Holdings: The District Court, Ruth B. Montenegro, J., held that:

buyer sufficiently alleged standing to bring claims regarding products she did not purchase, though standing could be revisited at class certification stage;

buyer plausibly alleged that "reef friendly" label would have deceived a reasonable consumer, so as to state claims under UCL, CLRA, and FAL;

buyer sufficiently alleged manufacturer's business practices were unlawful and unfair, so as to state claims under UCL;

buyer stated claim for breach of express warranty under California law;

buyer stated claim for breach of implied warranty of merchantability under California law; and

buyer stated claim for equitable relief under California law.

Motion denied.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

***1235** Ronald Marron, Alexis M. Wood, Kas L. Gallucci, Law Offices of Ronald A. Marron, San Diego, CA, for Plaintiff.

Dean Nicholas Panos, Pro Hac Vice, Jenner & Block, LLP, Chicago, IL, Alexander Michael Smith, Madeline P. Skitzki, Jenner & Block LLP, Los Angeles, CA, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

RUTH BERMUDEZ MONTENEGRO, UNITED STATES DISTRICT JUDGE

On March 2, 2022, Defendant The Hain Celestial Group, Inc. ("Defendant") filed a Motion to Dismiss Plaintiff Heidi Anderberg's ***1236** ("Plaintiff") First Amended Class Action Complaint ("Motion"). (Doc. 16.) Plaintiff filed an opposition to the Motion on April 11, 2022 (Doc. 19), and Defendant filed a reply on April 18, 2022 (Doc. 20). Plaintiff subsequently filed notices of supplemental authority on June 20, 2022 (Doc. 21) and August 29, 2022 (Doc. 22). For the reasons discussed below, Defendant's Motion is **DENIED**.

I. BACKGROUND

A. Procedural Background

On October 20, 2021, Plaintiff filed a Class Action Complaint against Defendant on behalf of herself and others similarly situated. (Doc. 1.) On January 12, 2022, Defendant filed a Motion to Dismiss Plaintiff's Class Action Complaint. (Doc. 10.) Plaintiff subsequently filed a First Amended Class Action Complaint ("FAC") on February 2, 2022. (Doc. 13.) The FAC asserts the following causes of action: (1) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (2) violation of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*; (3) violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§

17500, *et seq.*; (4) breach of express warranty; and (5) breach of implied warranty. (*Id.* at 26–34.) On March 2, 2022, Defendant filed the instant Motion requesting the Court dismiss Plaintiff's FAC with prejudice and without leave to amend. (Doc. 16.)

B. Factual Background

Plaintiff asserts that Defendant "advertises as an organic and natural products company which participates in almost all natural categories with well-known brands, including Alba Botanica," which produces sunscreen. (Doc. 13 at 2–3.) It is Plaintiff's position that Defendant "markets and sells chemical sunscreens with labeling and advertising that leads consumers to believe that the sunscreens are 'Reef[ ]Friendly', when in fact the chemical sunscreens contain active ingredients known to damage coral reefs and the marine life that inhabit them." (*Id.* at 3.) The FAC discusses the dangers various chemicals pose to coral reefs and states "[c]hemical sunscreens generally consist of a combination of different chemical ingredients, primarily oxybenzone, octinoxate, and avobenzone, but also include[ ] other chemicals such as octocrylene and homosalate" each of which "are known to cause harm to coral reefs and marine life." (*Id.* at 8.) Thus, Plaintiff argues that Defendant labeling its sunscreen products as "Reef Friendly" is misleading because the products "contain avobenzone, octocrylene, homosalate and octyl salicylate." (*Id.* at 13, 19.)

Defendant counters that "[i]n 2018, Hawaii banned the use of oxybenzone and octinoxate in sunscreen based on the Hawaii Legislature's determination that these two specific ingredients are harmful to coral reefs." (Doc. 16–1 at 7 (citing HAW. REV. STAT. § 342D-21).) Consistent with Hawaii law, Defendant's Alba Botanica Hawaiian Sunscreen does not contain oxybenzone and octinoxate, which Plaintiff does not dispute. (*Id.* at 7.) Thus, Defendant argues that Plaintiff's claims are defective because "[t]he packaging of Alba Botanica Hawaiian Sunscreen does not state—or even suggest—that the sunscreen is free of avobenzone, octocrylene, homosalate, or octyl salicylate" and that "[t]o the contrary, it discloses the presence of these ingredients in the 'Active Ingredients' panel," which appears on the back of the product. (*Id.*) Defendant's "Reef Friendly" label refers to the fact that, pursuant to Hawaii law, their sunscreen does not contain oxybenzone and octinoxate. (*Id.*)

The FAC includes Plaintiff's individual allegations as well as class allegations. ***1237** (Doc. 13 at 20–26.) In regard to Plaintiff's individual allegation, she explains she "has been purchasing Alba Botanica Hawaiian Sunscreen Coconut Clear Spray 50 and Alba Botanica Hawaiian Sunscreen Green Tea 45 (cream version) consistently for the past two years for personal and household use." (*Id.* at 20.) Plaintiff is "eco-conscious" and "believed the products to have clean chemicals and be reef friendly as advertised." (*Id.*) Thus, Plaintiff alleges she "paid an unlawful premium for the product advertised as reef friendly when it in fact is not safe for coral reefs and marine life" and "would not have purchased the products had the product been truthfully advertised." (*Id.* at 23.) Accordingly, Plaintiff claims she "was harmed and suffered injury in fact and lost money as a result of Defendant's false, unfair and fraudulent practices." (*Id.*) In regard to Plaintiff's class allegations, Plaintiff lists a total of fourteen of Defendant's chemical sunscreens (the "Products") [1] "which bear labeling stating 'Reef Friendly,' yet contain octocrylene and/or avobenzone." (*Id.* at 14.) Plaintiff thus brings a class action on behalf of a nationwide class and a California subclass of individuals who, within the applicable limitations period, purchased any of the fourteen products from Defendant. (*Id.* at 23.)

1 The Products include: (1) Alba Botanica Hawaiian Sunscreen Coconut Clear Spray 50, (2) Alba Botanica Cool Sport Sunscreen Refreshing Clear Spray 50, (3) Alba Botanica Kids Sunscreen Tropical Fruit Clear Spray 50, (4) Alba Botanica Sensitive Sunscreen Fragrance Free Clear Spray 50, (5) Alba Botanica Maximum Sunscreen Fragrance Free Clear Spray 70, (6) Alba Botanica Hawaiian Sunscreen Aloe Vera 30 (cream version), (7) Alba Botanica Hawaiian Sunscreen Green Tea (cream version), (8) Alba Botanica Soothing Sunscreen Pure Lavender 45 (cream version), (9) Alba Botanica Kids Sunscreen Tropical Fruit 45 (cream version), (10) Alba Botanica Sport Sunscreen Fragrance Free 45 (cream version), (11) Alba Botanica Sweet Pea Sheer Shield Sunscreen 45 (cream version), (12) Alba Botanica Sensitive Sheer Shield Sunscreen 45 (cream version), (13) Alba Botanica Facial Sheer Shield Sunscreen 45 (cream version), and (14) Alba Botanica Fast Fix Sun Stick 30.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6), an action may be dismissed for failure to allege "enough

facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal citations omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). Nor is the Court "required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "In sum, for a complaint to survive a motion to dismiss, ***1238** the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotation marks omitted).

When a Rule 12(b)(6) motion is granted, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

III. DISCUSSION

A. Request for Judicial Notice

A court generally cannot consider materials outside the pleadings on a motion to dismiss for failure to state a claim. FED. R. CIV. P. 12(d). A court may, however, consider materials subject to judicial notice without converting the motion to dismiss into one for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). Under Federal Rule of Evidence 201(b), a court may take judicial notice, either on its own accord or by a party's request, of facts that are not subject to reasonable dispute because they are (1) "generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). A court may also take judicial notice of "matters of public record." *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (internal citations omitted). Finally, under the incorporation by reference doctrine, courts may "take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (internal quotations and citations omitted). The incorporation by reference doctrine "treats certain documents as though they are part of the complaint itself," *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018), so long as "the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003).

Defendants request the Court take judicial notice of four exhibits: (1) images of the labeling of a lotion version of Alba Botanica Hawaiian Sunscreen (Ex. 1); (2) images of the labeling of a spray version of Alba Botanica Hawaiian Sunscreen (Ex. 2); (3) a copy of a webpage from the Hawaii State Legislature's website titled "SB132 SD2 HD1" (Ex. 3), and (4) a copy of the current version of Hawaii Senate Bill 132 (Ex. 4). (Doc. 17 at 2.)

The Court takes judicial notice of images of the labeling of the lotion and spray versions of Alba Botanica Hawaiian Sunscreen in Exhibits 1 and 2. *See* *Corbett v. PharmaCare U.S., Inc.*, 567 F. Supp. 3d 1172, 1182 (S.D. Cal. 2021) ("courts addressing motions to dismiss product-labeling claims take judicial notice of images of the product packaging if they are referenced or the images are in the complaint"). The Court also takes judicial notice of copy of a webpage from the Hawaii State Legislature's website titled "SB132 SD2 HD1" in Exhibit 3 as a publicly available material taken from a "source whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b); *see* *U.S. ex rel. Modglin v. DJO*

Glob. Inc., 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014), *aff'd sub nom. United States v. DJO Glob., Inc.*, 678 F. App'x 594 (9th Cir. 2017) ("the court can take judicial notice of [p]ublic records and government documents available from reliable sources on the Internet, such as websites run by ***1239** governmental agencies") (internal quotations omitted); *see also* *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-1166-IEG POR, 2009 WL 6597891, at *2 (S.D. Cal. Dec. 23, 2009) ("[i]nformation on government agency websites has often been treated as properly subject to judicial notice"). Finally, the Court takes judicial notice of Hawaii Senate Bill 132 in Exhibit 4 as it is a matter of public record. *See* *Stone v. Sysco Corp.*, No. 16-cv-01145-DAD-JLT, 2016 WL 6582598, at *4 (E.D. Cal. Nov. 7, 2016) (citing *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 945 n.2 (9th Cir. 2013)) (finding "the court may properly take judicial notice of legislative history, including committee reports"); *see also Singh v. IKEA Distribution Servs., Inc.*, No. 120CV0975NONEJLT, 2021 WL 1907608, at *2 (E.D. Cal. May 12, 2021), *report and recommendation adopted*, No. 120CV0975NONEJLT, 2021 WL 6775890 (E.D. Cal. June 16, 2021) (finding that "the accuracy of the Senate Bills ... cannot be questioned" and granting judicial notice).

B. Standing

In addition to Article III standing, a plaintiff must establish standing to bring UCL, CLRA, and FAL claims. *See* CAL. BUS. & PROF. CODE §§ 17204, 17535; CAL. CIV. CODE § 1780(a). These statutes require the plaintiff show that he or she has suffered an "economic injury." *See* *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323, 120 Cal.Rptr.3d 741, 246 P.3d 877 (2011). The economic injury requirement under the UCL is "substantially narrower than federal standing ... which may be predicated on a broader range of injuries." *Id.* at 324, 120 Cal.Rptr.3d 741, 246 P.3d 877; *see* *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 868 (N.D. Cal. 2012).

Defendant argues Plaintiff "lacks standing to sue as to the twelve products she did not purchase, as she cannot establish that she 'experienced injury stemming from the purchase' of those products." (Doc. 16–1 at 17) (quoting *Granfield v. NVIDIA Corp.*, No. 11-5403, 2012 WL 2847575, at *6 (N.D. Cal. July 11, 2012).) Defendant anticipates Plaintiff will argue she has standing to assert claims based on products that are 'substantially similar' to those she purchased. (Doc. 16–1 at 17); *see* *Lorentzen v. Kroger Co.*, 532 F. Supp. 3d 901, 908 (C.D. Cal. 2021) ("[s]ome district courts have held that a plaintiff may bring suit for any 'substantially similar' products not actually purchased"). However, Defendant claims Plaintiff will be unsuccessful because the absence of the phrase "Hawaiian Sunscreen" on the packaging "renders the majority of the challenged products fundamentally dissimilar from the two sunscreens Plaintiff allegedly purchased." (Doc. 16–1 at 17.) "[T]he use of the phrase 'Hawaiian Sunscreen' is significant because it clarifies that the sunscreen is free of ingredients that violate Hawaii law (i.e., oxybenzone and octinoxate) and can be used by beachgoers in Hawaii." (*Id.*) Thus, Defendant requests the Court dismiss Plaintiff's claims to the extent they seek to challenge products not labeled as "Hawaiian Sunscreen." (*Id.* at 18.)

Plaintiff counters that she has standing to assert claims for each of Defendant's Products because they are substantially similar. (Doc. 19 at 20.) "All of the Products are Defendant's chemical sunscreen products that are labeled as 'Reef Friendly,' " and "[a]ll of the Products similarly contain avobenzone, octocrylene, homosalate and/or octyl salicylate – harmful ingredients challenged in Plaintiff's FAC." (*Id.* at 21.) Plaintiff explains that "Defendant's argument is misguided, as Plaintiff does not challenge the Products' 'Hawaiian Sunscreen' claim. Instead, Plaintiff alleges that the Products' 'Reef ***1240** Friendly' claim is false and misleading." (*Id.*)

The Court notes that there is no controlling authority on whether plaintiffs have standing for products they did not purchase. *See, e.g.*, *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 921–22 (N.D. Cal. 2012). Some federal courts have held that a plaintiff lacks standing to assert such claims. *See, e.g.*, *Granfield*, 2012 WL 2847575, at *6 ("when a plaintiff asserts claims based both on products that she purchased and products that she did not purchase, claims relating to products not purchased must be dismissed for lack of standing"); *Mlejnecky v. Olympus Imaging America Inc.*, No. 2:10–CV–02630 JAM–KJN, 2011 WL 1497096, at *4 (N.D. Cal. Apr. 19, 2011) (dismissing claims based on products not purchased for failure to allege economic injury under the UCL). Others "hold that a plaintiff may have standing to assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged

misrepresentations are substantially similar." *Miller*, 912 F. Supp. 2d at 869; *see also* *Brazil v. Dole Food Co., Inc.*, No. 12-CV-01831-LHK, 2013 WL 5312418, at *8 (N.D. Cal. Sept. 23, 2013) (quoting *Lanovaz v. Twining's N. Am., Inc.*, No. 12-2646, 2013 WL 2285221, at *2 (N.D. Cal. May 23, 2013)) ("the substantially similar approach is also consistent with the Ninth Circuit's warning that courts 'should not be too rigid in applying standing requirements to proposed classes' "). Some courts have held that the standing inquiry is more appropriately resolved on a motion for class certification. *See e.g.*, *Cardenas v. NBTY, Inc.*, 870 F. Supp. 2d 984, 992–92 (E.D. Cal. 2012); *Forcellati v. Hyland's, Inc.*, 876 F. Supp. 2d 1155, 1161 (C.D. Cal. 2012).

In light of the foregoing, the Court is not inclined to dismiss Plaintiff's claims for lack of standing at this time. (*See* Doc. 13 at 14, 21.) To the extent this matter proceeds, the issue may be revisited at the class certification stage. *See* *Forcellati*, 876 F. Supp. 2d at 1161 (holding "we agree with the numerous recent decisions that have concluded that Defendants' argument is better taken under the lens of typicality or adequacy of representation, rather than standing"); *see also* *Brazil*, 2013 WL 5312418, at *8 (finding the plaintiff "has adequately demonstrated standing, at least for purposes of surviving a motion to dismiss, to assert substantially similar claims based on products that are substantially similar to the Purchased Products"); *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927 RMW, 2010 WL 94265, at *3 (N.D. Cal. Jan. 6, 2010) (denying defendant's motion to dismiss for lack of standing and deferred ruling on the standing question until class certification).

C. California Consumer Protection Statutes

The UCL, CLRA, and FAL, which are the basis of Plaintiff's first, second, and third causes of action, are California consumer protection statutes. The UCL prohibits "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice." CAL. BUS. & PROF. CODE § 17200. California's CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." CAL. CIV. CODE § 1770. California's FAL prohibits any "unfair, deceptive, untrue or misleading advertising." CAL. BUS. & PROF. CODE § 17500. "Because the same standard for fraudulent activity governs all three statutes, courts often analyze the three statutes together." *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1089 (N.D. Cal. 2017); *see, e.g.*, *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 985 (S.D. Cal. 2014) ("[c]ourts often analyze these statutes together because they share similar ***1241** attributes"); *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360, 8 Cal.Rptr.3d 22 (2003) (analyzing the UCL, CLRA, and FAL together).

a. "Reasonable Consumer" Standard

Claims made under the UCLA, CLRA, and FAL are governed by the "reasonable consumer" standard. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016). Under this standard, a plaintiff must "show that 'members of the public are likely to be deceived.' " *Ebner*, 838 F.3d at 965 (quoting *Williams*, 552 F.3d at 938). This standard "requires more than a mere possibility that [the] label 'might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.' " *Becerra v. Dr. Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019) (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508, 129 Cal.Rptr.2d 486 (2003)). Rather, it must be "probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie*, 105 Cal. App. 4th at 508, 129 Cal.Rptr.2d 486; *see also* *White v. Kroger Co.*, No. 21-CV-08004-RS, 2022 WL 888657, at *1 (N.D. Cal. Mar. 25, 2022). In general, "[t]he question of whether a business practice is deceptive in most cases presents a question of fact not amenable to resolution on a motion to dismiss." *Hairston v. S. Beach Beverage Co.*, No. CV 12-1429-JFW DTBX, 2012 WL 1893818, at *4 (C.D. Cal. May 18, 2012) (citing *Williams*, 552 F.3d at 938).

In the Motion, Defendant argues Plaintiff's FAC should be dismissed because Plaintiff has not plausibly alleged that the term "Reef Friendly" is deceptive and would mislead a reasonable consumer. (Doc. 16–1 at 10–11.) Defendant contends that their labeling is not misleading because when viewed "as a whole" the packaging makes clear that "Reef

Friendly" refers only to the absence of oxybenzone and octinoxate. (*Id.*) Defendant states that "[w]hatever the term 'Reef Friendly' might mean in isolation, the packaging makes clear that this term—as used on the labeling of a product marketed as 'Hawaiian Sunscreen'—refers to the absence of oxybenzone and octinoxate, the two chemicals specifically prohibited by Hawaii law." (*Id.*) Moreover, "the small, stylized 'Reef Friendly' statement does not appear by itself on the packaging of the products Plaintiff purchased. Instead, the packaging makes clear what 'Reef Friendly' means: 'no oxybenzone [or] octinoxate.' " (*Id.*)

As an initial matter, Plaintiff explains that "whether or not a reasonable consumer is misled is 'typically a question of fact not appropriate for determination [on a motion to dismiss].' " (Doc. 19 at 13–14 (quoting *Williams*, 552 F.3d at 938).) Thus, "whether reasonable consumers would understand 'Reef Friendly' to mean that (i) the Products do not contain ingredients that are harmful to reefs, or (ii) the Products do not contain two ingredients that are harmful to reefs but contain four other ingredients that are harmful to reefs," is not a question to be decided at this time. (Doc. 19 at 16.) However, it is Plaintiff's position that "Defendant has made material misrepresentations and omissions, both directly and indirectly, related to their Products advertised as 'Reef[ ]Friendly' " and that "Defendant's conduct ... is misleading, unfair, unlawful and is injurious to consumers who purchased the Products and were deceived by Defendant's misrepresentations." (Doc. 13 at 27.) In particular, Plaintiff argues "that the Products do not contain two harmful ingredients does not make the 'Reef Friendly' claim truthful where the Products contain four other ingredients that are harmful to reefs." (Doc. 19 at 15.) Moreover, Plaintiff contends that "Defendant's disclosure of the Products' ***1242** active ingredients on the Products' rear label does not immunize it from liability for its false advertising that the Products are 'Reef Friendly.' " (*Id.* at 17.)

The Court finds that whether or not a reasonable person would be misled by the "Reef Friendly" label on Defendant's Products is not fit for determination on a motion to dismiss in this case. *See* *Linear Technology Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134–35, 61 Cal.Rptr.3d 221 (2007) (quoting *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1472, 49 Cal.Rptr.3d 227 (2006)) ("[w]hether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires 'consideration and weighing of evidence from both sides' and which usually cannot be made on demurrer"); *see also* *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 978 (C.D. Cal. 2013) ("[t]he question of whether a business practice is deceptive in most cases presents a question of fact not amenable to resolution on a motion to dismiss"); *Rooney v. Cumberland Packing Corp.*, No. 12-CV-0033-H DHB, 2012 WL 1512106, at *3 (S.D. Cal. Apr. 16, 2012) (quoting *Williams*, 552 F.3d at 939) ("it is a 'rare situation' where granting a motion to dismiss claims under the UCL is appropriate"); *Pelayo*, 989 F. Supp. 2d at 978 (where a court "can conclude as a matter of law that members of the public are not likely to be deceived by the product packaging, dismissal is appropriate"). Here, the Court cannot conclude, as a matter of law, that a reasonable consumer would not be deceived by the "Reef Friendly" label on Defendant's packaging. *See* *Allred v. Frito-Lay N. Am., Inc.*, No. 17-CV-1345 JLS, 2018 WL 1185227, at *5 (S.D. Cal. Mar. 7, 2018) ("[t]he Court cannot conclude as a matter of law that a reasonable consumer would not be deceived by the packaging and ingredient list"); *see also* *Allred v. Frito-Lay N. Am., Inc.*, No. 17-CV-1345 JLS, 2018 WL 1185227, at *5 (S.D. Cal. Mar. 7, 2018) (holding that "the Court cannot determine at [the motion to dismiss] stage whether the Product's advertising was false or misleading").

Accepting as true all allegations in the FAC, it is plausible that statements on the Products' packaging could deceive a reasonable consumer. Accordingly, the Court concludes that this does not amount to the "rare situation" in which dismissing Plaintiff's UCL, CLRA, and FAL claims is appropriate. *See* *Williams*, 552 F.3d at 939.

b. "Unlawful, Unfair, or Fraudulent" under the UCL

As noted previously, the UCL prohibits "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice."[2] CAL. BUS. & PROF. CODE § 17200. In addition to arguing that their labeling is not deceptive, Defendant contends that Plaintiff's claims also fail under the "unlawful" and "unfair" prongs of the UCL. (Doc. 16–1 at 15–16.)

[2] A business practice is fraudulent pursuant to section 17200 if it is "likely to deceive the

> public." *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1380, 137 Cal.Rptr.3d 293 (2012), *as modified on denial of reh'g* (Feb. 24, 2012). Whether or not Defendant's labeling is likely to deceive the public is discussed at length above. (*See supra*, pp. 1241-42.)

The FAC alleges that Defendant's business practices violate the unfair prong of the UCL because Defendant's "conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of the conduct outweighs any alleged benefits." (Doc. 19 at 26–27.) Moreover, as discussed in detail *supra*, the FAC contains sufficient allegations that Defendant has made material representations and omissions related to Defendant's Products advertised as "Reef Friendly" and ***1243** that Defendant's conduct "was and continues to be of no benefit to purchasers of the Products." (*Id.* at 27.) The FAC also alleges violation of the unlawful prong as Defendant's business practices violate the CLRA and FAL. (*Id.* at 28.)

In light of the foregoing, the Court finds that Plaintiff's FAC sufficiently alleges "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Moreover, Defendant did not show Plaintiff failed to meet the reasonable consumer standard. Therefore, the Court **DENIES** Defendant's Motion to dismiss Plaintiff's UCL, CLRA, and FAL claims, which are Plaintiff's first, second, and third causes of action.

D. Breach of Express Warranty

Plaintiff's fourth cause of action alleges breach of express warranty. (Doc. 13 at 32–33.) Defendant argues that "Plaintiff's failure to allege a plausible claim of deception is also fatal to her claim[ ] for breach of express [ ] warranty" and that this cause of action should be dismissed with prejudice. (Doc. 16–1 at 18, 23.)

California Commercial Code § 2313 provides that "(a) [a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise," and "(b) [a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." CAL. COM. CODE § 2313. To plead a claim for breach of express warranty, the plaintiff "must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury." *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142, 229 Cal.Rptr. 605 (Ct. App. 1986).

Plaintiff's FAC alleges that: (1) Defendant expressly warranted on the packaging of the Products that they are "Reef Friendly," (2) Plaintiff and members of the class reasonably and justifiably relied on the express warranty, (3) Defendant breached the express warranty by selling the Products, which contain ingredients that are not reef friendly, and (4) Plaintiff and members of the class paid a premium price for the Products but did not obtain the full value of the Products as represented." (Doc. 13 at 33.) It is Plaintiff's position that, had she and the class members "known of the true nature of the Products, they would not have purchased the Products or would not have been willing to pay the premium price associated with the Products." (*Id.*)

The Court finds the allegations in the FAC sufficient to state a claim for breach of express warranty. *See* *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Therefore, the Court **DENIES** Defendant's Motion to dismiss Plaintiff's fourth cause of action for breach of express warranty.

E. Breach of Implied Warranty

Plaintiff's fifth cause of action alleges breach of implied warranty. (Doc. 13 at 33–34.) Defendant argues that "Plaintiff has not stated a plausible breach of implied warranty claim" because Plaintiff does not allege the Products are unfit for use "[n]or does she dispute that the sunscreen delivers all of the sun protection advertised on the labeling." (Doc. 16–1 at 18, 20.) Rather, Plaintiff alleges "the sunscreen does not conform to the representation that it is 'Reef Friendly.' " (Doc. 16–1 at 20.)

California Commercial Code § 2314 provides that "a warranty that the goods shall be merchantable is implied in a contract ***1244** for their sale if the seller is a merchant with respect to goods of that kind." CAL. COM. CODE § 2314(1). It also explains that "[g]oods to be merchantable must be at least such as ... (f) [c]onform to the promises or affirmations of fact made on the container or label if any." CAL. COM. CODE § 2314(2)(f).

The FAC alleges that Defendant is a merchant with respect to the sale of sunscreen products and, therefore, a warranty of merchantability is implied in every contract for sale. (Doc. 13 at 34.) Moreover, "[b]y advertising the Products with their current labeling, Defendant made a promise on the label of the Products that the Products are 'Reef Friendly.' " (*Id.*) However, the Products do not conform to the promises made on the label because the Products are not "Reef Friendly" and contain ingredients harmful to reefs. (*Id.*) Thus, Plaintiff explains that, had she and the class members "known that the products were not 'Reef Friendly,' they would not have been willing to pay the premium price associated with them or would not have purchased them at all." (*Id.*)

The Court find Plaintiff's pleading sufficiently states a claim for relief as the statute provides that goods shall "[c]onform to the promises or affirmations of fact made on the container or label ...." CAL. COM. CODE § 2314(2)(f); *see White*, 2022 WL 888657, at *3 (finding the plaintiff adequately pled breach of implied warranty when alleging contents of product did not conform to the promises made on the packaging and labeling). Therefore, the Court **DENIES** Defendant's Motion to dismiss Plaintiff's fifth cause of action for breach of implied warranty.

F. Equitable Relief

Lastly, Defendant argues that "even if this Court does not dismiss Plaintiff's lawsuit outright, it should nonetheless dismiss her claims to the extent they seek restitution, an injunction, and other equitable relief." (Doc. 16–1 at 21.) It is Defendant's position that Plaintiff cannot seek equitable relief under California's consumer protection statutes without establishing that she lacks an adequate remedy at law. (*Id.* (citing *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020).)) Defendant explains that "[s]everal of Plaintiff's claims permit her to recover money damages, and those damages would adequately compensate her for her alleged injury—i.e., the supposed 'price premium' she allegedly paid due to [Defendant's] use of the phrase 'Reef Friendly' on the labeling ...." Thus, Plaintiff is barred from seeking equitable relief.

Plaintiff counters that "the gravamen of Plaintiff's claims is that Defendant's marketing and advertising of the Products as 'Reef Friendly' misleads consumers." (Doc. 19 at 28.) Thus, "[t]he injury to consumers cannot be fully compensated through an award of monetary damages because the Products as currently labeled are deceptive and misleading and injunctive relief is necessary to put a stop to the continuing harm." (*Id.*) "A legal remedy is not adequate in these circumstances, and it is appropriate to permit Plaintiff to assert the equitable remedy of an injunction." (*Id.*)

Here, the Court finds Plaintiff may lack an adequate legal remedy for future harm such that barring equitable remedies is unjustified at this time. *See* *Deras v. Volkswagen Group of America, Inc.*, 2018 WL 2267448, at *6 (N.D. Cal. May 17, 2018) (court finding "no bar to the pursuit of alternative remedies at the pleadings stage" where plaintiffs argued legal remedy was inadequate) (citing *Aberin v. Am. Honda Motor Co., Inc.*, 2018 WL 1473085, at *9 (N.D. Cal. Mar. 26, 2018)) (internal quotations omitted). The main allegation in this action is that the "Reef Friendly" ***1245** label on Defendant's Products is misleading to consumers because the ingredients in the Products are harmful to reefs. (Doc. 13 at 13, 19.) Although monetary damages may ultimately fully address Plaintiff's harm, at this stage of the litigation there is "an ongoing, prospective nature to [plaintiff's allegations]" given her contention that she and other future purchasers will continue to be misled. *Aerojet Rocketdyne, Inc. v. Global Aerospace, Inc.*, No. 2:17-cv-01515-KJM-AC, 2020 WL 3893395, at *5 (E.D. Cal. July 10, 2020). Taken together, and viewed in the light most favorable to Plaintiff, the allegations of the FAC are "sufficient to suggest a likelihood of future harm amenable to injunctive relief" such that the Court will not bar equitable relief at this stage of the proceedings. *See* *id.*

IV. CONCLUSION

Accepting all factual allegations in the FAC as true and construing the pleadings in the light most favorable to Plaintiff, the Court finds Plaintiff's FAC is sufficient to survive Defendant's Motion. Accordingly, Defendant's Motion (Doc. 16) is **DENIED**.

IT IS SO ORDERED.

All Citations

652 F.Supp.3d 1232, 110 UCC Rep.Serv.2d 18

Footnotes

End of Document

607 F.Supp.3d 1025
United States District Court, C.D. California.

Jabril BATTLE, Jr., individually and on behalf of all others similarly situated, Plaintiff,
v.
TAYLOR JAMES, LLC, d/b/a Supergoop!, Defendant.

Case No.: CV 21-07915-FWS-KES
|
Signed June 15, 2022

Synopsis

Background: Consumer brought putative class action against sunscreen manufacturer, alleging that sunscreen was falsely advertised as "Reef Safe," when in fact sunscreen contained compounds believed to be harmful to marine environments, and asserting claims for violations of California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA), as well as claims for injunctive relief and breach of express and implied warranties. Manufacturer filed motion to dismiss.

Holdings: The District Court, Fred W. Slaughter, J., held that:

consumer's allegations were sufficient to establish Article III standing, as well as statutory standing with respect to claims pursuant to UCL, FAL, and CLRA;

consumer's allegations were sufficient to satisfy particularity requirement for pleading fraud, as relevant to UCL, FAL, and CLRA claims;

consumer's allegations were sufficient to plead that manufacturer's "Reef Safe" claim was false and misleading, as relevant to UCL, FAL, and CLRA claims;

consumer plausibly alleged that reasonable consumers could view sunscreen marketed as "Reef Safe" as misleading, as relevant to UCL, FAL, and CLRA claims;

consumer could not proceed with claim for injunctive relief; but

consumer sufficiently alleged that he was not required to give manufacturer pre-suit notice before asserting warranty claims.

Motion granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim; Motion to Dismiss for Lack of Personal Jurisdiction.

Attorneys and Law Firms

***1034** Alexis M. Wood, Lilach Halperin, Ronald A. Marron, Kas L. Gallucci, Law Offices of Ronald A. Marron APLC, San Diego, CA, for Plaintiff.

Gaganjyot Kaur Sandhu, Hannah Beth Shanks-Parkin, Ricky L. Shackelford, Greenberg Traurig LLP, Los Angeles, CA, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT [21]

FRED W. SLAUGHTER, UNITED STATES DISTRICT JUDGE

Before the court is Defendant Taylor James, LLC, d/b/a Supergoop!'s ("Defendant") Motion to Dismiss Plaintiff Jabril Battle, Jr.'s ("Plaintiff") First Amended Complaint ("Motion" or "Mot."). (Dkt. 21.) Plaintiff's First Amended Complaint ("FAC") asserts claims against Defendant for: (1) violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("UCL"); (2) violations of California's Consumer Legal Remedies Act, Cal. Bus. & Prof. Code §§ 1750, *et seq.* ("CLRA"); (3) violations of California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500-509, 17535 ("FAL"); (4) breach of express warranty, Cal. Comm. Code § 2312; and (5) breach of implied warranty, Cal. Comm. Code § 2314. (*See generally* FAC ¶¶ 52-101.) In summary, the FAC alleges that Defendant sells sunscreen products marketed and advertised as "Reef Safe" despite containing octocrylene and avobenzone, compounds which Plaintiff alleges are harmful to coral reefs and marine life. (*See generally id.* ¶¶ 7-40.)

The court finds this matter appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78(b) ("By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings."); L.R. 7-15 (authorizing

courts to "dispense with oral argument on any motion except where an oral hearing is required by statute"). Based on the state of the record, as applied to the applicable law, the court **GRANTS IN PART AND DENIES IN PART** the Motion. The court **DISMISSES WITHOUT PREJUDICE AND WITH LEAVE TO AMEND** Plaintiff's claims for injunctive relief and **DENIES** the Motion in all other respects.

I. Background

A. Summary of Relevant Allegations

Defendant is a Texas limited liability company with its principal place of business in Texas. (FAC ¶ 5.) Defendant markets and sells "Reef Safe" sunscreen and lotion products. (FAC ¶¶ 7, 10.) Plaintiff, an "eco-conscious" consumer, (*id.* ¶ 34,) alleges he purchased Defendant's PLAY Everyday Lotion SPF 50 with Sunflower Extract ("Lotion") at a Los Angeles retailer "in or around January of 2021," (*id.* ¶ 33). Plaintiff alleges that the Lotion is one of Defendant's products marketed and sold as "Reef Safe," and that he "wanted a product that had clean chemicals and was reef-safe." (*Id.* ¶¶ 7, 34.) Plaintiff alleges the Lotion contains avobenzone and octocrylene, "which are toxic to human health, coral reefs and marine species." (*Id.* ¶ 7.) Plaintiff also alleges Hawaii's Senate has passed legislation banning avobenzone and ***1035** octocrylene,[1] and that octocrylene specifically is "banned in sunscreen products sold" in the U.S. Virgin Islands, Key West, and the Republic of the Marshall Islands. (*Id.*) The FAC cites to an article from the Center for Biological Diversity in support of Plaintiff's allegations that "[r]esearch demonstrates that octocrylene can disrupt human hormones and have toxic impacts on a variety of aquatic organisms, including corals, fish and marine mammals" and "[a]vobenzone is also an endocrine disruptor and can reduce coral resilience against the high ocean temperatures that are killing corals worldwide." (*Id.* ¶ 8.) Plaintiff alleges the Lotion is sold at a "premium," and that Plaintiff would not have purchased the Lotion at its listed price had he known it contained "active ingredients that would harm coral reefs and marine life." (*Id.* ¶¶ 9, 30-31.)

[1] The FAC alleges "Hawai'i has passed a bill banning the two [ ] harmful petrochemicals, avobenzone and octocrylene, which are toxic to human health, coral reefs and marine species," while Defendant argues the legislation "actually failed to pass Hawaii's House." (FAC ¶ 7; *see* Mot. at 4; Reply at 2.) As discussed *infra* Section III.A, the court limits its consideration of the status of this legislation on which Defendant seeks judicial notice to the undisputed facts; namely, that the legislation is pending in Hawaii and has passed Hawaii's Senate.

Plaintiff alleges Defendant "promotes itself" as an "Expert[ ] in SPF" and claims that "every product [it sells] is reef-safe." (*Id.* ¶ 10.) The FAC lists thirty-five different products that Plaintiff asserts should be included in a class action, (*id.* ¶ 14,) though Plaintiff only alleges he purchased the Lotion, (see *id.* ¶ 33). Plaintiff alleges the packaging and in-store displays for the Lotion visibly include the "Reef Safe" claim. (*Id.* ¶¶ 18, 20, 23.) Relatedly, Plaintiff alleges "[t]he Products are marketed to consumers with labeling that appears streamline and clean and are placed in higher priced stores like Sephora and Nordstrom where consumers believe they are purchasing a superior, cleaner, and healthier product" and are advertised online without any disclaimer regarding whether the "Products are actually not safe for coral reefs and other marine life."[2] (*Id.* ¶ 26.) Plaintiff alleges he relied on Defendant's advertising and did not know, nor have any reason to know, that the Lotion contained ingredients that could be harmful to coral reefs and marine life. (*Id.* ¶¶ 36-37.) Plaintiff alleges he "intends to, desires to, and will purchase the Products again when he can do so with the assurance that the Products' labels and advertising, which indicate that the Products are 'Reef Safe,' are lawful and consistent with the Products' ingredients." (*Id.* ¶ 40.)

[2] The FAC defines "Products" as the thirty-five different products that Plaintiff asserts should be included in a class action. (*Id.* ¶ 14.)

B. Procedural Background

This case is in its early stages. Plaintiff filed the initial Complaint in this action on behalf of himself and the putative "Nationwide Class" and "California Subclass" on October 4, 2021, alleging the same five claims against Defendant as in the FAC. (Dkt. 1; *see also* FAC.) On the same day, Plaintiff mailed Defendant a letter providing notice he would add claims for monetary damages under the CLRA in an amended complaint absent a resolution of this case. (*See* Dkt. 1 ¶ 78; FAC ¶ 78.) Defendant answered the initial Complaint on November 19, 2022. (Dkt. 14.) As previewed, Plaintiff filed the FAC on December 10, 2021, to include claims for monetary damages under the CLRA. (*See* FAC ¶ 78.) Shortly after, Defendant filed the Motion on January 14, 2022, and briefing concluded on February 18, 2022. (Dkts.

21-26.) Plaintiff has not sought to certify the ***1036** asserted Nationwide Class or California Subclass yet.

II. Legal Standards

A. Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6)

Defendant brings the Motion to Dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure ("Rule") 12(b)(2); failure to state a claim under Rule 12(b)(6); and failure to plead fraud with specificity under Rule 9(b). (*See* Mot. at 1-2.)

1. Rule 12(b)(2)

Rule 12(b)(2) permits a defendant to move to dismiss a complaint for "lack of personal jurisdiction." Fed. R. Civ. P. 12(b)(2). Courts without personal jurisdiction over a defendant lack the power to issue a valid and enforceable judgment against that defendant. *See* *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945). For personal jurisdiction to comport with due process protections guaranteed by the Fourteenth Amendment, there must be sufficient " 'minimum contacts' between a defendant and the forum" to avoid subjecting the defendant to "the burdens of litigating in a distant or inconvenient forum" while "ensur[ing] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Accordingly, the exercise of personal jurisdiction comports with due process if "the defendant's contacts with the forum State" prevent "maintenance of the suit" from "offend[ing] traditional notions of fair play and substantial justice." *Id.* at 292, 100 S.Ct. 559 (citations and internal quotation marks omitted).

Federal courts "ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG v. Bauman*, 571 U.S. 117, 125, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014) (citing Fed. R. Civ. P. 4(k)(1)(A)). "Under California's long-arm statute, California state courts may exercise personal jurisdiction 'on any basis not inconsistent with the Constitution of this state or of the United States.' " *Id.* (quoting Cal. Code. Civ. Proc. § 410.10).

"When a defendant moves to dismiss for lack of personal jurisdiction, 'the plaintiff bears the burden of demonstrating that jurisdiction is appropriate.' " *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1141 (9th Cir. 2017) (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004)). Where "no evidentiary hearing [has] occurred in [an] action, the plaintiff need only make a prima facie showing of jurisdictional facts." *Id.* (citation and internal quotation marks omitted). Courts may consider evidence contained in affidavits or order discovery related to jurisdictional issues. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001), *abrogated on other grounds by* *Williams v. Yamaha Motor Co.*, 851 F.3d 1015 (9th Cir. 2017). In so doing, courts deem all uncontroverted allegations in the complaint to be true and resolve factual disputes in favor of the nonmoving party. *Id.* However, courts "may not assume the truth of allegations in a pleading which are contradicted by affidavit." *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011) (citation and internal quotation marks omitted).

Courts may exercise either general or specific personal jurisdiction over a defendant. *See* *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). "The standard for general jurisdiction 'is an exacting standard, as it should be, because a finding of general jurisdiction ***1037** permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.' " *CollegeSource, Inc.*, 653 F.3d at 1074 (quoting *Schwarzenegger*, 374 F.3d at 801). And "[a] nonresident defendant's discrete, isolated contacts with the forum support jurisdiction on a cause of action arising directly out of its forum contacts, but this is specific rather than general jurisdiction." *Id.* at 1075.

2. Rule 12(b)(6)

Rule 12(b)(6) permits a defendant to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To withstand a motion to dismiss brought under Rule 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on

its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). While "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a plaintiff must provide "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action" such that the factual allegations "raise a right to relief above the speculative level." *Id.* at 555, 127 S.Ct. 1955 (citations and internal quotation marks omitted); *see also* *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (reiterating that "recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice").

"Establishing the plausibility of a complaint's allegations is a two-step process that is 'context-specific' and 'requires the reviewing court to draw on its judicial experience and common sense.' " *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995-96 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937). "First, to be entitled to the presumption of truth, allegations in a complaint ... must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Id.* at 996 (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). "Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.* (quoting *Baca*, 652 F.3d at 1216); *see also* *Iqbal*, 556 U.S. at 681, 129 S.Ct. 1937. But " '[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* (quoting *Iqbal*, 556 at U.S. 678).

3. Heightened Standard for Pleading Fraud under Rule 9(b)

Allegations of "fraud or mistake must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) applies to claims "grounded in fraud" or that "sound in fraud." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003). As distinguished from allegations pertaining to state of mind, "[a]verments of fraud must be accompanied by the who, what, when, where, and how" of the alleged fraudulent activity. *Id.* at 1106 (citation and internal quotation marks omitted). Allegations subject to Rule 9(b)'s heightened pleading requirement must also " 'set forth what is false or misleading about a statement, and why it is false.' " *Id.* (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)). However, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

"Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct ... so ***1038** that they can defend against the charge and not just deny that they have done anything wrong." *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010) (citation and internal quotation marks omitted) (alteration in original). "To avoid dismissal for inadequacy under Rule 9(b), [a] complaint would need to state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (citation and internal quotation marks omitted).

III. DISCUSSION

A. Judicial Notice and Incorporation by Reference

1. Legal Standards

The court may take judicial notice of facts that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Civ. P. 201(b). Courts cannot take judicial notice of facts subject to reasonable dispute. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by* *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also* *Twombly*, 550 U.S. at 555 n.11, 127 S.Ct. 1955 ("Under Federal Rule of Evidence 201(b), a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to

sources whose accuracy cannot reasonably be questioned.") (internal quotation marks omitted).

For example, "courts routinely take judicial notice of letters published by the government ... as well as records and reports of administrative bodies." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 851 n.10 (9th Cir. 2016) (citations and internal quotation marks omitted). Additionally, courts "may consider material which is properly submitted as part of the complaint on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment," if the material is "physically attached to the complaint." *Lee*, 250 F.3d at 688 (citations and internal quotation marks omitted).

The "incorporation by reference" doctrine permits courts to "take into account documents 'whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading.' " *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (citation omitted) (alteration in original); *see also* *Lee*, 250 F.3d at 688. Application of the incorporation by reference doctrine may be appropriate in "situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel*, 393 F.3d at 1076.

2. Application

Defendant requests that the court take judicial notice, under Federal Rule of Civil Procedure 201, the incorporation by reference doctrine, and the court's "inherent authority," of four documents referenced or cited in the FAC: (1) the Center for Biological Diversity article discussing Hawaii's legislative activity on avobenzone and octocrylene ("Exhibit 1" or "Exh. 1"); (2) Defendant's online blog post titled "Everything You Should Know About Reef-Friendly Sunscreens" ("Exhibit 2" or "Exh. 2"); (3) activity on H.R. 102, 2021 Leg., 31st Sess. (Haw. 2021) ("Exhibit 3" or "Exh. 3"), a bill pending in Hawaii's ***1039** State Legislature relating to sunscreens; and (4) activity on S. 132, 2021 Leg., 31st Sess. (Haw. 2021) ("Exhibit 4" or "Exh. 4"), a similar bill pending in Hawaii's State Legislature relating to water pollution. (Dkt. 22.) Plaintiff does not oppose Defendant's requests. (*See generally* Opposition ("Opp.").)

Based on the foregoing analysis, the court rules on Defendant's requests as follows: in terms of the requests for judicial notice, the court **GRANTS IN PART AND DENIES IN PART** Defendant's requests for judicial notice on Exhibits 1 and 2, and **GRANTS** Defendant's requests for judicial notice on Exhibits 3 and 4. In terms of the incorporation by reference requests, the court **GRANTS** Defendant's requests for the court to consider Exhibits 1-4 under the incorporation by reference doctrine.

Exhibit 1 mentions that avobenzone and octocrylene have various toxic impacts on marine environments based on "[r]esearch" and statements from an ecotoxicologist but does not cite any specific studies in support. (*See* Mot., Exh. 1.) Plaintiff cites Exhibit 1 in the FAC. (*See, e.g.*, FAC ¶¶ 7-8.) However, the parties dispute the import of the claims made in Exhibit 1. (*Compare* Mot. at 6, *with* Opp. at 2-3, 7, 9.) Considering Plaintiff cites this Exhibit to provide context for the FAC's allegations and does not dispute the authenticity of Exhibit 1, the court finds the fact that the statements in Exhibit 1 were made is judicially noticeable under Fed. R. Evid. 201(b), but not for the truth of those statements. *See, e.g.*, *In-N-Out Burgers v. Smashburger IP Holder LLC*, 2018 WL 7891028, at *1 n.1 (C.D. Cal. Dec. 21, 2018) (taking judicial notice of third-party websites "for the limited purpose of establishing that the statements in the [websites] were made, but not for the truth of the information therein or as evidence related to the merits of the claims at issue" where "the facts [we]re in dispute"); *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1000-02 (9th Cir. 2018) (holding judicial notice of substance contained in materials "subject to varying interpretations" on which "there is a reasonable dispute as to what the [material] establishes" is improper) (citation and internal quotation marks omitted).

Under the incorporation by reference doctrine, the court may consider Exhibit 1 because the FAC cites, discusses, and hyperlinks it. *See* *Khoja*, 899 F.3d at 1002 ("[A] defendant may seek to incorporate a document into the complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.") (citation and internal quotation marks omitted); *Knievel*, 393 F.3d at 1076 ("Just as a reader must absorb a printed statement in the context of the media in which it appears, a computer user necessarily views web pages in the context

of the links through which the user accessed those pages."). However, the court will refrain from weighing the evidentiary persuasiveness of the statements in Exhibit 1. *See* *Khoja*, 899 F.3d at 1003 ("[U]nlike judicial notice, a court may assume an incorporated document's contents are true for purposes of a motion to dismiss under Rule 12(b)(6)" but "it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint") (citation and internal quotation marks omitted).

Exhibit 2 is a copy of Defendant's online blog post titled "Everything You Should Know About Reef-Friendly Sunscreens" and is cited in the FAC. (*See* Mot., Exh. 2; FAC ¶ 11.) Exhibit 2 is mentioned in the Motion only twice, as part of Defendant's argument that oxybenzone, octinoxate, and octisalate have "actually been banned by the State of Hawaii." (*See* Mot. at 4 n.1, 9.) The Opposition, ***1040** however, does not dispute these ingredients have been banned, and cites to Exhibit 2 to argue that all of Defendant's products containing avobenzone and/or octocrylene are marketed as "Reef Safe" and that Defendant markets itself as an "Expert in SPF," facts that Defendant does not dispute. (*See* Opp. at 11, 18.) Accordingly, the court takes judicial notice of Exhibit 2, for its existence and the undisputed facts offered by the parties to the extent relevant to their motion papers. *See* *Matthews v. Nat'l Football League Mgmt. Council*, 688 F.3d 1107, 1113 n.5 (9th Cir. 2012) (taking judicial notice of party's website where plaintiff did not "object to the request for judicial notice or question the accuracy" of the facts on which judicial notice was sought); *see also* *Khoja*, 899 F.3d at 1000 n.5 (noting "[a]n irrelevant fact could hardly be an 'adjudicative fact' " subject to judicial notice). Because the parties do not dispute its authenticity and the FAC discusses, cites, and hyperlinks Exhibit 2, the court will also consider the contents of Exhibit 2 under the incorporation by reference doctrine, to the extent it is relevant to the resolution of the Motion. *See* *Knievel*, 393 F.3d at 1076.

Exhibits 3 and 4 are materially identical for the purposes of judicial notice and incorporation by reference, so the court will consider them together. Exhibit 3 reflects a contemplated ban on the "sale, offer of sale, or distribution in the State [of Hawaii] of any sunscreen that contains avobenzone or octocrylene, or both, without a prescription issued by a licensed healthcare provider to preserve marine ecosystems," and was introduced on January 20, 2021. (*See* Mot., Exh. 3.) The attached activity schedule indicates that the measure was "deferred" in Hawaii's House on February 17, 2021. (*See id.*) Exhibit 4 reflects a contemplated ban on the "sale, offer of sale, or distribution in the State [of Hawaii] of any sunscreen that contains avobenzone or octocrylene, or both, without a prescription issued by a licensed healthcare provider," and was introduced one day after Exhibit 3. (*See* Mot., Exh. 4.) The attached activity schedule shows the bill passed in Hawaii's Senate in March 2021 and was pending in Hawaii's House as of December 10, 2021. (*See id.*) These Exhibits are printouts of legislative activity from the Hawaii State Legislature's official website. (Mot., Exhs. 3, 4.)

Courts regularly take judicial notice of legislative history and materials prepared by government agencies. *See, e.g.,* *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) ("Courts may take judicial notice of some public records, including the 'records and reports of administrative bodies.' ") (quoting *Interstate Nas. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953)). These Exhibits are also discussed in the FAC. (*See* FAC ¶ 7.) Accordingly, the court may also consider these materials for their contents under the incorporation by reference doctrine. *See* *Knievel*, 393 F.3d at 1076. However, the parties appear to dispute the extent to which the legislation is effective as law in Hawaii without sufficiently explaining to the court how to interpret the present status of these two bills. (*See* Mot. at 4; Opp. at 2 & n.1.) As such, the court will limit is consideration of these Exhibits to the facts that (1) legislation banning the sale of octocrylene and avobenzone in sunscreen products has passed Hawaii's Senate but is still pending in Hawaii's State Legislature; and (2) the legislation was introduced as part of an initiative to preserve marine environments. *See* *Khoja*, 899 F.3d at 1003.

B. Plaintiff's Standing to Bring Claims on Behalf of the Asserted "Nationwide Class"

Defendant argues Plaintiff's claims brought on behalf of the asserted "Nationwide ***1041** Class" must be dismissed "for lack of personal jurisdiction under Rule 12(b)(2), lack of standing, and because there can be no extra-territorial application of California consumer protection statutes to non-residents of California for purchases made outside California." (Mot. at 14.)

1. Personal Jurisdiction Under Rule 12(b)(2)

Defendant contests the court's general and specific personal jurisdiction over Defendant as to Plaintiff's "Nationwide Class" allegations, because Defendant is a corporation incorporated in Texas with its principal place of business also located in Texas. (FAC ¶ 5.) Defendant does not appear to challenge the application of California law to Plaintiff's claims brought on an individual basis. (*See* Mot. at 14-15.) With respect to the "Nationwide Class" allegations, Defendant's personal jurisdiction argument should be resolved at the class certification stage, because Defendant "d[oes] not have 'available' a Rule 12(b)(2) personal jurisdiction defense to the claims of unnamed putative class members who are not yet parties to the case." *See* *Moser v. Benefytt, Inc.*, 8 F.4th 872, 877 (9th Cir. 2021). "To conclude otherwise would be to endorse 'the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.*' " *Id.* (quoting *Smith v. Bayer Corp.*, 564 U.S. 299, 313, 131 S.Ct. 2368, 180 L.Ed.2d 341 (2011)). [3]

3 In the Motion, Defendant "recognizes that Courts generally defer ultimate resolution of these issues until class certification" and "rais[ed] this issue now to preserve it," (Mot. at 14,) but in Reply argued "[t]here is no reason to delay resolution of these issue[s]," (see Reply at 12). Defendant's apparent change in position after Plaintiff filed the Opposition provides another reason for the court to follow recent Ninth Circuit precedent and defer this inquiry until class certification. *Cf.* *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief.").

2. Standing of Putative Class Members

The Supreme Court has left open the question of "whether every class member must demonstrate standing *before* a court certifies a class." *TransUnion LLC v. Ramirez*, —— U.S. ——, 141 S. Ct. 2190, 2208 n.4, 210 L.Ed.2d 568 (2021). Courts in the Ninth Circuit sometimes resolve this issue at the class certification or motion to dismiss stage. *See* *Melendres v. Arpaio*, 784 F.3d 1254, 1261 (9th Cir. 2015) ("[W]hen courts have found a disjuncture between the claims of named plaintiffs and those of absent class members, they have not always classified the disjuncture consistently, some referring to it as an issue of standing, and others as an issue of class certification.").

Although some courts have addressed this issue at the motion to dismiss stage, the court agrees with recent Ninth Circuit precedent analyzing this issue at the class certification stage under Rule 23. *See* *Melendres*, 784 F.3d at 1262 (adopting "the class certification approach" which "has been embraced several times (though not always) by the Supreme Court, and is the one adopted by 'most' other federal courts to have addressed the issue"). Consistent with the court's view that Defendant's personal jurisdiction arguments will be better resolved at the class certification stage in this case, the court similarly finds that ruling on this argument is premature. *See* *Moser*, 8 F.4th at 878 ("[P]utative class members are not before the court at the Rule 12 stage.").

Though Defendant does not challenge Plaintiff's individual standing, "[s]tanding is a threshold matter central to our subject matter jurisdiction" which ***1042** must be "satisfied before [the court] proceed[s] to the merits." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). Article III standing requires a plaintiff to show they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016), *as revised* (May 24, 2016) (citations omitted). "[T]he party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* (citation and internal punctuation marks omitted).

The UCL, CLRA, and FAL impose additional statutory requirements on a plaintiff to show standing. [4] The UCL and FAL require a plaintiff to "(1) establish a loss or deprivation of money or property sufficient to qualify as an injury in fact, i.e., economic injury, and (2) show that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 322, 120 Cal.Rptr.3d 741, 246 P.3d 877 (2011) (emphasis removed). Similarly, the CLRA provides that a plaintiff "must not only be exposed to an unlawful practice but also have suffered some kind of damage." *Bower v. AT&T Mobility, LLC*, 196 Cal.App.4th 1545, 1556, 127 Cal.Rptr.3d 569 (2011) (citations and internal quotation marks omitted).

4 "Though lack of *statutory* standing requires dismissal for failure to state a claim" under Federal Rule of Civil Procedure 12(b)(6), "lack of *Article III* standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, 578 U.S. at 339, 136 S.Ct. 1540 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Though the " 'fairly traceable' and 'redressability' components for standing overlap and are two facets of a single causation requirement" they "are distinct in that traceability examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested relief." *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022) (citations and some internal quotation marks omitted). But the fact "[t]hat a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo*, 578 U.S. at 338 n.6, 136 S.Ct. 1540 (citations and internal quotation marks omitted) (second alteration in original); *see also* *In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 n.11 (9th Cir. 2018) ("[O]nly one Plaintiff needs to have standing for a class action to proceed."); *Bates* 511 F.3d at 985 ("In a class action, [Article III] standing is satisfied if at least one named plaintiff meets the requirements.").

Here, Plaintiff has alleged he would not have purchased the goods absent Defendant's allegedly misleading "Reef Safe" marketing, and that he paid a premium based on that claim. (FAC ¶¶ 8, 38, 39.) The court finds Plaintiff's allegations sufficiently establish Plaintiff's Article III standing as pleaded. *See* *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 & nn.3-4 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013) (holding plaintiff possessed Article III ***1043** standing based on allegations plaintiff paid premium for product based on false advertising). Plaintiff's allegations are also sufficient to confer statutory standing on Plaintiff's UCL and FAL claims under *Kwikset*, as well as on Plaintiff's CLRA claims. *See* *id.* at 1105 ("[W]hen a consumer purchases merchandise on the basis of false price information, and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL and FAL because he has suffered an economic injury."); *id.* at 1108 ("[A]ny plaintiff who has standing under the UCL's and FAL's 'lost money or property' requirement will, *a fortiori*, have suffered 'any damage' for purposes of establishing CLRA standing."). Notably, Defendant does not contest Plaintiff's standing to bring his individual claims against Defendant, except for Plaintiff's standing to seek injunctive relief. [5] (*See* Mot. at 12-16).

5 Plaintiff's claims for injunctive relief are discussed separately *infra* Section III.F.

3. Substantial Similarity of Products

Defendant takes issue with the FAC's list of 35 products with respect to which Plaintiff asserts putative class action allegations. (Mot. at 15.) "The ' "prevailing view" in the Ninth Circuit' is that class action plaintiffs can bring claims for products they did not purchase 'as long as the products and alleged misrepresentations are substantially similar.' " *Cordes v. Boulder Brands USA, Inc.*, 2019 WL 1002513, at *2 (C.D. Cal. Jan. 30, 2019) (quoting *In re 5-Hour ENERGY Mktg. & Sales Pracs. Litig.*, 2014 WL 5311272, at *7 (C.D. Cal. Sept. 4, 2014)). "Factors that other courts have considered include whether the challenged products are of the same kind, whether they are comprised of largely the same ingredients, and whether each of the challenged products bears the same alleged mislabeling." *Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp. 2d 1134, 1141 (N.D. Cal. 2013). "Courts often postpone the inquiry about the similarity of products until the class certification stage." *See Cordes*, 2019 WL 1002513, at *2. Like Defendant's arguments regarding "standing," the court finds that Defendant's challenge here would be better addressed at the class certification stage. *See, e.g.*, *Forcellati v. Hyland's, Inc.*, 876 F. Supp. 2d 1155, 1161 (C.D. Cal. 2012) (agreeing with "decisions that have concluded that Defendants' argument is better taken under the lens of typicality or adequacy of representation, rather than standing").

4. Extra-Territorial Application of California's Consumer Protection Statutes

"Whether a nonresident plaintiff can assert a claim under California law is a constitutional question based on whether California has sufficiently significant contacts with the plaintiff's claims." *Forcellati*, 876 F. Supp. 2d at 1160. Where sufficient contacts are demonstrated, the defendant must show "the interests of [an]other state's laws [a]re greater than California's interests." *See Rutledge v. Hewlett–Packard Co.*, 238 Cal.App.4th 1164, 1188, 190 Cal.Rptr.3d 411 (2015).

Absent a controlling choice-of-law agreement between parties, California courts determining whether to apply another state's law in an action engage in a "governmental interest" analysis. *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 994 (9th Cir. 2010), *disapproved of on other grounds by Poublon v. C.H. Robinson Co.*, 846 F.3d 1251 (9th Cir. 2017). The "governmental interest" analysis is a three-step inquiry:

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same ***1044** or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state[,]" and then ultimately applies "the law of the state whose interest would be the more impaired if its law were not applied."

Id. at 994-95 (9th Cir. 2010) (quoting *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 45 Cal.Rptr.3d 730, 137 P.3d 914 (2006)) (alteration in original).

As noted above, Defendant's arguments based on the application of California law to nonresidents—who are not yet parties to this action—are better addressed at the class certification stage rather than on a motion to dismiss. *See Forcellati*, 876 F. Supp. 2d at 1161; *see generally Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) (undertaking choice-of-law analysis at the class certification stage), *overruled on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022). In any case, the parties do not engage in meaningful choice-of-law analysis in their motion papers sufficient for the court to address this inquiry at this stage. [6]

6 The court expresses no view as to the sufficiency of Plaintiff's asserted classes at this time. Defendant argues *Mazza* supports the proposition that California purportedly has "no interest in 'applying California law to the claims of foreign residents concerning acts that took place in other states' " as a matter of law. (Mot. at 16 (citing *Mazza*, 666 F.3d at 594); *see also* Reply at 13.) But this argument overlooks the detailed choice-of-law analysis the Ninth Circuit undertook ten years ago in reaching the conclusion that the application of California law on the facts presented was improper. *See Mazza*, 666 F.3d at 590-94 (choice-of-law analysis); *id.* at 594 ("*Under the facts and circumstances of this case*, we hold that each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place.") (emphasis added). The court also notes the Ninth Circuit in *Mazza* reviewed the district court's ruling on class certification, not on a motion to dismiss. *See generally id.*

C. Plaintiff's Unfair Competition Law ("UCL") Claims

The UCL "prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.' " *Kwikset*, 51 Cal.4th at 320, 120 Cal.Rptr.3d 741, 246 P.3d 877 (quoting Cal. Bus. & Prof. Code § 17200). Each prong of the UCL provides a separate and distinct theory of liability. *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861, 878, 85 Cal.Rptr.2d 301 (1999).

"[T]o proscribe the kinds of unlawful business practices punishable" under it, the UCL's " 'unlawful' prong looks to other sources of substantive law" and treats violations of those other laws "as unlawful practices" that are "independently actionable." *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1177 (9th Cir. 2016) (citations and internal quotation marks omitted). "Unlawful" practices under the UCL encompass "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *S. Bay Chevrolet*, 72 Cal.App.4th at 880, 85 Cal.Rptr.2d 301. Courts consider several aspects of a practice alleged to be "unfair" under the UCL:

> Under the UCL's unfairness prong, courts consider either: (1) whether the challenged conduct is tethered to any ***1045** underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law; (2) whether the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers; or (3) whether the practice's impact on the victim outweighs the reasons, justifications and motives of the alleged wrongdoer.

Doe v. CVS Pharmacy, Inc., 982 F.3d 1204, 1214-15 (9th Cir. 2020), *cert. granted in part*, —— U.S. ——, 141 S. Ct. 2882, 210 L.Ed.2d 990 (2021), *and cert. dismissed sub nom. CVS Pharmacy, Inc. v. Doe, One*, —— U.S. ——, 142 S. Ct. 480, —— L.Ed.2d —— (2021) (citations and internal quotation marks omitted).

"This standard is intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud. The test of whether a business practice is unfair involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *S. Bay Chevrolet*, 72 Cal.App.4th at 886, 85 Cal.Rptr.2d 301 (citations and internal quotation marks omitted) (alteration in original). While "the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim," the unfairness prong of the UCL "does not give the court[ ] a general license to review the fairness of contracts." *Id.* at 886-87, 85 Cal.Rptr.2d 301 (citations and internal quotation marks omitted).

Finally, "[t]he fraud contemplated by [the UCL's] third prong bears little resemblance to common law fraud or deception." *Id.* at 888, 85 Cal.Rptr.2d 301 (citation and internal quotation marks omitted). To state a claim under the UCL based on its "fraudulent" prong, "it is necessary only to show that members of the public are likely to be deceived." *In re Tobacco II Cases*, 46 Cal.4th 298, 312, 93 Cal.Rptr.3d 559, 207 P.3d 20 (2009). This means that, "unlike common law fraud, [a violation] can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage." *S. Bay Chevrolet*, 72 Cal.App.4th at 888, 85 Cal.Rptr.2d 301 (citation and internal quotation marks omitted). For example, "[f]alse advertising is included in the 'fraudulent' category of prohibited practices." *Zhang v. Super. Ct.*, 57 Cal.4th 364, 370, 159 Cal.Rptr.3d 672, 304 P.3d 163 (2013) (citation omitted).

The heightened pleading standard of Rule 9(b) applies to claims brought under the fraudulent prong under the UCL or that are otherwise grounded in fraud. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). State law determines whether a claim is grounded in fraud. *See* *Kearns*, 567 F.3d at 1125. The "elements of a cause of action for fraud in California are: '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " *Kearns*, 567 F.3d at 1126 (quoting *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal.4th 951, 974, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997)).

Defendant argues Plaintiff's UCL claims should be dismissed for three reasons: (1) because Plaintiff's allegations do not satisfy the heightened pleading standard for fraud under Rule 9(b); (2) because Plaintiff has insufficiently pleaded falsity; and (3) because Plaintiff's interpretation of "Reef Safe" is unreasonable under the "reasonable consumer

test." (*See* Mot. at 6, 8, 9.) Plaintiff does not dispute his claims brought under the UCL, CLRA, and FAL, which are all based on "material misrepresentations and omissions," (see FAC ¶¶ 56, ***1046** 60, 65, 70-73, 85,) are subject to Rule 9(b), (see Opp. at 9-11). *See also* *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig.*, 754 F. Supp. 2d 1145, 1170-72 (C.D. Cal. 2010). The court observes the parties do not squarely address whether Plaintiff's claims under the "unlawful" and "unfair" prong are grounded in fraud. Regardless, Defendant challenges Plaintiff's UCL claims en masse on the grounds that Plaintiff has not sufficiently alleged falsity, satisfied the reasonable consumer test, or satisfied the standard of Rule 9(b), while Plaintiff maintains the FAC's allegations satisfy all three.

The court takes the parties' arguments in turn. As discussed below, the court finds Plaintiff has pleaded allegations sufficient to withstand the Motion.

1. Pleading Fraud under Rule 9(b)

The parties agree that Plaintiff must allege the "who, what, when, where, and how of the misconduct" to satisfy Rule 9(b). (*See* Mot. at 10; Opp. at 11.) Defendant argues that Plaintiff insufficiently supports the "basis for his assertion that the 'reef safe' representation is false." (Mot. at 10.) Regardless, the court finds that Plaintiff has plausibly alleged the "who, what, when, where, and how" of the purported fraudulent conduct: Plaintiff alleges that (1) Defendant made a false and misleading claim; (2) the claim at issue is that the Lotion is "Reef Safe"; (3) the claim was made on the Lotion's packaging and in Defendant's marketing materials; (4) Plaintiff purchased the Lotion in or around January 2021 at a third-party retailer in Los Angeles; (5) the Lotion contains two ingredients which have been implicated as harmful to ocean environments; and (6) Plaintiff did not know, and had no reason to know, those ingredients would be harmful to marine ecosystems. The court concludes these allegations meet the pleading standard of Rule 9(b). *See* *Grimm v. APN, Inc.*, 2017 WL 6060624, at *6 (C.D. Cal. Nov. 20, 2017) (finding plaintiff's allegations satisfied Rule 9(b) with respect to plaintiff's UCL, CLRA, and FAL claims where plaintiff alleged the specific misrepresentations made by defendant; the terms on defendant's product's packaging that were misleading; why those terms were misleading; plaintiff's reliance on the alleged misrepresentations; and when plaintiff purchased defendant's product).

Defendant cites *Weiss v. Trader Joe's Co.*, 2018 WL 6340758 (C.D. Cal. Nov. 20, 2018), *aff'd sub nom. Weiss v. Trader Joe's*, 838 F. App'x 302 (9th Cir. 2021); *Aloudi v. Intramedic Rsch. Grp., LLC*, 729 F. App'x 514 (9th Cir. 2017); and *Arroyo v. Pfizer, Inc.*, 2013 WL 415607 (N.D. Cal. Jan. 31, 2013) as support, but these cases do not contradict the sufficiency of Plaintiff's allegations. In *Weiss*, the court dismissed the plaintiff's UCL, CLRA, and FAL claims where her claims were brought based on "videos on the internet [and] personally testing the pH balance" of the alkaline water she purchased, and the complaint was "vague as to *when* Plaintiff observed that the pH balance was not 9.5." 2018 WL 6340758 at *7. *Aloudi* addressed, in dicta, a challenge to the Defendant's use of "clinically proven" representations, where the plaintiff "did not plausibly and specifically allege" the "compound" in an allegedly "fraudulent" supporting clinical trial was "the same as the functional compound" in the defendant's product to which the challenged representations related. *See* 729 F. App'x at 516. And the court in *Arroyo* found that the plaintiff's complaint "d[id] not take issue with the content of [the product], but rather with its efficacy" in a different way than "a consumer of a [product] could reasonably infer that the [product] was comprised of the [components] pictured" on the packaging. 2013 WL 415607, at *8 (distinguishing from *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)).

***1047** By contrast, in this case, the court observes Plaintiff has alleged the active ingredients in the Lotion are harmful to coral reefs and other marine life, with reference to pending legislation based on findings that those ingredients are harmful to marine environments and the Center for Biological Diversity article stating the same. Plaintiff alleges Defendant's "Reef Safe" marketing misled him regarding the Lotion's purported environmental safety because he was not familiar with octocrylene and avobenzone at the time of purchase. The court finds Plaintiff's allegations are sufficient to satisfy the "who, what, when, where, and how" required by Rule 9(b) at the pleadings stage; Plaintiff is not "require[d]" to "allege how [ ]he 'came to believe' that the product was misrepresented when, as in this case,

all the Rule 9(b) considerations have been met." *See* *Davidson*, 889 F.3d at 966.

2. Plaintiff's Allegations of Falsity

Defendant argues that the FAC's lack of citations to "testing, studies, scientific literature or anecdotal evidence" to support Plaintiff's allegations militates dismissal of Plaintiff's UCL claims. (Mot. at 6.) However, Plaintiff alleges that (1) octocrylene and avobenzone are dangerous to coral reefs and marine life, which is supported by an article issued by the Center for Biological Diversity; (2) the U.S. Virgin Islands, Key West, and the Republic of the Marshall Islands, ban those compounds from sunscreen products sold in their respective jurisdictions; and (3) similar legislation has passed in Hawaii's Senate. The parties dispute the persuasiveness of the Center for Biological Diversity article referenced in the FAC and Hawaii's pending legislation banning octocrylene and avobenzone. As noted above, the court must draw all reasonable inferences based on plausibly pleaded allegations in favor of Plaintiff. The court also notes California courts "have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." *Williams*, 552 F.3d at 938-39 (citing *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal.App.4th 115, 134-35, 61 Cal.Rptr.3d 221 (2007)).

Considering the applicable standards, the court finds Plaintiff's allegations of falsity are sufficiently plausible to allege the "Reef Safe" claim is false and misleading at this stage of the litigation. Plaintiff alleges that oxybenzone and octocrylene are damaging to coral reefs and other marine life, and it is undisputed that both are active ingredients in the Lotion. Plaintiff provides as support pending legislation in Hawaii which contemplates banning these compounds from the sunscreen products due to their damaging effects on marine environments (Exhs. 3, 4). Although Plaintiff does not allege a reason for the alleged bans of those compounds in sunscreen products sold in the U.S. Virgin Islands, Key West, and the Republic of the Marshall Islands, under the applicable standards, it is reasonable to infer legislation pending in Hawaii banning octocrylene and avobenzone based on findings these chemicals are harmful to the environment coupled with a notice from an environmental advocacy group[7] stating the ***1048** same renders Plaintiff's claims plausible. *See Brenner v. Procter & Gamble Co.*, 2016 WL 8192946, at *6 (C.D. Cal. Oct. 20, 2016) (finding "Plaintiff raise[d] a plausible inference that the 'Natural Clean' label [wa]s misleading" considering "FTC enforcement actions, FDA and French government advisories, and Natural Clean brand packaging"); *Fagan v. Neutrogena Corp.*, 2014 WL 92255, at *2 (C.D. Cal. Jan. 8, 2014) (denying motion to dismiss allegations that sunscreens contained "numerous unnatural synthetic agreements" where marketed as having "100% naturally-sourced ingredients" and being 100% "naturally-sourced sunscreens").

7 Defendant argues that the Center for Biological Diversity article (Exh. 1) is "unpersuasive" because it does not "constitute[ ]" or "reference" any "persuasive studies" or "scientific literature." (*See* Mot. at 6.) As noted above, it would be premature for the court to weigh the persuasiveness of evidence at this stage. *See, e.g., Gasser v. Kiss My Face, LLC*, 2018 WL 4538729, at *4 (N.D. Cal. Sept. 21, 2018) (noting "on this motion to dismiss, the Court must accept as true Plaintiffs' allegation" that active ingredient in lotion was "a synthetic ingredient that 'nourishes' " without evaluating the truth of the contents of a website related to the active ingredient on which defendant requested judicial notice, because "[w]hether the evidence will support that allegation is an issue for summary judgment.").

Defendant cites several cases that Defendant argues support dismissal of Plaintiff's claim for failing to cite a persuasive study. Those cases are distinguishable. *Tubbs v. Advocare Int'l, L.P.*, concerned allegations of "speculative" benefits conferred by the defendant's products and supposedly disproven by the plaintiff's allegations based on studies conducted on other health-based products which were not "logically related" to the defendant's products. *See* 2018 WL 11351992, at *6 (C.D. Cal. Mar. 21, 2018) (noting a "high[ ] degree of detail and specificity is needed to cure [a] lack-of-substantiation defect" considering that "health ... is probably influenced by a number of variables") (citations and internal quotation marks omitted), *aff'd*, 785 F. App'x 396 (9th Cir. 2019); *see also* 2017 WL 4022397, at *6 (C.D. Cal. Sept. 12, 2017) (dismissing claims based on allegations there was no "genuine scientific research" regarding the benefits of an amino acid in defendant's products). The court expresses concern about evaluating the "persuasiveness" of studies at the motion to dismiss stage; indeed, the Ninth Circuit

affirming the 2018 dismissal order in *Tubbs* "assume[d], without deciding, that the district court erred by evaluating the persuasiveness the report's final conclusions." 785 F. App'x at 397.

It is true that "[t]he falsity of advertising claims may be established by testing, scientific literature, or anecdotal evidence." *Kwan v. SanMedica Int'l, LLC* 854 F.3d 1088, 1097 (9th Cir. 2017) (citation omitted). But, as discussed above, Plaintiff has alleged octocrylene and avobenzone are banned from sale in sunscreen products in several coastal jurisdictions; references pending legislation in Hawaii regarding banning the same compounds on grounds they are harmful to coral reefs and marine environments; and mentions a related advisory article issued by the Center for Biological Diversity. Defendant's other cited cases all concern plaintiffs who, as in *Tubbs*, attempted to show falsity through studies purportedly finding a lack of impact of one particular compound in a product, rather than allegations affirmatively demonstrating falsity, and in the context of products promising to deliver a health benefit dependent on personalized variables. *See* *McCrary v. Elations Co., LLC*, 2013 WL 6402217, at *3 (C.D. Cal. Apr. 24, 2013) ("All of the studies Plaintiff cite[d] examine[d] whether GH and/or CS are effective in treating osteoarthritis" but "none of the marketing or advertising claims challenged by Plaintiff concern[ed] osteoarthritis"); *Otto v. Abbott Labs., Inc.*, 2013 WL 12132064, at *4 (C.D. Cal. Mar. 15, 2013) (finding no "plausible claim for relief" established where studies allegedly disproving the efficacy of defendant's dietary supplements were "in tension with" each other and did not test the combination of ingredients in the challenged product); *Eckler v. Wal-Mart Stores, Inc.*, 2012 WL 5382218, at *6-7 (S.D. Cal. Nov. 1, 2012) (citing studies that did not concern product's "proprietary blend" and evaluated its effectiveness combating osteoarthritis ***1049** to support allegations product did not deliver touted health benefits, where defendant disclaimed product's ability to "diagnose, treat, cure or prevent any disease"). Indeed, the court in *McCrary* held the plaintiff "plausibly alleged that Defendant's claims regarding the clinical effectiveness of glucosamine and chondroitin in its [ ] supplement [we]re false and misleading" where "claims in [defendant's] advertisements single[d] out the effectiveness [of] glucosamine and chondroitin," 2013 WL 6402217, at *5, a more apt analogy to Plaintiff's allegations that octocrylene and avobenzone are damaging to coral reefs on their own despite being included in the "Reef Safe" Lotion.

Defendant similarly argues that Plaintiff has failed to demonstrate falsity through allegations of personal experience because Plaintiff does not allege that the "Lotion did not work as a work as a sunscreen, he does not allege that he used the [ ] Lotion anywhere near a coral reef, and he does not allege that any coral reefs or marine life were harmed by his use" of the Lotion. (Mot. at 7.) But Plaintiff's claims do not concern the efficacy of the Lotion on an individual basis; Plaintiff's claims concern the alleged negative impact of the Lotion's ingredients on the environment in light of Defendant's "Reef Safe" claim and Plaintiff's "eco-conscious" disposition. The court has found Plaintiff's allegations are sufficient to withstand a motion to dismiss, and Defendant's argument does not bear on Plaintiff's claims as pleaded in the FAC.

Defendant next argues Plaintiff's claims should be interpreted as impermissibly shifting the burden to Defendant to substantiate its "Reef Safe" claim. (Mot. at 7.) Citing *Yamasaki v. Zicam LLC*, Defendant correctly notes that "the law is clear" that lack of substantiation claims cannot be brought by private plaintiffs under California law. (*See id.* (citing 2021 WL 4951435, at *4 (N.D. Cal. Oct. 25, 2021)).) Plaintiff argues the FAC alleges "Defendant's advertising is false because ... both octocrylene and avobenzone (independently and in any amount) are harmful to reefs and marine life." (*See* Opp. at 16.)

A lack of substantiation claim is brought on the basis that a defendant's advertising claim is unsupported by scientific evidence. *See Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 993 (9th Cir. 2018). Indeed, the court in *Yamasaki* evaluated the plaintiff's allegations that the defendant's "clinically proven" claims were insufficiently supported by "adequate scientific evidence." *See* 2021 WL 4951435, at *4-5. By contrast, Plaintiff alleges here that Defendant's "Reef Safe" claim is false and misleading because it contains two ingredients allegedly harmful to coral reefs and therefore is not "Reef Safe." Plaintiff makes no allegations concerning the *lack* of scientific evidence supporting the *benefits* of the Lotion. Accordingly, Plaintiff is not bringing an impermissible lack of substantiation claim.

3. The Reasonable Consumer Test

Defendant argues Plaintiff's claims fail the "reasonable consumer test" which requires that a plaintiff bringing claims under the UCL allege "that members of the public are likely to be deceived" from the perspective of a "reasonable consumer." *See* *Williams*, 552 F.3d at 938. (citations and internal quotation marks omitted). Generalized, vague, and unspecified assertions are puffery and nonactionable under this test. *See* *id.* at 939 n.3.

In arguing that Plaintiff's allegations fail to show Defendant's "Reef Safe" labeling is misleading, Defendant argues that the fact Hawaii has not banned avobenzone and octocrylene renders Plaintiff's interpretation "unreasonable." (*See* Mot. at 8.) Defendant notes that, "to the extent a ***1050** reasonable interpretation of the term 'reef safe' implicates individual ingredients," it would be one that concerns "ingredients that have actually been banned by the state of Hawaii." (Mot. at 9 (emphases removed).) As Plaintiff notes, however, Plaintiff "does not allege that the [Lotion's] ingredients must be 'banned from the United States' " for "the 'Reef Safe' claim to be false or misleading." (Opp. at 9.) The court cannot find, as a matter of law, that a consumer would more naturally interpret a product marketed as "Reef Safe" as not containing any "banned" ingredients as opposed to being free of any ingredients that are "unsafe" to coral reefs or marine environments. *See, e.g.*, *Smith v. Keurig Green Mountain, Inc.*, 393 F. Supp. 3d 837, 847 (N.D. Cal. 2019) ("[C]ommon sense would not so clearly lead a person to believe that a package labeled 'recyclable' is not recyclable anywhere."); *see also* *Morales v. Unilever U.S., Inc.*, 2014 WL 1389613, at *7 (E.D. Cal. Apr. 9, 2014) ("Even if plaintiffs had not proffered an 'objective meaning' of the term 'natural,' they need not do so; the relevant question is the meaning that consumers would attach to the term."). Relatedly, the weight a reasonable consumer would afford to pending legislation banning octocrylene and avobenzone as it relates to the Lotion's "Reef Safe" characteristics is a question of fact not proper to resolve on a motion to dismiss. *See* *Mattero v. Costco Wholesale Corp.*, 336 F. Supp. 3d 1109, 1117 (N.D. Cal. 2018) (relationship between "unchallenged statements" that products were designed and produced according to EPA, OECD, and USDA guidelines "and whether those statements as understood by reasonable consumers undermine plaintiff's claims based her assertion that consumers do not expect 'environmentally responsible' products to contain[ ] the identified toxic and hazardous ingredients" could not be "appropriately resolved on a motion to dismiss"); *Morales*, 2014 WL 1389613, at *7.

Defendant also argues that Plaintiff's lack of "cit[ation] to a single study, test, experiment, or piece of scientific literature to support his allegation that octocrylene and/or avobenzone —whether alone or in the actual formulations used in the numerous Supergoop! products referenced in the FAC—are harmful to coral reefs" renders Plaintiff's "interpretation" unreasonable. (Mot. at 8.) Defendant essentially repeats the argument discussed above and similarly cites *Weiss* and *Eckler* as support. However, *Eckler* concerned a plaintiff's challenge to the purported benefits delivered by the defendant's products based on studies that: (1) concerned a subset of the population more limited than Plaintiff's allegation that the Lotion is harmful in any amounts to coral reefs and marine environments; and (2) did not test the combination of ingredients in the product at issue, which may have delivered the defendant's purported health benefits as synthesized. *See* 2012 WL 5382218, at *6-7 (challenging claims of product's benefits based on studies limited to osteoarthritis and not conducted on defendant's "proprietary blend"). And *Weiss* concerned advertising that did not reasonably convey the benefit to a consumer that the plaintiff argued it would deliver. *See* 2018 WL 6340758, at *4 (finding "[t]he crux of Plaintiff's claims" were that the "advertisement of the [w]ater misleads consumers to believe that its greater alkalinity will give them an internally balanced pH level that will result in health benefits"). Plaintiff's allegations differ in that the FAC alleges the active ingredients of the Lotion are harmful to marine environments based on legislative activity in coastal areas and an advocacy group's advisory article, and, therefore, the Lotion is not "Reef Safe" as marketed.

***1051** As discussed above, the court finds Plaintiff has plausibly alleged that reasonable consumers could view the Lotion, which is marketed as "Reef Safe," as misleading because it includes avobenzone and octocrylene when the FAC's allegations are viewed in the light most favorable to Plaintiff. *See* *Williams*, 552 F.3d 934, 939 (9th Cir. 2008) (disagreeing "with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth

from the ingredient list in small print on the side of the box"). Based on the record, as applied to the applicable law and analyzed above, the court **DENIES** Defendant's Motion to Dismiss Plaintiff's UCL claims.

D. Plaintiff's Claims under California's Consumer Legal Remedies Act ("CLRA")

The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). The CLRA enumerates twenty-eight categories of practices that are "unlawful" under its provisions. *See generally* *id.* §§ 1770(a)-(b). Plaintiff alleges Defendant has violated Sections 1770(a)(5) (relating to "[r]epresenting that goods have," among other characteristics, "benefits" which "they do not have"); 1770(a)(7) (relating to "[r]epresenting that goods of a particular standard, quality or grade" are "of another"); and 1770(a)(9) (relating to "[a]dvertising goods or services with [the] intent not to sell them as advertised"). (FAC ¶¶ 70-72.)

Courts generally consider claims brought under the UCL, CLRA, and FAL together. *See* *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 982 (C.D. Cal. 2015), *aff'd sub nom.* *Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. 2017), *and aff'd sub nom.* *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017); *see also* *Consumer Advocs. v. Echostar Satellite Corp.*, 113 Cal.App.4th 1351, 1360-62, 8 Cal.Rptr.3d 22 (2003). Indeed, the parties' briefing addresses Plaintiff's CLRA claims in tandem with Plaintiff's UCL and FAL claims and does not distinguish between the claims. Considering the briefing in this matter and the similar approach taken by other courts in the Ninth Circuit, the court will consider Plaintiff's CLRA claims together with Plaintiff's UCL claims. As such, the court refers to its analysis above in Section III.C and **DENIES** Defendant's Motion to Dismiss Plaintiff's CLRA claims.

E. Plaintiff's False Advertising Claims ("FAL")

The FAL broadly prohibits the making or dissemination of "any statement" towards the public that is "untrue or misleading." Cal. Bus. & Prof. Code § 17500. The statement must also be made or disseminated with the intent to "directly or indirectly [ ] dispose of" property or services. *Id.* As with claims brought under the UCL's "fraudulent" prong, a plaintiff must "show that members of the public are likely to be deceived" to bring claims under the FAL. *In re Tobacco II*, 46 Cal. 4th 298, 312, 93 Cal.Rptr.3d 559, 207 P.3d 20 (2009) (citation and internal quotation marks omitted).

As noted above, the parties address Plaintiff's FAL claims in tandem with Plaintiff's UCL and CLRA claims in their briefing and do not separately analyze Plaintiff's claims under the three statutes. As such, the court will address Plaintiff's FAL claims together with Plaintiff's CLRA and UCL claims. *See, e.g.*, *In re ConAgra Foods*, 90 F.Supp.3d at 982. Accordingly, the court refers to its analysis above in Section III.C and **DENIES** Defendant's Motion to Dismiss Plaintiff's FAL claims.

***1052 F. Injunctive Relief**

Plaintiff seeks injunctive relief with respect to his UCL, CLRA, and FAL claims. (*See* FAC ¶¶ 67, 79, 87.) Injunctive relief is an equitable remedy available in federal courts only where a plaintiff makes a showing of irreparable injury and the inadequacy of remedies at law. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). "Although courts in this circuit occasionally imply otherwise, there is no reason prospective injunctive relief must always be premised on a realistic threat of a similar injury recurring. A sufficiently concrete prospective injury is sufficient." *Davidson*, 889 F.3d at 971 n.7 (9th Cir. 2018) (citations omitted). However, where "injunctive relief is premised entirely on the threat of repeated injury" a plaintiff must show "a sufficient likelihood that [the plaintiff] will again be wronged in a similar way." *Id.* at 971; *see also* *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660. "[P]ublic injunctive relief [is] a remedy available to private plaintiffs under the UCL and the false advertising law [FAL], as well as under the CLRA." *McGill v. Citibank, N.A.*, 2 Cal.5th 945, 961, 216 Cal.Rptr.3d 627, 393 P.3d 85 (2017). However, the Ninth Circuit has held that "the traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution under the UCL and CLRA in a diversity action." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020). Though injunctive relief was not at issue in *Sonner*, the court views the logic of *Sonner* as applying to claims for injunctive relief, another equitable

remedy. *See* *id.* at 844 n.7 ("Federal equitable principles are not subject to qualification by the intent of California's legislature."); *Coleman v. Mondelez Int'l Inc.*, 554 F. Supp. 3d 1055, 1064 (C.D. Cal. 2021) (applying *Sonner* to claims for injunctive relief under the UCL and CLRA).

Though the court defers on the parties' arguments regarding the Article III standing of other purported class members until class certification as discussed above, Plaintiff seeks injunctive relief in the FAC in his individual capacity. (*See* FAC ¶ 79.) Accordingly, the court will consider Plaintiff's standing to seek injunctive relief here.

1. Inadequate Remedy at Law

Defendant argues that Plaintiff has not sufficiently alleged an inadequate remedy at law. (*See* Mot. at 10-11.) In addition to injunctive relief, Plaintiff seeks "restitution" and "disgorgement"[8] under the UCL and FAL, as well as "monetary relief" under the CLRA and damages generally. (FAC ¶¶ 67, 77, 83, 93, 100 & Prayer for Relief.) The court finds Plaintiff does not plausibly allege the monetary damages or any of the legal remedies sought in the FAC are inadequate. Accordingly, Plaintiff's allegations insufficiently demonstrate an entitlement to equitable relief based on an inadequate remedy at law.[9] *See* *Sonner*, 971 F.3d at 844 (affirming ***1053** dismissal of claims for equitable restitution where "the operative complaint d[id] not allege that [plaintiff] lack[ed] an adequate legal remedy").

8 Because the parties do not specifically address any remedies other than injunctive relief in their motion papers, the court expresses no view as to the appropriateness of any remedy other than Plaintiff's sought injunctive relief.

9 Plaintiff's reliance on *Davidson* to establish an inadequate remedy at law, (see Opp. at 14-15,) is not persuasive. *Davidson* did not address the adequacy of a plaintiff's remedy at law. Moreover, the Ninth Circuit in *Davidson* held, although it was a "close question," that the plaintiff had adequately alleged she "face[d] an imminent or actual threat of future harm" where she had "no way of determining whether the representation 'flushable' [wa]s in fact true"; "regularly visit[ed] stores" where the wipes were sold; and provided a plausible basis for her desire to purchase a particular product again in the future. *See* 889 F.3d 956, 970-72. By contrast, Plaintiff purchased the Lotion once, but simultaneously alleges he "intends" and "desires" to purchase all or an undefined number of the thirty-five products listed in the Complaint "again" when their labels and advertising are "lawful and consistent with the Products' ingredients." (FAC ¶ 40.) It is not clearly alleged whether Plaintiff intends to purchase a product(s) again if Defendant removes the "Reef Safe claim"; if Defendant removes octocrylene and avobenzone but retains the "Reef Safe claim"; or which products Plaintiff "intends to, desires to, and will purchase [ ] again."

Plaintiff argues in opposition that Defendant's argument fails because the FAC alleges the "available remedies" are inadequate. (*See* Opp. at 13.) Despite Plaintiff's contention, the court finds the FAC contains no plausible allegations that monetary relief is "inadequate"; the FAC merely asserts injunctive relief is appropriate based on unspecific recitations that harm is "continuing." (*See, e.g.*, FAC ¶ 66.) Absent from Plaintiff's contention that an injunction is necessary to stop a "continuing harm," (see Opp. at 12,) are plausible allegations supporting that monetary relief would be inadequate, or grounds on which the court could find injunctive relief would reasonably be preferable. Accordingly, the court concludes the FAC does not plausibly allege a claim for equitable relief. *See* *Pelayo v. Hyundai Motor Am., Inc.*, 2021 WL 1808628, at *9 (C.D. Cal. May 5, 2021) ("*Sonner* stands for the proposition that a plaintiff's failure to plead inadequate remedies at law dooms the claim for equitable relief at any stage.") (citation and internal quotation marks omitted); *Sagastume v. Psychemedics Corp.*, 2020 WL 8175597, at *7-8 (C.D. Cal. Nov. 30, 2020) (dismissing claims for equitable relief where complaint failed to allege plaintiff "lack[ed] an adequate legal remedy").

Relatedly, Plaintiff has only alleged a single purchase of the Lotion, yet avers he "intends to, desires to, and will purchase" an undefined number of Defendant's thirty-five products "again when he can do so with the assurance that the Products' labels and advertising, which indicate that the Products are 'Reef Safe,' are lawful and consistent with the Products' ingredients." (FAC ¶ 40; *see also id.* ¶ 33.) Because the FAC contains inadequate facts plausibly supporting Plaintiff's

assertion he has ever purchased or otherwise intends to purchase any other product than the Lotion in the future, or whether his intent is to purchase the Lotion with correct labeling or the removal of avobenzone and/or octocrylene, the court finds Plaintiff's pleaded allegations are also not specific enough to sufficiently demonstrate an entitlement to equitable relief. *See* *Michael v. Honest Co.*, 2016 WL 8902574, at *13 (C.D. Cal. Dec. 6, 2016) (denying injunction where allegations "le[ft] unclear the products whose purchase Plaintiffs would consider").

2. Risk of Future Harm

Defendant also argues that Plaintiff has no standing to seek injunctive relief because he has not sufficiently alleged a risk of injury in the future. (*See* Mot. at 12-13.) Because the court finds the FAC lacks sufficient allegations to plausibly plead an inadequate remedy at law and is not sufficiently specific in its claims for injunctive relief, the court need not reach this issue.

The court **GRANTS** Defendant's Motion to Dismiss Plaintiff's claims for injunctive relief and **DISMISSES WITHOUT PREJUDICE** those claims.

G. Plaintiff's Breach of Express and Implied Warranty Claims

Under the California Commercial Code, "[a]ny affirmation of fact or promise ***1054** made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise" and "[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." Cal. Comm. Code § 2313(1)(a)-(b). Similarly, "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *Id.* § 2314(1). Under California law, "[a] breach of merchantability occurs if the product lacks even the most basic degree of fitness for ordinary use." *See* *Angiano v. Anheuser-Busch InBev Worldwide, Inc.*, 532 F. Supp. 3d 911, 919 (C.D. Cal. 2021) (citation and internal quotation marks omitted), *appeal dismissed*, 2021 WL 5315446 (9th Cir. Aug. 5, 2021); *see* Cal. Com. Code § 2314(1). Among other requirements, a "merchantable" good is required to "[c]onform to the promises or affirmations of fact made on the container or label if any." Cal. Comm. Code § 2314(2)(f).

Defendant argues Plaintiff's claims for breach of express warranty under Section 2313 and breach of implied warranty under Section 2314 fail for two reasons. First, Defendant argues that Plaintiff failed to provide pre-suit notice to Defendant or the third-party retailer from whom Plaintiff purchased the product. (Mot. at 13.) Second, Defendant argues Plaintiff's warranty claims must fail because Plaintiff has not pleaded "any facts to support his allegation that octocrylene and avobenzone are harmful to coral reefs (or humans or marine life), nor has he alleged that any coral reefs were actually harmed by the [ ] Lotion he actually purchased and used." (Mot. at 13-14 (emphasis removed).)

Plaintiff does not dispute that no notice was provided to Defendant. Plaintiff argues instead that he was not required to give notice because Plaintiff is bringing claims against Defendant "as a manufacturer, not a seller." (Opp. at 15.) In general, a plaintiff claiming breach of warranty must notify the seller of the breach within a reasonable time after discovery to preserve their right to a remedy. *See* *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011); Cal. Comm. Code § 2607(3)(A). But, as Plaintiff notes, some courts have held "this requirement is excused as to a manufacturer with which the purchaser did not deal." *In re Toyota Motor Corp.*, 754 F. Supp. 2d at 1180 (C.D. Cal. 2010); *see also* *Greenman v. Yuba Power Prods.*, 59 Cal.2d 57, 61, 27 Cal.Rptr. 697, 377 P.2d 897 (1963) (finding no notice required where claims brought against manufacturer because "it will not occur to [plaintiff] to give notice to one with whom [plaintiff] has had no dealings"); *Viggiano v. Johnson & Johnson*, 2015 WL 12860480, at *5 (C.D. Cal. June 12, 2015) (collecting cases). In rebuttal, Defendant argues "the FAC alleges that [Defendant] sells the sunscreen products at issue directly to consumers on its website," (Reply at 11,) but Defendant does not dispute that Plaintiff alleges *he* purchased the Lotion from a third-party retailer, a nonparty to this litigation, (FAC ¶ 33). The court agrees with authority holding pre-suit notice should not be required for plaintiffs bringing claims of breach of express warranty against manufacturers —e.g., parties with whom plaintiffs have had no dealings— and finds that Plaintiff has adequately alleged pre-suit notice to Defendant was not required.

Defendant next argues Plaintiff has not adequately pleaded Defendant's Lotion is misleadingly labeled as "Reef Safe," and makes the same arguments discussed above in the context of Plaintiff's UCL claims. Defendant does not distinguish between Plaintiff's breach of express and ***1055** implied warranty claims and rests its argument on its challenge to the sufficiency of Plaintiff's allegations.

As discussed above, the court finds the FAC adequately alleges the Lotion contains ingredients that may be harmful to coral reefs despite labeling which designates the Lotion as "Reef Safe."[10] *See supra* Section III.C.2. Accordingly, Defendant's Motion to Dismiss is **DENIED** as to Plaintiff's breach of express and implied warranty claims.

10 Defendant again cites *Weiss* as support. In *Weiss*, the court dismissed the plaintiff's claims because "nothing in the labeling or marketing" of the alkaline water at issue "promise[d]" that consumers would achieve the benefits on the packaging that related to the water itself. 2018 WL 6340758 at *8; *see id.* at *5 ("[T]he Court finds that a reasonable consumer would read the Water's label to mean that the *Alkaline Water*, not the consumer, is perfectly balanced."). Because Defendant here essentially restates its argument in Section III.C.2, *Weiss* fails to be persuasive here for the same reasons discussed above.

H. Leave to Amend

"A party may amend its pleading once as a matter of course within: [(1)] 21 days after serving it, or [(2)] if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1). "In all other cases," pleadings may only be amended with the opposing party's written consent or the court's leave, the latter of which is "freely give[n] when justice so requires." Fed. R. Civ. P. 15(a)(2). "In assessing whether leave to amend is proper, courts consider the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 814-15 (9th Cir. 2020) (citation and internal quotation marks omitted). Courts may find amendment futile where "no amendment would allow the complaint to withstand dismissal as a matter of law," and "[f]utility of amendment can, by itself, justify the denial of a motion for leave to amend." *Id.* at 815 (citation and internal quotation marks omitted). But "[i]f a complaint does not state a plausible claim for relief, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Perez v. Mortg. Elec. Registration Sys., Inc.*, 959 F.3d 334, 340 (9th Cir. 2020) (citation and internal quotation marks omitted).

Pursuant to Rule 15, the court "freely give[s]" leave to amend a complaint "when justice so requires." Fed. R. Civ. P. 15(a)(2). The court finds the record does not support a finding of any instances of "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party [or] futility of the proposed amendment." *See Kroessler*, 977 F.3d at 814-15 (9th Cir. 2020) (citation and internal quotation marks omitted). Though Plaintiff has previously amended the Complaint, the court observes the Motion is Defendant's first motion to dismiss, and Plaintiff's claims for injunctive relief dismissed by this Order could be cured by more specific pleading in an amended complaint consistent with the analysis in this Order. Thus, the court does not find the FAC's allegations dismissed by this Order are futile. Accordingly, the court affords Plaintiff leave to amend Plaintiff's claims dismissed without prejudice by this Order.

IV. DISPOSITION

For the reasons set forth above, the court **GRANTS IN PART AND DENIES *1056 IN PART** the Motion. The court **DISMISSES WITHOUT PREJUDICE AND WITH LEAVE TO AMEND** Plaintiff's claims for injunctive relief, and the court **DENIES** the Motion in all other respects. Should Plaintiff desire to file an amended complaint that addresses the issues in this ruling, Plaintiff must file and serve it within thirty (30) days of service of notice of this ruling.

IT IS SO ORDERED.

All Citations

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United States District Court, S.D. New York.

Deborah BROWN, individually and on behalf of all others similarly situated, Plaintiff,
v.
COTY, INC., Defendant.

22 Civ. 2696 (AT)
|
Signed March 29, 2023

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ORDER

ANALISA TORRES, District Judge:

***1** Plaintiff, Deborah Brown, brings this putative class action against Defendant. Coty, Inc. ("Coty"), alleging violations of the New York Consumer Law for Deceptive Acts and Practices, N.Y. Gen. Bus. Law §§ 349 and 350, breach of an express warranty, breach of an implied warranty, and unjust enrichment. Compl. ¶¶ 154–208, ECF No. 1. Coty moves to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF No. 35; *see also* Def. Mem., ECF No. 36. For the reasons stated below, Coty's motion is GRANTED. [1]

1 Coty's request for oral argument is DENIED. *See* Def. Mem. The Court also declines to take judicial notice of the documents Coty and Brown submit in their briefing. *Id.* at 8 n.3; Pl. Opp. at 4 n.1. ECF No. 44. Consideration of these documents is unnecessary to dispose of the motion.

BACKGROUND [2]

2 The following facts are taken from the complaint and "are presumed to be true for purposes of considering a motion to dismiss for failure to state a claim." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395. 398 (2d Cir. 2015).

Per and Polyfluoroalkyl Substances ("PFAS") are synthetic chemicals used in consumer, household, and commercial products. Compl. ¶¶ 7, 30–31. There are thousands of PFAS in existence. *Id.* ¶ 32. All PFAS contain multiple carbon-fluorine bonds. *Id.* ¶¶ 32–33. PFAS can have a variety of adverse effects on human health, even at low levels of exposure. *Id.* ¶¶ 42, 44, 46–48. Some PFAS, such as perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonate ("PFOS"), may be carcinogenic. *Id.* ¶¶ 35, 39, 44–45, 55. PFAS differ in the types of adverse health consequences they may produce and the level of exposure at which they can be harmful to humans. *Id.* ¶¶ 42 n.15, 44, 52, 53 n.18. PFAS can be ingested, inhaled, or absorbed through the skin. *Id.* ¶ 43.

PFAS are used in some cosmetics which are applied to the skin. *Id.* ¶ 61. PFAS may be intentionally added to cosmetics as emulsifiers, stabilizers, surfactants, viscosity regulators, and solvents. *Id.* ¶¶ 62–66. These may be disclosed on a product's ingredient list. *Id.* ¶¶ 63–66, 68. PFAS may also be found in cosmetics as a result of degradation, impurities, or the use of ingredients treated with PFAS. *Id.* ¶¶ 70, 80. Since 2018, there has been increasing consumer demand for natural ingredients in cosmetics and "green" cosmetics, at least partially due to consumer fears about harmful chemicals in their cosmetics and personal care products. *Id.* ¶¶ 21–23, 50, 60. Large cosmetics retailers have begun designating certain products as "clean," meaning that those products do not contain particular ingredients, including PFAS. *Id.* ¶¶ 25–26, 28. Some cosmetics retailers are dedicated to carrying only products designated as "clean." *Id.* ¶ 27. Consumers perceive products designated as "clean" to be safer and healthier than traditional cosmetics. *Id.* ¶ 29.

Brown purchased "one or more" tubes of CoverGirl Lash Blast Volume Waterproof Mascara ("Lash Blast") within the last three years. *Id.* ¶ 109. Brown relied on the "packaging, labeling, and ingredient list[ ]" when purchasing the product. *Id.* ¶¶ 104, 114–15. Brown determined through independent, third-party laboratory testing that "several popular CoverGirl waterproof mascara products, including [Lash Blast] and

CoverGirl Clump Crusher Waterproof Mascara [('Clump Crusher')]" contained "certain ... PFAS like PFOA." *Id.* ¶ 89. Brown states that Lash Blast and Clump Crusher contain "detectable levels of PFAS, including PFOA, PFHxA, PFDoS, and NEtFOSE." *Id.* ¶ 108. Neither the Lash Blast nor the Clump Crusher packaging discloses that the product contains PFAS. *Id.* ¶¶ 91, 108. Brown "reasonably believed [that Lash Blast was] safe for use around, adjacent to, and near her eyes." *Id.* ¶ 112. If Brown had known at the time of purchase that Lash Blast contained PFAS, she would not have purchased the product or would have paid less for the product. *Id.* ¶¶ 105, 117–18, 125.

***2** Coty is a cosmetics company that sells, *inter alia*, waterproof mascara products under the "CoverGirl" brand name. *Id.* ¶¶ 7, 92. Coty formulated, developed, manufactured, labeled, distributed, marketed, advertised, and sold Lash Blast and Clump Crusher throughout the United States. *Id.* ¶ 103.

On April 1, 2022, Brown brought this action on behalf of herself and all others in the United States who purchased Lash Blast or Clump Crusher between 2018 and the present. *Id.* ¶¶ 89, 109, 144.[3] Brown has not yet moved for class certification. Coty moves to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rules 12(b)(6) and 9(b). ECF No. 35; *see also* Def. Mem. at 8.

3 On July 5, 2022, Brown voluntarily dismissed all claims against Defendant Cover Girl Cosmetics. ECF No. 32; *see also* ECF No. 33.

DISCUSSION

I. Motion to Dismiss

A. Legal Standards

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient factual allegations in the complaint that, accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff is not required to provide "detailed factual allegations" in the complaint, but must assert "more than labels and conclusions," and must provide more than a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Ultimately, the facts pleaded in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* The Court must accept the allegations in the pleadings as true and draw all reasonable inferences in favor of the non-movant. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

To state a claim for a violation of New York General Business Law §§ 349 or 350, a plaintiff must allege that a defendant engaged in consumer-oriented conduct that was materially misleading and that the plaintiff suffered an injury as a result. *See Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015); *Barreto v. Westbrae Nat., Inc.*, 518 F. Supp. 3d 795, 802 (S.D.N.Y. 2021). A plaintiff must also show that the allegedly misleading practice is likely to mislead a reasonable consumer. *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013); *Barreto*, 518 F. Supp. 3d at 802. A court may decide as a matter of law that an advertisement would not mislead a reasonable consumer. *Fink*, 714 F.3d at 741; *Lugones v. Pete & Gerry's Organic, LLC*, 440 F. Supp. 3d 226, 241 (S.D.N.Y. 2020).

A claim for breach of an express warranty requires a plaintiff to allege that the defendant made an affirmation of fact or promise which was false or misleading when made and which had a natural tendency to induce a buyer to purchase the offending product, and that the plaintiff relied on the express warranty to her detriment. *See DiBartolo v. Abbott Lab'ys*, 914 F. Supp. 2d 601, 625 (S.D.N.Y. 2012) (collecting cases); *see also Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 289 (S.D.N.Y. 2014). If a claim for breach of an express warranty is premised on the assertion that a defendant's labeling is materially misleading, a plaintiff must also allege that the labeling "would be likely to deceive or mislead a reasonable consumer." *Twohig v. Shop-Rite Supermarkets, Inc.*, 519 F. Supp. 3d 154, 165 (S.D.N.Y. 2021). A plaintiff must point to a specific, express statement that is false or misleading and that a reasonable consumer can interpret as a material claim about the product. *Twohig*, 519 F. Supp. 3d at 167 (citations omitted); *see also Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 482 (S.D.N.Y. 2014) (collecting cases).

***3** To state a claim for breach of the implied warranty of merchantability and fitness, a plaintiff must allege that the defective product is not fit for its ordinary purpose, that the seller had reason to know at the time of contracting of the particular purpose for which such products are used, and that the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish suitable goods. *Catalano v. BMW of N. Am., LLC*, 167 F. Supp. 3d 540, 556 (S.D.N.Y. 2016). Where the only alleged injury is economic, a plaintiff must show privity between the plaintiff and the defendant, unless the plaintiff can show that she is a third-party beneficiary of a contract between the defendant and another party. *Id.* at 556–57; *see also* *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 249 (2d Cir. 1986). To establish that she is a third-party beneficiary, the plaintiff must demonstrate the existence of a contract between the defendant and another party that was intended for the plaintiff's benefit, which benefit is sufficiently immediate and not incidental, indicating an assumption by the contracting parties of a duty to compensate the plaintiff if the benefit is lost. *Catalano*, 167 F. Supp. 3d at 557; *see also* *Marshall v. Hyundai Motor Am.*, 51 F. Supp. 3d 451, 469 (S.D.N.Y. 2014). It is insufficient to allege that the defendant knew that consumers were the ultimate purchasers of the allegedly defective product. *Catalano*, 167 F. Supp. 3d at 557; *Marshall*, 51 F. Supp. 3d at 469.

A claim for unjust enrichment requires a plaintiff to allege that the defendant was enriched at the plaintiff's expense and, under the circumstances, equity and good conscience require the defendant to make restitution. *Goldemberg*, 8 F. Supp. 3d at 483. This cause of action is only available when, even though the defendant has not breached a contract or committed a recognized tort, the circumstances create an equitable obligation running from the defendant to the plaintiff. *Id.* It is not available if it simply duplicates a contract or tort claim. *Twohig*, 519 F. Supp. 3d at 168 (collecting cases). If a claim for unjust enrichment is premised on the assertion that a defendant's labeling is materially misleading, a plaintiff must also allege that the labeling "would be likely to deceive or mislead a reasonable consumer." *Id.* at 165.

Under Rule 12(b)(1), a district court must dismiss a complaint if the plaintiff has not established standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). A plaintiff has standing if she has pleaded a case or controversy in the outcome of which she has a personal stake. *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.a.r.l*, 790 F.3d 411, 417 (2d Cir. 2015). A plaintiff must demonstrate that she has sustained an injury in fact that is concrete, particularized, and actual or imminent; that the injury was caused by the defendant's action or omission; and that a favorable resolution is likely to redress the injury. *Id.*; *see also* *Lujan*, 504 U.S at 560–61. The jurisdictional question must be resolved before the merits. *Cortlandt St. Recovery Corp.*, 790 F.3d at 417.

B. Analysis

First, Coty argues that Brown has failed to establish standing because she has failed to allege a concrete and particularized injury. Def. Mem. at 8–14. Coty contends that, because Brown alleges only economic injury, Brown has not alleged an injury in fact that would confer standing. *Id.* at 12. The Court disagrees. Brown alleges that, but for Coty's alleged material omission—the failure to disclose that Lash Blast contains PFAS—she would not have purchased the product or would not have paid the price she did. *Id.* ¶¶ 105, 117–18, 125. Such economic injury, including the payment of a "price premium" that the plaintiff otherwise would not have paid, is sufficient to confer standing. *See* *Orlander*, 802 F.3d at 301–02.

Coty also argues that Brown has not established that she has standing to bring claims on behalf of putative class members with respect to Clump Crusher. *See* Def. Reply at 13, ECF No. 48. The Court agrees. A plaintiff may have standing to bring class claims with respect to a product she did not purchase if that product is sufficiently similar to the product the plaintiff purchased such that both products raise "nearly identical" concerns. *DiMuro v. Clinique Lab'ys, LLC*, 572 F. App'x 27, 29 (2d Cir. 2014). Brown does not allege that Lash Blast and Clump Crusher are sufficiently similar. She claims that the two products are "CoverGirl waterproof mascara products" that contain undisclosed PFAS. Compl. ¶¶ 89, 91. She does not allege that they contain the same PFAS at the same levels. She acknowledges that PFAS differ in the type and severity of harm they may produce and the level of exposure at which they are harmful. *See id.* ¶¶ 42 n.15, 44, 52, 53 n.18. Brown, therefore, has not alleged that the two products are sufficiently similar in that they raise nearly identical issues as to whether they are unsafe or unfit for

ordinary use and whether Coty's omission was misleading. Accordingly, Coty's motion is GRANTED as to Brown's class claims regarding Clump Crusher.

***4** Second, Coty argues that Brown has not plausibly alleged that reasonable consumers are likely to be misled by Coty's omission, Def. Mem. at 14–17, which is fatal to her claims under New York General Business Law §§ 349 or 350, as well as her breach of express warranty and unjust enrichment claims, Def. Reply at 5, 14; *see also* *Fink*, 714 F.3d at 741; *Twohig*, 519 F. Supp. 3d at 165. The Court agrees.

Brown alleges that Coty's statements on its website and in a press release are misleading, Compl. ¶¶ 93–100, but she does not allege that she or any putative class members relied on these statements when purchasing Lash Blast, *id.* ¶¶ 11, 104, 114–15, 121, 128, 130. Thus, Coty's statements on its website and in its press release cannot support Brown's claims under New York General Business Law § 350 or her breach of express warranty claim. *See, e.g.*, *Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177, 186 n.6 (E.D.N.Y. 2018) (noting that § 350 claims require a plaintiff to demonstrate reliance, but § 349 claims do not); *Goldemberg*, 8 F. Supp. 3d at 482 (holding that a plaintiff must point to a particular statement on which she relied in order to plead a breach of express warranty).

Moreover, the statements at issue are nonactionable puffery. *See* *Lugones*, 440 F. Supp. 3d at 241 (finding that claims for violations of New York General Business Law §§ 349 and 350 are not cognizable when based on statements that constitute mere puffery). Puffery includes statements that are broad, vague, and commendatory, or that express opinion rather than fact. *See* *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 159 (2d Cir. 2007); *Shema Kolainu-Hear Our Voices v. ProviderSoft, LLC*, 832 F. Supp. 2d 194, 209 (E.D.N.Y. 2010). A court considers vagueness, subjectivity, and ability to influence buyers' expectations in determining whether a statement constitutes puffery. *See* *Colangelo v. Champion Petfoods USA, Inc.*, No. 18 Civ. 1228, 2020 WL 777462, at *8 (N.D.N.Y. Feb. 18, 2020); *Avola v. Louisiana-Pac. Corp.*, 991 F. Supp. 2d 381, 391 (E.D.N.Y. 2013). Coty's statements on its website and in its press release do not describe any particular product, let alone Lash Blast. *See* *Avola*, 991 F. Supp. 2d at 392; *Elkind v. Revlon Consumer Prods. Corp.*, No. 14 Civ. 2484, 2015 WL 2344134, at *13, (E.D.N.Y. May 14, 2015). Rather, the statements are aspirational company mission statements. *See, e.g.*, Compl. ¶ 93 ("[W]e intend to ..."); *id.* ¶ 94 ("Our ambition is to ..."), *id.* ¶ 100 ("[Coty] continuously seeks to improve ..." (alteration omitted)). These statements cannot be objectively measured and cannot be proven true or false. *See, e.g.*, *id.* ¶ 97 (claiming that Coty is a "responsible beauty brand"); *Avola* 991 F. Supp. 2d at 393; *Time Warner Cable, Inc.*, 497 F.3d at 159; *Lipton v. Nature Co.*, 71 F.3d 464, 474 (2d Cir. 1995). Therefore, these statements cannot support Brown's claims.

Brown also alleges that the failure to disclose on the packaging that Lash Blast contains PFAS is material and misleading. *See, e.g.*, Compl. ¶¶ 89, 91, 107. Because Brown does not identify any particular statements on which she relied, she cannot state a claim for breach of an express warranty. *See* *Twohig*, 519 F. Supp. 3d at 167; *Goldemberg*, 8 F. Supp. 3d at 482. Therefore, Coty's motion is GRANTED as to Brown's breach of express warranty claim.

***5** Further, even reading the complaint in the light most favorable to Brown, she has not sufficiently pleaded that she and the putative class members have been misled by Coty's omission. The complaint can be read to allege that Brown believed Lash Blast was safe for use, Compl. ¶ 112, because the product packaging did not disclose the presence of PFAS, *id.* ¶¶ 91, 105, but Lash Blast did, in fact, contain PFAS, *id.* ¶ 89, which rendered it unsafe, *id.* ¶¶ 107, 118. Brown does not specify which PFAS were present in Lash Blast or at what levels. *See id.* ¶ 89. The complaint acknowledges that PFAS differ in the type and severity of harm they may produce and the level of exposure at which they are harmful. *See id.* ¶¶ 42 n.15, 44, 52, 53 n.18. As a result, Brown has not sufficiently pleaded that Lash Blast is actually unsafe such that it is not of the "quality and safety promised" at the time of purchase. *Id.* ¶ 118. For the same reason, she has not adequately pleaded that Lash Blast is not fit for its ordinary use.

The complaint can also be read to allege that Coty adds PFAS as ingredients in Lash Blast. *See id.* ¶¶ 11, 114–15, 121, 134, 140. Brown claims that PFAS are commonly used in cosmetics. *Id.* ¶¶ 61–62, 64, 66. She does not allege that the Lash Blast packaging represented the product to be

PFAS-free; rather, she claims that other products marked as "clean" by retailers specifically state that they do not contain PFAS, and that these products tend to be more expensive than products not marked as "clean." *Id.* ¶¶ 25–29. She does not identify any basis on which she or another reasonable consumer might assume that Lash Blast does not contain PFAS. It may be inferred from the complaint that Brown is claiming that PFAS should have been listed in the ingredient list on the Lash Blast packaging, but Brown states that "a reasonable consumer would be unlikely to identify most of the compounds as part of the PFAS family simply by looking at the name of the ingredient." *Id.* ¶ 66. Brown does not allege that Lash Blast contains a PFAS that is recognizable to consumers which was added as an ingredient to the product, and which was not disclosed on the ingredient list. Therefore, Brown has not sufficiently alleged that Coty omitted PFAS from the Lash Blast ingredient list and that such omission is misleading to a reasonable consumer.

The complaint may also be read as claiming that Lash Blast contains PFAS as a result of product degradation, impurities, or the treatment of certain ingredients with PFAS. *Id.* ¶¶ 70, 80, 107, 134, 140. But, Brown does not plead such a claim with a level of specificity sufficient to permit Coty to have a "fair understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery." *Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 577 (S.D.N.Y. 2021) (quoting *Harnage v. Lightner*, 916 F.3d 138, 141 (2d Cir. 2019)). For instance, it cannot be determined from the complaint whether Brown is alleging that Coty should have known its ingredients were treated with PFAS, or whether Coty should have known that, under certain conditions, the product would degrade and ultimately contain PFAS, even if it did not contain PFAS at the time of manufacturing. And, if Brown is indeed alleging that Lash Blast may contain PFAS as a result of degradation or impurities, Brown has not alleged that the products she herself purchased contained PFAS such that she can allege an injury in fact. *See* *Cortlandt St. Recovery Corp.*, 790 F.3d at 417. Thus, on any fair reading of the complaint, Brown has failed to state a claim under New York General Business Law §§ 349 and 350 and has failed to state a claim for unjust enrichment.[4] Accordingly, Coty's motion is GRANTED as to these claims.

[4] The Court does not reach Coty's Rule 9(b) arguments because the Court's analysis under Rule 12(b)(6) is sufficient to resolve the motion. *See* Def. Mem. at 18–20.

Finally, Coty argues that Brown's implied warranty claims must be dismissed because she does not allege that she is in privity with Coty. Def. Mem. at 23. The Court agrees. Brown does not allege that she purchased Lash Blast directly from Coty. *See* Compl. ¶ 109. She also fails to adequately plead that she was an intended third-party beneficiary of a contract between Coty and the retailer from which she purchased Lash Blast. She has not identified any retailer, let alone a contract between Coty and that retailer; she, therefore, cannot plausibly allege that such a contract was intended by the parties to benefit her and the putative class members. *Catalano*, 167 F. Supp. 3d at 557; *Marshall* at 51 F. Supp. 3d at 469. Brown's conclusory allegation that she and the putative class members are intended beneficiaries, Compl. ¶ 132, is insufficient to state a claim for breach of an implied warranty, *Catalano*, 167 F. Supp. 3d at 557; *Marshall*, 51 F. Supp. 3d at 469. Coty's motion is GRANTED as to Brown's claim for breach of an implied warranty.

***6** And, because Brown, individually, does not state a claim as to Lash Blast, no such claims can be maintained on behalf of the putative class. *See* *Lugones*, 440 F. Supp. 3d at 236–39; *Okla.* *Police Pension & Ret. Sys. v. U.S. Bank Nat. Ass'n*, 986 F. Supp. 2d 412, 420 (S.D.N.Y. 2013); *Fermin v. Pfizer Inc.*, 215 F. Supp. 3d 209, 213 (E.D.N.Y. 2016). For these reasons, Coty's motion is GRANTED in its entirety.

Leave to amend a complaint should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). Granting leave "is within the sound discretion of the district court." *Kim v. Kimm*, 884 F.3d 98, 105 (2d Cir. 2018) (quotation marks omitted). Accordingly, Brown's request for leave to amend her complaint, Pl. Opp. at 30, is GRANTED.

CONCLUSION

For the foregoing reasons, Coty's motion to dismiss is GRANTED. Brown's request for leave to amend her complaint is GRANTED. By **April 12, 2023**, Brown shall file her amended complaint. Because Brown's complaint is dismissed in its entirety, Brown's pending motion to appoint interim class counsel, ECF No. 52, is DENIED without

prejudice to renewal, and the case management conference scheduled for June 20, 2023, is ADJOURNED *sine die.*

SO ORDERED.

All Citations

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United States District Court, S.D. New York.

Deborah BROWN, Mare Giordano, Jessica Carde-Hartman, Darlene Bobczyk, Gwendolyn Simmons, Mari Miller, April Zacarias, Buffy Marie Ingle, and Christina Chadwell, and Deena Scandore, individually and on behalf of all others similarly situated, Plaintiffs,

v.

COTY, INC., Defendant.

22 Civ. 2696 (AT)

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Signed March 1, 2024

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ORDER

ANALISA TORRES, District Judge:

***1** Plaintiffs, Deborah Brown, Marie Giordano, Jessica Carde-Hartman, Darlene Bobczyk, Gwendolyn Simmons, Mari Miller, April Zacarias, Buffy Marie Ingle, Christina Chadwell, and Deena Scandore, bring this putative class action to challenge the alleged presence of synthetic chemicals in cosmetics manufactured by Defendant Coty, Inc. ("Coty"). Plaintiffs assert claims under the consumer protection laws of New York, Illinois, California, Michigan, Nevada, North Carolina, and Virginia, as well as a claim for unjust enrichment under New York law. Am. Compl. ¶¶ 305–451, ECF No. 64. Coty moves to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 9(b). ECF No. 79; *see also* Def. Mem., ECF No. 80. For the reasons stated below, Coty's Rule 12(b)(1) motion is GRANTED.

BACKGROUND

I. Factual Background [1]

[1] The following facts are taken from the amended complaint and "are presumed to be true for purposes of considering a motion to dismiss for failure to state a claim," *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 398 (2d Cir. 2015), and for considering a motion to dismiss for lack of standing, *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010) (cleaned up).

Per- and polyfluoroalkyl substances ("PFAS") are synthetic chemicals used in consumer, household, and commercial products. Am. Compl. ¶ 46. PFAS can have a variety of adverse effects on human health, even at low levels of exposure. *Id.* ¶¶ 57, 59, 61–68. PFAS can be ingested, inhaled, or absorbed through the skin. *Id.* ¶ 59. A 2021 study published by Notre Dame scientists (the "Notre Dame Study") found that "some mascaras purporting to be waterproof contain undisclosed PFAS." *Id.* ¶ 1; *see id.* ¶¶ 89–96.

Coty "manufactures certain popular waterproof mascara products," including Lash Blast Volume ("Lash Blast") and Clump Crusher under the CoverGirl brand name. *Id.* ¶ 2. Plaintiffs do not allege that the Notre Dame Study, which did not name the mascaras it tested in its two research phases, found Lash Blast or Clump Crusher to contain PFAS. *Id.* ¶¶ 91, 93–95. Following the publication of the Notre Dame Study, however, Plaintiffs "arranged for independent third-party testing to determine whether certain CoverGirl-branded cosmetic products contained PFAS" (the "Commissioned Test" or the "Test"). *Id.* ¶ 103. The Commissioned Test found that Lash Blast contained five types of PFAS and that Clump Crusher contained four types. [2] *Id.* ¶¶ 106–07.

[2] The Lash Blast PFAS included perfluorooctanoic acid (PFOA) at a concentration of 250 parts per trillion, perfluorohexanoic acid (PFHxA)

at a concentration of 4,600 parts per trillion, hexafluoropropylene oxide dimmer acid (HFPO-DA, also known as Gen-X) at a concentration of 2,500 parts per trillion, N-methyl perfluorooctane sulfonamido ethanol (NMeFOSE) at an unspecified concentration, and N-ethyl perfluorooctane sulfonamido ethanol (NEtFOSE) at an unspecified concentration. Am. Compl. ¶¶ 106–08, 111. The Clump Crusher PFAS included perfluorohexanoic acid (PFHxA) at an unspecified concentration, perfluorododecanesulfonic acid (PFDoS) at an unspecified concentration, perfluoropentanoic acid (PFPeA) at a concentration of 1,000 parts per trillion, and adsorbable organic fluorine (AOF) at an unspecified concentration. *Id.* ¶¶ 107, 112.

***2** PFAS may be intentionally added to cosmetics as emulsifiers, stabilizers, surfactants, viscosity regulators, and solvents. *Id.* ¶¶ 74–78. PFAS may also be found in cosmetics because of degradation, impurities, or the use of ingredients treated with PFAS. *Id.* ¶¶ 81–84. The ingredient lists for Lash Blast and Clump Crusher do not state that the products contain PFAS, and their packaging does not state that the products could degrade to ultimately contain PFAS. *Id.* ¶¶ 135, 136, 138.

Coty "uses standardized manufacturing and production protocols designed to minimize variations in the production process," including "strict quality control measures, standardized ingredient sourcing, and rigorous testing procedures." *Id.* ¶ 143. Plaintiffs claim that as a result, Coty "knew or should have known [that Lash Blast and Clump Crusher] contain toxic PFAS at the point of sale." *Id.* ¶ 151.

Plaintiffs Brown, Giordano, Carde-Hartman, Bobczyk, Simmons, Miller, Zacarias, Chadwell, and Scandore purchased "one or more" tubes of Lash Blast since April 1, 2019. *Id.* ¶¶ 155, 166, 177, 189, 201, 214, 225, 248, 259. Plaintiffs Ingle and Scandore purchased "one or more" tubes of Clump Crusher since April 1, 2018. *Id.* ¶¶ 236, 259. Each Plaintiff relied on Coty's advertisements, packaging, labeling, ingredient lists, and disclosures when purchasing the product. *Id.* ¶¶ 159–60, 170–71, 182–83, 194–95, 207–08, 218–19, 229–30, 241–42, 252–53, 263–64. If each Plaintiff had known at the time of purchase that Lash Blast or Clump Crusher contained PFAS, she would not have purchased the product or would have paid less for the product. *Id.* ¶¶ 163, 174, 186, 198, 211, 222, 233, 245, 256, 267.

II. Procedural History

On April 1, 2022, Plaintiff Brown brought this action on behalf of herself and all others in the United States who purchased Lash Blast or Clump Crusher between 2018 and the present, asserting claims under the New York consumer protection law, as well as breach of an express warranty, breach of an implied warranty, and unjust enrichment. Compl. ¶¶ 89, 109, 144, ECF No. 1. By order dated March 29, 2023 (the "Order"), the Court dismissed the complaint and granted Brown leave to amend. Order at 12, ECF No. 61.

On May 12, 2023, Plaintiffs filed the amended complaint, adding nine plaintiffs and asserting claims under the consumer protection laws of six additional states. Am. Compl. ¶¶ 17–26. Coty again moves to dismiss the amended complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rules 12(b)(6) and 9(b). ECF No. 79; *see also* Def. Mem. at 1–4.

DISCUSSION

I. Legal Standard

Under Rule 12(b)(1), a district court must dismiss a complaint if the plaintiff has not established standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "At the pleading stage, Plaintiffs have the burden of alleging facts that affirmatively and plausibly suggest that they have standing to sue." *Amadei v. Nielsen*, 348 F. Supp. 3d 145, 154 (E.D.N.Y. 2018) (cleaned up) (citing *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016)). A plaintiff has standing if she has pleaded a case or controversy in the outcome of which she has a personal stake. *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.a.r.l*, 790 F.3d 411, 417 (2d Cir. 2015). For a plaintiff to have standing to bring a lawsuit under Article III of the United States Constitution, "(1) the plaintiff must have suffered an injury-in-fact; (2) there must be a causal connection between the injury and the conduct at issue; and (3) the injury must be likely to be redressed by a favorable decision." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (citation omitted). The jurisdictional question must be resolved before the merits. *Cortlandt St. Recovery Corp.*, 790 F.3d at 417. "Because standing is challenged here on the basis of the pleadings, [the Court] therefore accept[s] as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."

Carver v. City of New York, 621 F.3d 221, 225 (2d Cir. 2010) (cleaned up).

II. Analysis

***3** The injury-in-fact requirement is a "low threshold" and can be satisfied at the pleading stage with "general factual allegations of injury." *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (citations omitted). As with their original complaint, Plaintiffs claim that they "paid Defendant a price premium" for the products because they believed that the products did not contain PFAS. Am. Compl. ¶ 272; Order at 6–7. "Such an allegation that a plaintiff would not have purchased a product or would not have paid the same amount comfortably satisfies the injury-in-fact prong of Article III standing." *Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 575 (S.D.N.Y. 2021) (collecting cases).

However, because Plaintiffs claim that "they were injured because they overpaid for misbranded and/or inadequately labeled [p]roducts," they must plausibly allege that "one of them purchased a [p]roduct that was misbranded, *i.e.*, that contained PFAS." *Onaka v. Shiseido Ams. Corp.*, No. 21 Civ. 10665, 2023 WL 2663877, at *4 (S.D.N.Y. Mar. 28, 2023). Plaintiffs claim to have bought "one or more tubes" of Lash Blast or Clump Crusher in the past five to six years. Am. Compl. ¶¶ 155, 166, 177, 189, 201, 214, 225, 236, 248, 259. They do not claim to have "purchased the [p]roducts with any regular frequency." *Onaka*, 2023 WL 2663877, at *5. Plaintiffs concede that they did not test the individual products that each purchased. Pl. Opp. at 10, ECF No. 82.

"[T]he fact that [P]laintiffs did not actually test the products that they purchased does not mean that they lack standing." *Clinger v. Edgewell Personal Care Brands, LLC*, No. 21 Civ. 1040, 2023 WL 2477499, at *3 (D. Conn. Mar. 13, 2023). But, Plaintiffs must allege that "the presence of PFAS in the [p]roducts is so widespread as to render it plausible that any Plaintiff purchased a mislabeled [p]roduct at least once." *Onaka*, 2023 WL 2663877, at *4.

"[A] product defect may be plausibly inferred from the fact that a third-party investigation has revealed defects in the same line of such products." *Clinger*, 2023 WL 2477499, at *3 (citing *John*, 858 F.3d at 736–38). Independent testing of a product line must be "reasonably near in time" to Plaintiffs' own purchases. *Onaka*, 2023 WL 2663877, at *4 (citation omitted). For example, in *John*, a city investigation found that, from fall 2014 to winter 2015, Whole Foods "systematically" and "routinely inflated the weight listed on the labels of pre-packaged products" in eight New York City stores, such that "89 percent of all packages" tested by the city agency "failed to satisfy federal labeling standards." 858 F.3d at 734–37. The plaintiff alleged that he had made monthly purchases of cheese and cupcakes—which were "among the pre-packaged products" identified by the investigation as mislabeled—at two New York City stores during the time period analyzed by the city. *Id.* at 735. The Second Circuit held that these allegations were sufficient to show standing: the investigation's findings of systematic mislabeling and the plaintiff's monthly purchases made it "plausible that [the plaintiff] overpaid for at least one product." *Id.* at 737.

Plaintiffs argue that they have alleged "systemic" contamination of Lash Blast and Clump Crusher, making it similarly plausible that they each overpaid for at least one product. Pl. Opp. at 11. To support their claim, Plaintiffs cite to the Notre Dame Study, the Commissioned Test, and Defendant's standardized manufacturing processes. *Id.* at 10–11. Although Plaintiffs "need not prove the accuracy of the [studies'] findings or the rigor of [their] methodology" at the pleading stage, *id.*, Plaintiffs' allegations are deficient because they are "murky as to [the studies'] actual findings." *Hicks v. L'Oréal U.S.A., Inc.*, No. 22 Civ. 1989, 2023 WL 6386847, at *7 (S.D.N.Y. Sept. 30, 2023) (dismissing a complaint that also relied on the Notre Dame Study and a plaintiff-commissioned study); *see Esquibel v. Colgate-Palmolive Co.*, 2023 WL 7412169, at *3 (S.D.N.Y. Nov. 9, 2023) ("Plaintiffs have pled insufficient information about the third-party testing to support their assertion that the products the named Plaintiffs purchased plausibly contained PFAS.").

***4** According to the amended complaint, the Notre Dame Study analyzed 231 cosmetic products for total fluorine, which Plaintiffs claim is a "scientifically valid, widely used method to investigate whether PFAS are present." Am. Compl. ¶¶ 89–90. But, although mascaras were one of the product categories with the highest proportion of fluorine concentrations, Plaintiffs do not indicate "how many total mascara products were tested[,] what percentage of those mascaras contained fluorine," whether "the presence of fluorine necessarily means the presence of PFAS," and

whether either Lash Blast or Clump Crusher were among the products tested. *Hicks*, 2023 WL 6386847, at *7. [3]

3 Plaintiffs also do not allege the time period analyzed by the Notre Dame Study, and the Court cannot conclude on the face of the complaint that the testing is "reasonably near in time" to Plaintiffs' own purchases. *Onaka*, 2023 WL 2663877, at *4.

Plaintiffs attempt to support their allegations with the Commissioned Test, which did analyze Lash Blast and Clump Crusher and identified specific types of PFAS in each product. Plaintiffs claim that they need not say more because "[i]t is reasonable to assume that [PFAS] did not magically appear ... [and] must have appeared by reason of some aspect of the manufacturing process." Pl. Opp. at 11 (quoting *Clinger*, 2023 WL 2477499, at *4). But, Plaintiffs are vague about the Test's findings. In contrast to the governmental investigation in *John*, the Test is not alleged to have found that the presence of PFAS is "systemic" in Lash Blast or Clump Crusher. [4] Plaintiffs do not allege how many lots or tubes of Lash Blast and Clump Crusher were tested, nor do they "allege how pervasive PFAS was found to be" or "whether all products within the same product line tested positive for the presence of PFAS." *Hicks*, 2023 WL 6386847, at *8. These details are necessary not to scrutinize the Test's scientific validity, but to understand what the Test found. Without more, the Court cannot know if all tested tubes of Lash Blast and Clump Crusher tested positive for similar levels of the identified PFAS—or if a single tube tested positive, while every other tested tube showed no signs of PFAS. In the latter case, the Court cannot plausibly infer that the few tubes purchased by Plaintiffs over a span of years contain PFAS.

4 Unlike the studies in *John* and *Clinger*, the Commissioned Test is not a wholly independent third-party investigation with public methodology; Plaintiffs commissioned the Test but have disclosed few details about who conducted it and how it was conducted. *See* Am. Compl. ¶¶ 103–105 ("Plaintiffs sought out an independent laboratory that used industry standard techniques").

Plaintiffs contend that "[i]f PFAS is present in the [p]roducts because of degradation or impurity of raw materials, or because Coty's manufacturing process relies on a contaminated water source, the impact is reasonably likely to be systemic given Coty's standardized processes intended to ensure consistency of the final product." Pl. Opp. at 11. But, Plaintiffs do not allege that degradation and impurities occur at a predictable and systemic rate, nor do they provide factual content to support such an inference. And, the "mere risk that the [p]roduct was contaminated with an injurious substance ... does not establish an economic injury." *Esquibel*, 2023 WL 7412169, at *3.

Plaintiffs have failed to allege that they each suffered an injury in fact. Accordingly, Defendant's motion to dismiss for lack of standing is GRANTED. [5]

5 Because the Court finds that Plaintiffs fail to adequately allege Article III standing, it shall not reach the remainder of Defendants' arguments. *See* *Onaka*, 2023 WL 2663877, at *6.

III. Dismissal Without Prejudice

***5** Defendant requests that the complaint be dismissed with prejudice. Def. Mem. at 4. "[W]here a complaint is dismissed for lack of Article III standing, the dismissal must be without prejudice, rather than with prejudice," because the Court lacks the power to "adjudicate the merits of the case" or "dismiss a case with prejudice." *Carter,* 822 F.3d at 54–55.

"Leave to amend, though liberally granted, may be properly denied for repeated failure to cure deficiencies by amendments previously allowed or futility of amendment, among other reasons." *Esquibel*, 2023 WL 7412169, at *4 (quotation marks and citation omitted). Plaintiffs have "had the benefit of a court ruling with respect to the deficiencies of [their] pleading." *Id.* (citation omitted). The Order instructed Plaintiff Brown that if she "is indeed alleging that Lash Blast may contain PFAS as a result of degradation or impurities, [she] has not alleged that the products she herself purchased contained PFAS such that she can allege an injury in fact." Order at 10. The Court shall not at this time grant leave to amend. If—and only if—Plaintiffs "believe that they can plead facts that would adequately state a claim upon which relief may be granted and which can cure the standing-related defects identified above," Plaintiffs may move for leave to amend. *Hicks*, 2023 WL 6386847, at *10.

CONCLUSION

For the foregoing reasons, Coty's motion to dismiss pursuant to Rule 12(b)(1) is GRANTED. The deadlines in the second amended case management plan, ECF No. 89, are VACATED. By **April 15, 2024**, Plaintiffs may move for leave to file an amended complaint.

SO ORDERED.

All Citations

Slip Copy, 2024 WL 894965

KeyCite Yellow Flag - Negative Treatment
Overruling Recognized by McNeff v. Pleasanton Police Department, N.D.Cal., July 17, 2024

838 F.3d 958
United States Court of Appeals, Ninth Circuit.

Angela EBNER, Plaintiff–Appellant,
v.
FRESH, INC., a Delaware Corporation, Defendant–Appellee.

No. 13–56644
|
Argued and Submitted January 11, 2016—Pasadena, California
|
Filed March 17, 2016
|
Amended September 27, 2016

Synopsis

Background: Consumer brought putative class action against cosmetics manufacturer, alleging that manufacturer's label, tube design, and packaging for its lip treatment product were deceptive and misleading in violation of California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA). The United States District Court for the Central District of California, James V. Selna, J., 2013 WL 9760035, entered an order granting manufacturer's motion to dismiss, and consumer appealed.

Holdings: On denial of panel rehearing and rehearing en banc, the Court of Appeals, Tashima, Circuit Judge, held that:

California's safe harbor doctrine barred claim that manufacturer's label was deceptive in that only 75% of product was reasonably accessible;

California's safe harbor doctrine did not bar claim that manufacturer omitted a supplemental statement about amount of product that was accessible;

Federal Food, Drug, and Cosmetic Act (FDCA) did not preempt claim that manufacturer omitted such a statement;

manufacturer did not violate California law by omitting a supplemental statement; and

any product falling below dispenser's stop device was not prohibited slack fill under California's Fair Packaging and Labeling Act (FPLA).

Affirmed.

Opinion, 818 F.3d 799, withdrawn.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

***961** Henry Alexander Iliff (argued), Dorsey & Whitney LLP, New York, New York; James E. Howard, Dorsey & Whitney LLP, Seattle, Washington; Adam H. Springel, Springel & Fink LLP, Irvine, California, for Plaintiff–Appellant.

Stephen R. Smerek (argued), Drew A. Robertson, and Shawn Rieko Obi, Winston & Strawn LLP, Los Angeles, California, for Defendant–Appellee.

Appeal from the United States District Court for the Central District of California, James V. Selna, District Judge, Presiding. DC No. 8:13 cv–00477 JVS.

Before: Jerome Farris, A. Wallace Tashima, and Jay S. Bybee, Circuit Judges.

ORDER

The Opinion filed March 17, 2016, and reported at 818 F.3d 799, is withdrawn and replaced by the Amended Opinion filed concurrently with this order.

With these amendments, the panel has voted to deny the petition for panel rehearing. Judge Bybee votes to deny the petition for rehearing en banc and Judges Farris and Tashima so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

TASHIMA, Circuit Judge:

Angela Ebner ("Plaintiff") alleges that cosmetics and skin care products manufacturer Fresh, Inc. ("Fresh") deceived consumers about the quantity of lip balm in its Sugar Lip Treatment ("Sugar") product line. Although Sugar's label accurately indicates the net weight of included lip product, the tube design uses a screw mechanism that allows only 75% of the product to advance up the tube. A plastic stop device prevents the remaining 25% from advancing past the tube opening. Each Sugar tube contains a weighted metallic bottom and is wrapped in oversized packaging. Plaintiff brought a putative consumer class action against Fresh, alleging that Fresh's label, tube design, and packaging are deceptive and misleading. The district court granted Fresh's Rule 12(b)(6) motion ***962** to dismiss Plaintiff's First Amended Complaint ("FAC") with prejudice. We affirm.

I.

We accept as true the well-pleaded factual allegations in the complaint. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). According to the FAC, Sugar is a lip treatment that comes in a variety of flavors and tints and sells in retail stores and on the internet for approximately $22.50 to $25.00 per unit. Over the past four years, Plaintiff, a California resident, has purchased Sugar at various locations in Southern California.

Sugar comes in an oversized dispenser tube that uses a screw mechanism to push the lip product to the top of the tube. The tube is packaged and sold in a large cardboard box. Both the tube and the cardboard box have labels indicating the net weight of the included lip product. For an "original" size tube, the indicated product weight is "4.3g e 0.15 oz."; for the "mini" size, the label reads "2.2.g e 0.08 oz." The FAC does not allege that the Sugar tube contains less than the stated quantity of product. Rather, it alleges that the stated product quantity is false and misleading because only a portion of that product is reasonably accessible to the consumer. Specifically, the tube's screw mechanism permits only 75% of the total lip product to advance past the top of the tube. A plastic stop device prevents the remaining 25% of the product "from being accessible to the consumer in its intended manner or any other reasonable manner." Plaintiff alleges that the "intended manner" of application is to apply the product from the tube directly to the lips. By contrast, other lip balms using a dispenser tube, such as Burt's Bees, make "all or more" of the advertised product weight accessible to the consumer.

Plaintiff alleges that Sugar's "vastly oversized tubes and boxes" create the misleading impression that each unit has a larger quantity of lip product than it actually contains. Each Sugar tube also contains a 5.35 gram metallic weight that is concealed at the base of the tube. Collectively, the tube, cardboard box, weighted bottom, and 4.3 grams of lip product in an original tube of Sugar weigh approximately 29 grams. Plaintiff contends that as a result of Fresh's labeling, design, and packaging practices, she was misled as to the amount of lip product actually accessible in a tube of Sugar and was deprived of the value of her purchases.

The FAC asserts four state-law causes of action: (1) violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*; (2) violation of the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*; (3) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; and (4) unjust enrichment. Fresh moved to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion and denied leave to amend. This timely appeal followed.

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291. "We review de novo the district court's grant of a motion to dismiss under Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Skilstaf, Inc.*, 669 F.3d at 1014. We may "affirm the district court's dismissal on any ground supported by the record." *ASARCO, LLC v. Union Pac. R.R.*, 765 F.3d 999, 1004 (9th Cir. 2014) (citations omitted). Dismissal is appropriate if the plaintiff has not "allege[d] enough facts to state a claim to ***963** relief that is plausible on its face." *Turner v. City & Cty. of S.F.*, 788

F.3d 1206, 1210 (9th Cir. 2015) (quoting *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008)). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

A court's denial of leave to amend is reviewed for an abuse of discretion. *Alvarez v. Chevron Corp.*, 656 F.3d 925, 931 (9th Cir. 2011). "In dismissing for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (citation omitted).

III.

The district court divided Plaintiff's claims into two categories: (1) claims based on Sugar's labeling; and (2) claims based on Sugar's tube design and packaging. In dismissing the label-based claims, the district court concluded that both California's safe harbor doctrine and federal preemption under the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, were independently fatal to Plaintiff's claims. As for the design and packaging claims, the district court concluded that neither Sugar's tube design nor packaging were deceptive or misleading to the reasonable consumer. Additionally, the district court concluded that the FAC failed to plead a violation of the California Fair Packaging and Labeling Act's ("FPLA") prohibition of nonfunctional slack fill, Cal. Bus & Prof. Code § 12606. We discuss each of these in turn.

A.

1. California's Safe Harbor Doctrine

The UCL, CLRA, and FAL, under which Plaintiff's deceptive labeling claims are brought, all prohibit unlawful, unfair, or fraudulent business practices. *See* Cal. Bus. & Prof. Code §§ 17200, 17500; *see also* Cal. Civ. Code § 1770. In California, unfair competition claims are subject to the safe harbor doctrine, which precludes plaintiffs from bringing claims based on "actions the Legislature permits." *Cel–Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527, 542 (1999). To fall within the safe harbor, the challenged conduct must be affirmatively permitted by statute—the doctrine does not immunize from liability conduct that is merely not unlawful. As the California Supreme Court explained:

> There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful.... Acts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law, but acts may, if otherwise unfair, be challenged under the unfair competition law even if the Legislature failed to proscribe them in some other provision.

Id., 83 Cal.Rptr.2d 548, 973 P.2d at 541–42.

The FAC alleges that, although the Sugar label accurately states the net weight of lip product in the tube, only 75% of that product is reasonably accessible. To the extent the FAC challenges the Sugar label's accurate net weight statement, this claim is barred by the safe harbor doctrine. Both federal and California law affirmatively require cosmetics manufacturers to include an accurate statement of the net weight of included cosmetic product. 21 C.F.R. § 701.13(g) ("The declaration shall ***964** accurately reveal the quantity of cosmetic in the package exclusive of wrappers and other material packed therewith[.]"); Cal. Bus. & Prof. Code § 12603(b) ("The net quantity of contents [ ]in terms of weight or mass ... shall be separately and accurately stated ... upon the principal display panel of that label[.]"). Because Fresh complied with federal and state law requiring a net weight statement on Sugar's label, this conduct cannot form the basis of an unfair competition claim. *Cal–Tech Commc'ns, Inc.*, 83 Cal.Rptr.2d 548, 973 P.2d at 541–42.

Plaintiff's other label claim is based on Fresh's *omission* of any supplemental or clarifying statement about product accessibility. This omission, Plaintiff argues, renders the existing net weight label deceptive and misleading. Unlike a claim seeking to alter the net weight declaration itself, this

claim does not fall within the safe harbor because there is no law expressly permitting the omission of supplemental statements. *See* *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1167 (9th Cir. 2012) ("[T]o fall under a safe harbor, the omission of the annual [fee] disclosure from Defendants' advertisements must be expressly permitted by some other provision. It is not enough if [federal law] merely fail[s] to prohibit such an omission."). For that matter, federal regulations governing cosmetic labeling expressly *permit* "supplemental statements at locations other than the principal display panel(s) describing in nondeceptive terms the net quantity of contents...." 21 C.F.R. § 701.13(q). Likewise, the FPLA, Cal. Bus. & Prof. Code § 12601 *et seq.*, permits supplemental statements "describing in nondeceptive terms the net quantity of contents[.]" Cal. Bus. & Prof. Code § 12605. Because the omission of supplemental statements is not expressly and affirmatively permitted by law, Plaintiff's claim that the net weight label is nonetheless deceptive due to the lack of a supplemental statement explaining product accessibility is not precluded by the safe harbor doctrine.

2. Federal Preemption Under the FDCA

As an additional ground for dismissing the label-based claims, the district court held that Plaintiff's claim that Fresh was required to include supplemental statements regarding product accessibility was preempted by the FDCA. We disagree.

The relevant FDCA provision states:

> [N]o State ... may establish or continue in effect any requirement for labeling or packaging of a cosmetic that is different from or in addition to, or that is otherwise not identical with, a requirement specifically applicable to a particular cosmetic or class of cosmetics under this chapter.

21 U.S.C. § 379s(a). Importantly, § 379s "does not preempt state laws that allow consumers to sue cosmetics manufacturers that label or package their products *in violation of federal standards*." *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 757 (9th Cir. 2015) (emphasis added).

Fresh argues that any state-law claim requiring it to include supplemental statements about product accessibility is preempted by the FDCA because federal law does not impose any such requirement on cosmetics manufacturers. This argument misconstrues Plaintiff's claim. In challenging Fresh's omission of supplemental statements about product weight, Plaintiff seeks to enforce § 111730 of California's Sherman Food, Drug, and Cosmetic Law ("Sherman Law"), Cal. Health & Safety Code § 109875 *et seq.* Section 111730 states that "[a]ny cosmetic is misbranded ***965** if its labeling is false or misleading in any particular." Cal. Health & Safety Code § 111730. The language in the Sherman Law is virtually identical to the language in the FDCA, which states that a "cosmetic shall be deemed to be misbranded if its labeling is false or misleading in any particular." 21 U.S.C. § 362(a). In other words, both the federal FDCA and California's Sherman Law prohibit the false or misleading labeling of a cosmetic. Viewed in this light, Plaintiff "is not asking [Fresh] to modify or enhance any aspect of its cosmetics labels that are required by federal law." *Astiana*, 783 F.3d at 758. Rather, the state-law duty that Plaintiff seeks to enforce under the Sherman Law is *identical* to Fresh's federal duty under the FDCA: the duty to avoid false or misleading labeling. Whether or not the lack of a supplemental statement rendered the accurate net weight label deceptive goes to the *merits* of the claim, not the question of federal preemption. *See* *id.* at 758 n.3 ("To the extent [the defendant] claims that no consumer would be deceived ... this argument goes to the merits of [plaintiff's] assertion that she was deceived by the allegedly false or misleading label, not the question of federal preemption."). Because the Sherman Law does not amount to something "different from or in addition to" what federal law already requires, under 21 U.S.C. § 379s, preemption does not bar Plaintiff's claim.

3. Reasonable Consumer Standard

Although we conclude that neither the safe harbor doctrine nor FDCA preemption bars Plaintiff's supplemental statement claim, this label claim ultimately fails on the merits because Plaintiff cannot plausibly allege that the omission of supplemental disclosures about product weight rendered Sugar's label "false or misleading" to the reasonable consumer. Plaintiff's claims under the California consumer protection statutes are governed by the "reasonable consumer" test. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Under this standard, Plaintiff must "show that 'members of the public are likely to

be deceived.' " *Id.* (citation omitted); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). This requires more than a mere possibility that Sugar's label "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 129 Cal.Rptr.2d 486, 495 (2003). Rather, the reasonable consumer standard requires a probability "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id.*

Plaintiff's claim that the reasonable consumer would be deceived as to the amount of lip product in a tube of Sugar is not plausible. It is undisputed that the Sugar label discloses the correct weight of included lip product. Dispenser tubes that use a screw mechanism to push up a solid bullet of lip product [1] are commonplace in the market. The reasonable consumer understands the general mechanics of these dispenser tubes and further understands that some product may be left in the tube to anchor the bullet in place. Moreover, the allegations of the FAC make clear that even after the plastic stop device prevents more product from advancing up the tube, the consumer can still see the surface of the remaining bullet. Although the consumer may not know precisely how much product remains, the consumer's knowledge ***966** that *some* additional product lies below the tube's opening is sufficient to dispel any deception; at that point, it is up to the consumer to decide whether it is worth the effort to extract any remaining product with a finger or a small tool. A rational consumer would not simply assume that the tube contains no further product when he or she can plainly see the surface of the bullet. And even if "some consumers might hazard such an assumption," the Sugar tube is not false and deceptive merely because the remaining product quantity may be " 'unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons ...' " that may purchase the product. *Davis*, 691 F.3d at 1162 (quoting *Lavie*, 129 Cal.Rptr.2d at 494).

[1] We use the term "bullet of lip product" to describe the cylindrical mass of lip product that is dispensed from the top of the tube.

Plaintiff's reliance on *Williams* is unpersuasive. In *Williams*, parents of small children brought a class action against Gerber based on the allegedly deceptive packaging of its Fruit Juice Snacks, a food product for toddlers. 552 F.3d at 936. The two most prominent ingredients of Fruit Juice Snacks were sugar and corn syrup, and the only fruit or juice content was white grape juice from concentrate. *Id.* Nevertheless, the product: (1) was named "Fruit Juice Snacks"; (2) had images of fruits such as oranges, peaches, strawberries, and cherries on the box; (3) stated that it was made with "fruit juice and other natural ingredients"; and (4) stated that it was "one of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy." *Id.* at 936, 939. We concluded that these features on the packaging would lead a reasonable consumer to believe falsely that the product contained the pictured fruits and that all the ingredients were natural. *Id.* In light of such deceptive packaging, we rejected the use of the ingredient list as a "shield for liability for the deception[,]" explaining that a reasonable consumer is not "expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." *Id.* Stated straightforwardly, *Williams* stands for the proposition that *if* the defendant commits an act of deception, the presence of fine print revealing the truth is insufficient to dispel that deception.

But here, unlike in *Williams*, there is no deceptive act to be dispelled. As explained above, Sugar's weight label complies with both federal and California law. Further, the weight label does not contradict other representations or inferences on Sugar's packaging. Apart from the accurate weight label, there are no other words, pictures, or diagrams adorning the packaging, as there were in *Williams*, from which *any* inference could be drawn or on which *any* reasonable belief could be based about how much of the total lip product can be accessed by using the screw mechanism. In the absence of any statement or other depiction anywhere on the package about lip product accessibility, we conclude that it is not plausible that "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled" into thinking the entire lip bullet will clear the tube's opening. *See* *Lavie*, 129 Cal.Rptr.2d at 495.

Plaintiff has not alleged, and cannot allege, facts to state a plausible claim that the Sugar label is false, deceptive, or

misleading. Thus, the district court did not err in dismissing the label-based claims.

B.

Next, Plaintiff alleges that Sugar's oversized and weighty packaging and tube design are unfair, deceptive, and misleading under the FAL, CLRA, and UCL. As ***967** part of her UCL claim, Plaintiff also alleges unlawful acts in violation of the Sherman Law, which proscribes "misleading" cosmetics containers, Cal. Health & Safety Code § 111750, and the FPLA, which provides that no container shall have a false bottom that "facilitate[s] the perpetration of deception or fraud," Cal. Bus. & Prof. Code § 12606(a).

Like the label-based claims, Plaintiff's design and packaging claims under these statutes are governed by the reasonable consumer test.[2] *Williams*, 552 F.3d at 938 (citing *Freeman*, 68 F.3d at 289). Plaintiff alleges that the tube's screw mechanism, the 5.35 gram metallic bottom, and the oversized tube and cardboard packaging all contribute to the misleading impression of a larger quantity of lip product than is actually included. These claims fail for largely the same reasons that the label-based claims fail. As explained above, an accurate net weight label is affixed to every Sugar tube and its accompanying cardboard box. Just as the reasonable consumer understands that additional product may remain in the dispenser tube after the screw mechanism prevents further advancement of the lip bullet, the reasonable consumer also understands that some additional weight at the bottom of the tube—not consisting of product—may be required to keep the tube upright.

2 Having dismissed Plaintiff's label-based FAL claim on safe harbor and preemption grounds, the district court dismissed any remaining part of the FAL claim on the ground that Sugar's packaging does not constitute an untrue or misleading "statement" prohibited by the FAL. This ruling was in error. The FAL prohibits unfair, deceptive, untrue, or misleading *advertising*, and this Court has previously concluded that a product's packaging may form the basis of an FAL claim. *See* *Williams*, 552 F.3d at 938–40 (reversing district court's dismissal of an FAL claim where defendant's packaging for its fruit juice snack product included pictures of different fruits "potentially suggesting (falsely) that those fruits or their juices are contained in the product"). However, as explained below, the FAL claim ultimately fails because Plaintiff has not alleged a plausible claim for relief.

Sugar sells for approximately $22.50 to $25.00 a unit. When viewed in the proper context of the high-end cosmetics market, Sugar's elaborate packaging and the weighty feel of the tube is commonplace and even expected by a significant portion of Fresh's "targeted consumers." *Lavie*, 129 Cal.Rptr.2d at 495. Because of the widespread nature of this practice, no reasonable consumer expects the weight or overall size of the packaging to reflect directly the quantity of product contained therein. Because Plaintiff cannot plausibly allege that Sugar's design and packaging is deceptive, the district court did not err in dismissing the packaging-based claims.

C.

Finally, Plaintiff claims that the Sugar tube violates § 12606(b) of the FPLA, which deems a container misleading if it contains nonfunctional slack fill. Cal. Bus. & Prof. Code § 12606(b). Slack fill is defined as "the difference between the actual capacity of a container and the volume of product contained therein." *Id.* "Nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than" one or more of the 15 enumerated reasons listed in the statute. *Id.*

The FAC alleges that "the significant portion of product falling below the mechanical stop device constitutes nonfunctional slack fill." This cannot constitute "slack fill" because under the plain language of the statute, slack fill means the portion of the container *without* product, *i.e.*, empty space. Thus, the lip product falling below the stop device does not meet the definition of actionable slack fill. The ***968** district court correctly concluded that the FAC fails to allege a violation of § 12606(b).

IV.

Plaintiff also contends that she should have been given leave to amend her FAC. Although, under Federal Rule of Civil

Procedure 15(a)(2), leave to amend should be "freely" given, that liberality does not apply when amendment would be futile. *See* *Doe*, 58 F.3d at 497 (leave to amend should be freely given, "unless [the court] determines that the pleading could not possibly be cured by the allegation of other facts"). Such is the case here. As the above analysis in Part III demonstrates, any further amendment would be futile.

Finally, Plaintiff also pleads a cause of action for unjust enrichment. The FAC recognizes, however, that "[u]njust enrichment is a component of recovery under the statutes [UCL, CLRA, FAL, and FPLA] cited above." Thus, here, unjust enrichment is asserted as a remedy for the statutory violations alleged in the FAC. Because we have concluded that the FAC fails to state a claim under any of these statutes, the unjust enrichment cause of action has been mooted.

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For the foregoing reasons, the judgment of the district court is **AFFIRMED.**

All Citations

838 F.3d 958, 16 Cal. Daily Op. Serv. 10,467, 2016 Daily Journal D.A.R. 9858

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION, Plaintiff, v. CURE ENCAPSULATIONS, INC., *et al.*, Defendants.	Case No. 19-cv-982 (LDH) (ST)

JOINT MOTION FOR ENTRY OF STIPULATED ORDER FOR PERMANENT INJUNCTION AND MONETARY JUDGMENT

Plaintiff, the Federal Trade Commission ("FTC"), and defendants, Cure Encapsulations, Inc. and Naftula Jacobowitz ("Defendants"), respectfully and jointly move the Court for entry of the attached Stipulated Order for Permanent Injunction and Monetary Judgment. In support of this motion, the parties state as follows:

1. On February 19, 2019, the FTC filed a Complaint for Permanent Injunction and Other Equitable Relief against Defendants pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), alleging deceptive marketing practices and false advertising in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

2. The FTC and Defendants, having been represented by counsel and acting by and through such counsel, have consented to the entry of a proposed Stipulated Order for Permanent Injunction and Monetary Judgment, attached as Exhibit 1 hereto, without a trial or adjudication of any issue of law or fact. The parties will email chambers a word processing version of the proposed Order pursuant to Rule II.C of the Court's Individual Practice Rules.

3. Entry of this Stipulated Order for Permanent Injunction and Monetary Judgment would resolve this matter in full, except the Court would retain jurisdiction for the purpose of enforcement of the Order.

WHEREFORE, the parties respectfully move this Court to enter the attached Stipulated Order for Permanent Injunction and Monetary Judgment.

Dated: 2/19/2019

Respectfully submitted,

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Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION, Plaintiff, v. CURE ENCAPSULATIONS, INC., a New York corporation; and NAFTULA JACOBOWITZ, a/k/a Nat Jacobs and Nate Jacobs, individually and as an officer of CURE ENCAPSULATIONS, INC., Defendants.	Case No. 19-cv-982 (LDH) (ST) **STIPULATED ORDER FOR PERMANENT INJUNCTION AND MONETARY JUDGMENT**

Plaintiff, the Federal Trade Commission ("Commission" or "FTC"), filed its Complaint For Permanent Injunction And Other Equitable Relief ("Complaint"), for a permanent injunction, and other equitable relief in this matter, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b). The Commission and Defendants stipulate to the entry of this Stipulated Order for Permanent Injunction and Monetary Judgment ("Order") to resolve all matters in dispute in this action between them.

THEREFORE, IT IS ORDERED as follows:

FINDINGS

1. This Court has jurisdiction over this matter.

2. The Complaint charges that Defendants participated in deceptive acts or practices in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, in connection with the labeling, advertising, marketing, distribution, and sale of Quality Encapsulations Garcinia Cambogia Extract with HCA, a product that purportedly causes weight loss.

3. Defendants neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Order. Only for purposes of this action, Defendants admit the facts necessary to establish jurisdiction.

4. Defendants waive any claim that they may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action through the date of this Order, and agree to bear their own costs and attorney fees.

5. Defendants waive all rights to appeal or otherwise challenge or contest the validity of this Order.

DEFINITIONS

For the purpose of this Order, the following definitions apply:

A. "**Defendants**" means the Individual Defendant and the Corporate Defendant, individually, collectively, or in any combination.

1. "**Corporate Defendant**" means Cure Encapsulations, Inc. and its successors and assigns.

2. "**Individual Defendant**" means Naftula Jacobowitz, also known as Nat Jacobs and Nate Jacobs.

B. "**Covered Product**" means any Dietary Supplement, Food, or Drug, including Quality Encapsulations Garcinia Cambogia Extract with HCA.

C. "**Dietary Supplement**" means: (1) any product labeled as a dietary supplement or otherwise represented as a dietary supplement; or (2) any pill, tablet, capsule, powder, softgel, gelcap, liquid, or other similar form containing one or more ingredients that are a vitamin, mineral, herb or other botanical, amino acid, probiotic, or other dietary substance for use by humans to supplement the diet by increasing the total dietary intake, or a concentrate, metabolite,

constituent, extract, or combination of any ingredient described above, that is intended to be ingested, and is not represented to be used as a conventional food or as a sole item of a meal or the diet.

D. "**Drug**" means: (1) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals; (3) articles (other than food) intended to affect the structure or any function of the body of humans or other animals; and (4) articles intended for use as a component of any article specified in (1), (2), or (3); but does not include devices or their components, parts, or accessories.

E. "**Essentially Equivalent Product**" means a product that contains the identical ingredients, except for inactive ingredients (e.g., binders, colors, fillers, excipients) in the same form and dosage, and with the same route of administration (e.g., orally, sublingually), as the Covered Product; provided that the Covered Product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field indicates that the amount and combination of additional ingredients is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product.

F. "**Food**" means: (1) any article used for food or drink for humans or other animals; (2) chewing gum; and (3) any article used for components of any such article.

ORDER

I. PROHIBITED WEIGHT-LOSS AND DISEASE CLAIMS

IT IS ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, are permanently restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation that such product:

A. causes or helps cause weight loss or any specific amount of weight loss;

B. causes or helps cause rapid weight loss;

C. causes or helps cause substantial weight loss;

D. suppresses or reduces appetite;

E. blocks the formation of fat cells; or

F. cures, mitigates, or treats any disease,

unless the representation is non-misleading, and, at the time of making such representation, they possess and rely upon competent and reliable scientific evidence substantiating that the representation is true. For purposes of this Section, competent and reliable scientific evidence shall consist of human clinical testing of the Covered Product, or of an Essentially Equivalent Product, that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the

representation is true. Such testing must be: (1) randomized, double-blind, and placebo-controlled; and (2) conducted by researchers qualified by training and experience to conduct such testing. In addition, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as described in the Section entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission. Persons covered by this Section have the burden of proving that a product satisfies the definition of Essentially Equivalent Product.

II. OTHER PROHIBITED HEALTH-RELATED CLAIMS

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, are permanently restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation, other than representations covered under the Section of this Order entitled Prohibited Weight-Loss and Disease Claims, about the health benefits, performance, efficacy, safety, or side effects of any Covered Product, unless the representation is non-misleading, and, at the time of making such representation, they possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which

the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

For purposes of this Section, competent and reliable scientific evidence means tests, analyses, research, or studies (1) that have been conducted and evaluated in an objective manner by experts in the relevant disease, condition, or function to which the representation relates; (2) that are generally accepted by such experts to yield accurate and reliable results; and (3) that are randomized, double-blind, and placebo-controlled human clinical testing of the Covered Product, or of an Essentially Equivalent Product, when such experts would generally require such human clinical testing to substantiate that the representation is true. In addition, when such tests or studies are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as set forth in the Section entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission. Persons covered by this Section have the burden of proving that a product satisfies the definition of Essentially Equivalent Product.

III. PRESERVATION OF RECORDS RELATING TO COMPETENT AND RELIABLE HUMAN CLINICAL TESTS OR STUDIES

IT IS FURTHER ORDERED that, with regard to any human clinical test or study ("test") upon which Defendants rely to substantiate any claim covered by this Order, Defendants shall secure and preserve all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of the test, including:

A. All protocols and protocol amendments, reports, articles, write-ups, or other accounts of the results of the test, and drafts of such documents reviewed by the test sponsor or any other person not employed by the research entity;

B. All documents referring or relating to recruitment; randomization; instructions, including oral instructions, to participants; and participant compliance;

C. Documents sufficient to identify all test participants, including any participants who did not complete the test, and all communications with any participants relating to the test; all raw data collected from participants enrolled in the test, including any participants who did not complete the test; source documents for such data; any data dictionaries; and any case report forms;

D. All documents referring or relating to any statistical analysis of any test data, including any pretest analysis, intent-to-treat analysis, or between-group analysis performed on any test data; and

E. All documents referring or relating to the sponsorship of the test, including all communications and contracts between any sponsor and the test's researchers.

Provided, however, the preceding preservation requirement does not apply to a reliably reported test, unless the test was conducted, controlled, or sponsored, in whole or in part by: (1) any Defendant; (2) any Defendant's officers, agents, representatives, or employees; (3) any other person or entity in active concert or participation with any Defendant; (4) any person or entity affiliated with or acting on behalf of any Defendant; (5) any supplier of any ingredient contained in the product at issue to any of the foregoing or to the product's manufacturer; or (6) the supplier or manufacturer of such product.

For purposes of this Section, "reliably reported test" means a report of the test has been published in a peer-reviewed journal, and such published report provides sufficient information about the test for experts in the relevant field to assess the reliability of the results.

For any test conducted, controlled, or sponsored, in whole or in part, by Defendants, Defendants must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of any personal information collected from or about participants. These procedures must be documented in writing and must contain administrative, technical, and physical safeguards appropriate to Corporate Defendants' size and complexity, the nature and scope of Defendants' activities, and the sensitivity of the personal information collected from or about the participants.

IV. FDA-APPROVED CLAIMS

IT IS FURTHER ORDERED that nothing in this Order prohibits Defendants, Defendants' officers, agents, employees, and attorneys, or all other persons in active concert or participation with any of them from:

A. For any drug, making a representation that is approved in labeling for such drug under any tentative final or final monograph promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and

B. For any product, making a representation that is specifically authorized for use in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 or permitted under Sections 303-304 of the Food and Drug Administration Modernization Act of 1997.

V. PROHIBITION AGAINST MISREPRESENTATIONS REGARDING ENDORSEMENTS

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product are permanently restrained and enjoined from making, or assisting others in making, any misrepresentation, expressly or by implication:

A. that any endorsement is a truthful endorsement or by an actual user of such product; or

B. through the use of any endorsement of such product.

VI. MONETARY JUDGMENT AND PARTIAL SUSPENSION

IT IS FURTHER ORDERED that:

A. Judgment in the amount of $12,845,724 is entered in favor of the Commission against Individual Defendant and Corporate Defendant, jointly and severally, as equitable monetary relief.

B. Defendants are ordered to pay to the Commission $50,000, which, as Defendants stipulate, their undersigned counsel holds in escrow for no purpose other than payment to the Commission. Such payment must be made within 7 days of entry of this Order by electronic fund transfer in accordance with instructions previously provided by a representative of the Commission. Upon such payment and the payment by Defendants of their outstanding 2017 federal and state tax obligations in the amounts set forth in Item 20 of the Financial Statement of Individual Defendant Naftula Jacobowitz signed on October 18, 2018, the remainder of the judgment is suspended,

subject to the Subsections below.

C. The Commission's agreement to the suspension of part of the judgment is expressly premised upon the truthfulness, accuracy, and completeness of Defendants' sworn financial statements and related documents (collectively, "financial representations") submitted to the Commission, namely:

1. the Financial Statement of Individual Defendant Naftula Jacobowitz signed on October 18, 2018;

2. the Financial Statement of Corporate Defendant Cure Encapsulations, Inc. signed by Naftula Jacobowitz as its President on August 9, 2018 (with the Item 19 Current-Year-to-Date Financial Summary corrected by an unsigned amended financial statement attached to an October 12, 2018 email from Defendants' counsel August Horvath to Commission Counsel Richard Cleland and Michael Ostheimer);

3. the representations and additional documentation submitted by Defendants' counsel August Horvath to Commission Counsel Richard Cleland and Michael Ostheimer dated August 13, 2018, August 16, 2018 (attaching loan applications), August 21, 2018 (four emails including ones attaching bank statements, property appraisals, tax returns, and check images), August 24, 2018 (two emails), August 27, 2018, August 29, 2018 (attaching an accountant's letter, a loan denial, and a letter from counsel), October 12, 2018 (attaching amended Financial Statement of Corporate Defendant Cure Encapsulations, Inc.), and October 18, 2018 (attaching tax returns);

D. The suspension of the judgment will be lifted as to any Defendant if, upon motion by the Commission, the Court finds that Defendant failed to disclose any material asset, materially misstated the value of any asset, or made any other material misstatement or omission in the

financial representations identified above.

E. If the suspension of the judgment is lifted, the judgment becomes immediately due as to that Defendant in the amount specified in Subsection A. above (which the parties stipulate only for purposes of this Section represents the consumer injury alleged in the Complaint), less any payment previously made pursuant to this Section, plus interest computed from the date of entry of this Order.

VII. ADDITIONAL MONETARY PROVISIONS

IT IS FURTHER ORDERED that:

A. Defendants relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

C. The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

D. Defendants acknowledge that their Taxpayer Identification Numbers (Social Security Numbers or Employer Identification Numbers), which Defendants previously submitted to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. §7701.

E. All money paid to the Commission pursuant to this Order may be deposited into a fund

administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Defendants have no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection.

F. The Commission may request any tax-related information, including amended tax returns and any other filings, that Defendants have the authority to release. Within 14 days of receipt of a written request from a representative of the Commission, Defendants must take all necessary steps (such as filing a completed IRS Form 4506 or 8821) to cause the Internal Revenue Service or other tax authority to provide the information directly to the Commission.

VIII. CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order are permanently restrained and enjoined from directly or indirectly:

A. failing to provide sufficient customer information to enable the Commission to efficiently administer consumer redress. If a representative of the Commission requests in writing any information related to redress, Defendants must provide it, in the form prescribed by the

Commission, within 14 days.

B. disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), that any Defendant obtained prior to entry of this Order in connection with labeling, advertising, marketing, distribution,or sale of Quality Encapsulations Garcinia Cambogia Extract with HCA; and

C. failing to destroy such customer information in all forms in their possession, custody, or control within 30 days after receipt of written direction to do so from a representative of the Commission.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order.

IX. NOTICE TO PAST CUSTOMERS

IT IS FURTHER ORDERED that Defendants must notify customers as follows: Defendants must identify all consumers who purchased Quality Encapsulations Garcinia Cambogia Extract with HCA from them on or after March 6, 2017 and through the date of entry of this Order ("identified past customers"). Within 30 days after the date of entry of this Order, Defendants must email all identified past customers a notice in the form of Attachment A, with an attachment in the form of Attachment B. The email to identified past customers must not include any additional content or attachments.

X. NOTIFICATION REGARDING PREVIOUSLY POSTED PRODUCT REVIEWS

IT IS FURTHER ORDERED that within 30 days of the date of entry of this Order, Defendants must notify Amazon, Inc. that Defendants or their agents purchased reviews of Quality Encapsulations Garcinia Cambogia Extract with HCA sold by Defendants and appearing on the www.amazon.com website. The notification must: (A) be sent by email to an email address to be provided by FTC staff; (B) have the subject line: FTC v. Cure Encapsulations, Inc.; (C) include the Review ID numbers of all Amazon product reviews that were purchased by Defendants or their agents and if Review ID numbers are not available for a purchased review, must include all other information possessed by Defendants identifying the purchased review; (D) attach copies of the Complaint and of this Order; and (E) copy DEbrief@ftc.gov.

XI. ORDER ACKNOWLEDGMENTS

IT IS FURTHER ORDERED that Defendants obtain acknowledgments of receipt of this Order:

A. Each Defendant, within 7 days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 5 years after entry of this Order, Individual Defendant for any business that such Defendant, individually or collectively with any other Defendants, is the majority owner or controls directly or indirectly, and Corporate Defendant, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3)

any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within 7 days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Defendant delivered a copy of this Order, that Defendant must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

XII. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Defendants make timely submissions to the Commission:

A. Ninety days after entry of this Order, each Defendant must submit a compliance report, sworn under penalty of perjury:

1. Each Defendant must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Defendant; (b) identify all of that Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Defendant (which Individual Defendant must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Defendant is in compliance with each Section of this Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, Individual Defendant must: (a) identify all telephone numbers and all

physical, postal, email and Internet addresses, including all residences; (b) identify all business activities, including any business for which such Defendant performs services whether as an employee or otherwise and any entity in which such Defendant has any ownership interest; and (c) describe in detail such Defendant's involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 10 years after entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Defendant must report any change in: (a) any designated point of contact; or (b) the structure of any Corporate Defendant or any entity that Defendant has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Defendant must report any change in: (a) name, including aliases or fictitious name, or residence address; or (b) title or role in any business activity, including any business for which such Defendant performs services whether as an employee or otherwise and any entity in which such Defendant has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

C. Each Defendant must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Defendant within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I

declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: FTC v. Cure Encapsulations, Inc.

XIII. RECORDKEEPING

IT IS FURTHER ORDERED that Defendants must create certain records for 10 years after entry of the Order, and retain each such record for 5 years. Specifically, Corporate Defendant in connection with any activity subject to this Order and Individual Defendant for any business that such Defendant, individually or collectively with any other Defendants, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

E. a copy of each unique advertisement or other marketing material.

XIV. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Defendants' compliance with this Order, including any failure to transfer any assets as required by this Order:

A. Within 14 days of receipt of a written request from a representative of the Commission each Defendant must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

B. For matters concerning this Order, the Commission is authorized to communicate directly with each Defendant. Defendant must permit representatives of the Commission to interview any employee or other person affiliated with any Defendant who has agreed to such an interview. The person interviewed may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities, to Defendants or any individual or entity affiliated with Defendants, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Defendant, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. §1681b(a)(1).

XV. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED this _____ day of _____, _____.

_____
UNITED STATES DISTRICT JUDGE

SO STIPULATED AND AGREED:

FOR PLAINTIFF:

FEDERAL TRADE COMMISSION

Michael Ostheimer

Michael Ostheimer, Attorney
Federal Trade Commission
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FOR DEFENDANTS:

Date: 10/19/2018

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DEFENDANTS: Cure Encapsulations, Inc. and Naftula Jacobowitz

Date: 10/19/18

Naftula Jacobowitz, Individually
and as an Officer of Cure Encapsulations, Inc.

ATTACHMENT A

Subject Line: FTC says company deceptively advertised a product you bought

Dear Customer:

Our records show you bought our Quality Encapsulations Garcinia Cambogia Extract with HCA product. The Federal Trade Commission (FTC), the nation's consumer protection agency, has charged us with deceptive advertising. To settle the case, we have agreed to send this notice to people who bought our product.

According to the FTC, we deceptively claimed – among other things – that our product causes significant weight loss, is a powerful appetite suppressant, and blocks the formation of new fat cells. We don't have scientific proof for any of those claims.

You might want to look at the attached National Institutes of Health fact sheet on dietary supplements for weight loss. It discusses common ingredients in weight-loss dietary supplements, including *garcinia cambogia*. It says, "*Garcinia cambogia* has little to no effect on weight loss." The fact sheet also addresses other topics, including whether weight-loss dietary supplements can be harmful and choosing a sensible approach to weight loss.

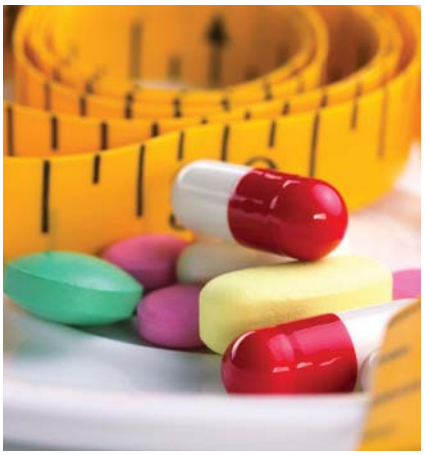
Sincerely,

Naftula Jacobowitz
Chief Executive Officer
Cure Encapsulations, Inc.

ATTACHMENT B

National Institutes of Health
Office of Dietary Supplements

Dietary Supplements for Weight Loss
Fact Sheet for Consumers



If you're thinking about taking a dietary supplement to lose weight, talk with your health care provider.

What are weight-loss dietary supplements and what do they do?

The proven ways to lose weight are eating healthful foods, cutting calories, and being physically active. But making these lifestyle changes isn't easy, so you might wonder if taking a dietary supplement that's promoted for weight loss might help.

This fact sheet describes what's known about the safety and effectiveness of many ingredients that are commonly used in weight-loss dietary supplements. Sellers of these supplements might claim that their products help you lose weight by blocking the absorption of fat or carbohydrates, curbing your appetite, or speeding up your metabolism. But there's little scientific evidence that weight-loss supplements work. Many are expensive, some can interact or interfere with medications, and a few might be harmful.

If you're thinking about taking a dietary supplement to lose weight, talk with your healthcare provider. This is especially important if you have high blood pressure, diabetes, heart disease, liver disease, or other medical conditions.

What are the ingredients in weight-loss dietary supplements?

Weight-loss supplements contain many ingredients—like herbs, fiber, and minerals—in different amounts and in many combinations. Sold in forms such as capsules, tablets, liquids, and powders, some products have dozens of ingredients.

Common ingredients in weight-loss supplements are described below in alphabetical order. You'll learn what's known about whether each ingredient works and is safe. Figuring out whether these ingredients really help you lose weight safely is complicated, though. Most products contain more than one ingredient, and ingredients can work differently when they're mixed together.

You might be surprised to learn that makers of weight-loss supplements rarely carry out studies in people to find out whether their product works and is safe. And when studies are done, they usually involve only small numbers of people who take the supplement for just a few weeks or months. To know whether a weight-loss supplement can help people lose weight safely and keep it off, larger groups of people need to be studied for a longer time.

The next pages provide information on common ingredients found in weight-loss dietary supplements.

African mango

African mango seed extract is claimed to curb the formation of fat tissue.

Does it work?

African mango might help you lose a very small amount of weight.

Is it safe?

African mango seems to be safe, but its safety hasn't been well studied. It can cause headache, sleeping problems, flatulence, and gas.

Beta-glucans

Beta-glucans are soluble dietary fibers in bacteria, yeasts, fungi, oats, and barley. They might slow down the time it takes for food to travel through your digestive system, making you feel fuller.

Does it work?

Beta-glucans don't seem to have any effect on body weight.

Is it safe?

Beta-glucans seem to be safe (at up to 10 grams [g] a day for 12 weeks). They can cause flatulence.

Bitter orange

Bitter orange contains synephrine (a stimulant). It's claimed to burn calories, increase fat breakdown, and decrease appetite. Products with bitter orange usually also contain caffeine and other ingredients. Bitter orange is in some weight loss dietary supplements that used to contain ephedra, another stimulant-containing herb that was banned from the U.S. market in 2004 (*see the section on Ephedra*).

Does it work?

Bitter orange might slightly increase the number of calories you burn. It might also reduce your appetite a little, but whether it can help you lose weight is unknown.

Is it safe?

Bitter orange might not be safe. Supplements with bitter orange can cause chest pain, anxiety, headache, muscle and bone pain, a faster heart rate, and higher blood pressure.

Caffeine

Caffeine is a stimulant that can make you more alert, give you a boost of energy, burn calories, and increase fat breakdown. Often added to weight-loss dietary supplements, caffeine is found naturally in tea, guarana, kola (cola) nut, yerba mate, and other herbs. The labels of supplements that contain caffeine don't always list it, so you might not know if a supplement has caffeine.

Does it work?

Weight-loss dietary supplements with caffeine might help you lose a little weight or gain less weight over time. But when you use caffeine regularly, you become tolerant of it. This tolerance might lessen any effect of caffeine on body weight over time.

Is it safe?

Caffeine is safe for most adults at doses up to 400–500 milligrams (mg) a day. But it can make you feel nervous, jittery, and shaky. It can also affect your sleep. At higher doses, it can cause nausea, vomiting, rapid heartbeat, and seizures. Combining caffeine with other stimulant ingredients can increase caffeine's effects.

Calcium

Calcium is a mineral you need for healthy bones, muscles, nerves, blood vessels, and many of your body's functions. It's claimed to burn fat and decrease fat absorption.

Does it work?

Calcium—either from food or in weight-loss dietary supplements—probably doesn't help you lose weight or prevent weight gain.

Is it safe?

Calcium is safe at the recommended amounts of 1,000 to 1,200 mg a day for adults. Too much calcium (more than 2,000–2,500 mg a day) can cause constipation and decrease your body's absorption of iron and zinc. Also, too much calcium from supplements (but not foods) might increase your risk of kidney stones.

Capsaicin

Capsaicin comes from chili peppers and makes them taste hot. It's claimed to help burn fat and calories and to help you feel full and eat less.

Does it work?

Capsaicin hasn't been studied enough to know if it will help you lose weight.

Is it safe?

Capsaicin is safe (at up to 33 mg a day for 4 weeks or 4 mg a day for 12 weeks), but it can cause stomach pain, burning sensations, nausea, and bloating.

Carnitine

Your body makes carnitine, and it's also found in meat, fish, poultry, milk, and dairy products. In your cells, it helps break down fats.

Does it work?

Carnitine supplements might help you lose a small amount of weight.

Is it safe?

Carnitine supplements seem to be safe (at up to 2 g a day for 1 year or 4 g a day for 56 days). They can cause nausea, vomiting, diarrhea, abdominal cramps, and a fishy body odor.

Chitosan

Chitosan comes from the shells of crabs, shrimp, and lobsters. It's claimed to bind fat in the digestive tract so that your body can't absorb it.

Does it work?

Chitosan binds only a tiny amount of fat, not enough to help you lose much weight.

Is it safe?

Chitosan seems to be safe (at up to 15 g a day for 6 months). But it can cause flatulence, bloating, mild nausea, constipation, indigestion, and heartburn. If you're allergic to shellfish, you could have an allergic reaction to chitosan.

Chromium

Chromium is a mineral that you need to regulate your blood sugar levels. It's claimed to increase muscle mass and fat loss and decrease appetite and food intake.

Does it work?

Chromium might help you lose a very small amount of weight and body fat.

Is it safe?

Chromium in food and supplements is safe at recommended amounts, which range from 20 to 45 micrograms a day for adults. In larger amounts, chromium can cause watery stools, headache, weakness, nausea, vomiting, constipation, dizziness, and hives.

Coleus forskohlii

Coleus forskohlii is a plant that grows in India, Thailand, and other subtropical areas. Forskolin, made from the plant's roots, is claimed to help you lose weight by decreasing your appetite and increasing the breakdown of fat in your body.

Does it work?

Forskolin hasn't been studied much. But so far, it doesn't seem to have any effect on body weight or appetite.

Is it safe?

Forskolin seems to be safe (at 500 mg a day for 12 weeks), but it hasn't been well studied. It can cause frequent bowel movements and loose stools.

Conjugated linoleic acid (CLA)

CLA is a fat found mainly in dairy products and beef. It's claimed to reduce your body fat.

Does it work?

CLA may help you lose a very small amount of weight and body fat.

Is it safe?

CLA seems to be safe (at up to 6 g a day for 1 year). It can cause an upset stomach, constipation, diarrhea, loose stools, and indigestion.

Fucoxanthin

Fucoxanthin comes from brown seaweed and other algae. It's claimed to help with weight loss by burning calories and decreasing fat.

Does it work?

Fucoxanthin hasn't been studied enough to know if it will help you lose weight. Only one study in people included fucoxanthin (the other studies were in animals).

Is it safe?

Fucoxanthin seems to be safe (at 2.4 mg a day for 16 weeks), but it hasn't been studied enough to know for sure.

Garcinia cambogia

Garcinia cambogia is a tree that grows throughout Asia, Africa, and the Polynesian islands. Hydroxycitric acid in the fruit is claimed to decrease the number of new fat cells your body makes, suppress your appetite and thus reduce the amount of food you eat, and limit the amount of weight you gain.

Does it work?

Garcinia cambogia has little to no effect on weight loss.

Is it safe?

Garcinia cambogia seems to be fairly safe. But it can cause headache, nausea, and symptoms in the upper respiratory tract, stomach, and intestines.

Glucomannan

Glucomannan is a soluble dietary fiber from the root of the konjac plant. It's claimed to absorb water in the gut to help you feel full.

Does it work?

Glucomannan has little to no effect on weight loss. But it might help lower total cholesterol, LDL ("bad") cholesterol, triglycerides, and blood sugar levels.

Is it safe?

Most forms of glucomannan seem to be safe (at up to 15.1 g a day for several weeks in a powder or capsule form). It can cause loose stools, flatulence, diarrhea, constipation, and abdominal discomfort.

Green coffee bean extract

Green coffee beans are unroasted coffee beans. Green coffee bean extract is claimed to decrease fat accumulation and help convert blood sugar into energy that your cells can use.

Does it work?

Green coffee bean extract might help you lose a small amount of weight.

Is it safe?

Green coffee bean extract seems to be safe (at up to 200 mg a day for 12 weeks). It might cause headache and urinary tract infections. Green coffee beans contain the stimulant caffeine, which can cause problems at high doses or when it's combined with other stimulants (*see the section on Caffeine*).

Green tea and green tea extract

Green tea (also called *Camellia sinensis*) is a common beverage all over the world. Green tea and green tea extract in some weight-loss supplements are claimed to reduce body weight by increasing the calories your body burns, breaking down fat cells, and decreasing fat absorption and the amount of new fat your body makes.

Does it work?

Green tea might help you lose a small amount of weight.

Is it safe?

Drinking green tea is safe, but taking green tea extract might not be. Green tea extract can cause constipation, abdominal discomfort, nausea, and increased blood pressure. In some people, it has been linked to liver damage.

Guar gum

Guar gum is a soluble dietary fiber in some dietary supplements and food products. It's claimed to make you feel full, lower your appetite, and decrease the amount of food you eat.

Does it work?

Guar gum probably doesn't help you lose weight.

Is it safe?

Guar gum seems to be safe (at up to 30 g a day for 6 months) when it is taken with enough fluid. But it can cause abdominal pain, flatulence, diarrhea, nausea, and cramps.

Guarana (*see the section on Caffeine*)

Hoodia

Hoodia is a plant from southern Africa, where it's used as an appetite suppressant.

Does it work?

There hasn't been much research on hoodia, but it probably won't help you eat less or lose weight. Analyses showed that some "hoodia" supplements sold in the past contained very little hoodia or none at all. It's not known whether this is true of hoodia supplements sold today.

Is it safe?

Hoodia might not be safe. It can cause rapid heart rate, increased blood pressure, headache, dizziness, nausea, and vomiting.

Kola (or cola) nut (*see the section on Caffeine*)

Mate (*see the section on Caffeine*)

Probiotics

Probiotics are microorganisms in foods, such as yogurt, that help maintain or restore beneficial bacteria in your digestive tract.

Does it work?

Probiotic supplements seem to have little to no effect on weight loss, but they haven't been well studied.

Is it safe?

Probiotics are safe but may cause gas or other gastrointestinal problems.

Pyruvate

Pyruvate is naturally present in your body. Pyruvate in weight-loss supplements is claimed to increase fat breakdown, reduce body weight and body fat, and improve exercise performance.

Does it work?

Pyruvate in supplements might help you lose a small amount of weight.

Is it safe?

Pyruvate seems to be safe (at up to 30 g a day for 6 weeks). It can cause diarrhea, gas, bloating, and rumbling noises in the intestines due to gas.

Raspberry ketone

Raspberry ketone, found in red raspberries, is claimed to be a "fat burner."

Does it work?

Raspberry ketone has only been studied as a weight-loss aid in combination with other ingredients and not alone. Its effects on body weight are unknown.

Is it safe?

Raspberry ketone hasn't been studied enough to tell if it's safe.

Vitamin D

Your body needs vitamin D for good health and strong bones. People who are obese tend to have lower levels of vitamin D, but there is no known reason why taking vitamin D would help people lose weight.

Does it work?

Vitamin D doesn't help you lose weight.

Is it safe?

Vitamin D from foods and dietary supplements is safe at the recommended amounts of 600–800 IU a day for adults. Too much vitamin D (more than 4,000 IU a day) can be toxic and cause nausea, vomiting, poor appetite, constipation, weakness, and irregular heartbeat.

White kidney bean/ bean pod

White kidney bean or bean pod (also called *Phaseolus vulgaris*) is a legume grown around the world. An extract of this bean is claimed to block the absorption of carbohydrates and suppress your appetite.

Does it work?

Phaseolus vulgaris extract might help you lose a small amount of weight and body fat.

Is it safe?

Phaseolus vulgaris seems to be safe (at up to 3,000 mg a day for 12 weeks). But it might cause headaches, soft stools, flatulence, and constipation.

Yerba mate (*see the section on Caffeine*)

Yohimbe

Yohimbe is a West African tree. Yohimbe extract is an ingredient in supplements used to improve libido, increase muscle mass, and treat male sexual dysfunction. Yohimbe is also found in some weight-loss supplements and is claimed to increase weight loss.

Does it work?

Yohimbe doesn't help you lose weight.

Is it safe?

Yohimbe might not be safe (especially at doses of 20 mg or higher). Use it only with guidance from your healthcare provider because the side effects can be severe. Yohimbe can cause headaches, high blood pressure, anxiety, agitation, rapid heartbeat, heart attack, heart failure, and death.

Ephedra, an ingredient banned from dietary supplements?

Ephedra (also called má huáng) is a plant containing substances that can stimulate your nervous system, increase the amount of energy you burn, increase weight loss, and suppress your appetite. In the 1990s, ephedra was a popular ingredient in dietary supplements sold for weight loss and to enhance athletic performance. In 2004, the U.S. Food and Drug Administration (FDA) banned ephedra in dietary supplements, concluding that it isn't safe. Ephedra can cause nausea, vomiting, anxiety, mood changes, high blood pressure, abnormal heartbeat, stroke, seizures, heart attack, and death.

How are weight-loss dietary supplements regulated?

The FDA is the federal agency that oversees dietary supplements in the United States. Unlike over-the-counter and prescription drugs—which must be approved by the FDA before they can be sold—dietary supplements don't require review or approval by the FDA before they are put on the market. Also, manufacturers don't have to provide evidence to the FDA that their products are safe or effective before selling these products.

When the FDA finds an unsafe dietary supplement, it can remove the supplement from the market or ask the supplement maker to recall it. The FDA and the Federal Trade Commission can also take enforcement action against companies that make false weight-loss claims about their supplements; add pharmaceutical drugs to their supplements; or claim that their supplements can diagnose, treat, cure, or prevent a disease.

For more information about dietary supplement regulations, see the Office of Dietary Supplements publication, *Dietary Supplements: What You Need to Know.*

Can weight-loss dietary supplements be harmful?

Weight-loss supplements, like all dietary supplements, can have harmful side effects and might interact with prescription and over-the-counter medications. Many weight-loss supplements have ingredients that haven't been tested in combination with one another, and their combined effects are unknown.

Tell your healthcare providers about any weight-loss supplements or other supplements you take. This information will help them work with you to prevent supplement-drug interactions, harmful side effects, and other risks..

Fraudulent and adulterated products

Be very cautious when you see weight-loss supplements with tempting claims, such as "magic diet pill," "melt away fat," and "lose weight without diet or exercise." If the claim sounds too good to be true, it probably is. These products might not help you lose weight—and they could be dangerous.

Weight-loss products marketed as dietary supplements are sometimes adulterated with prescription drugs or controlled substances. These ingredients won't be listed on the product label, and they could harm you. The FDA puts out public notifications about tainted weight-loss products.

Interactions with medications

Like most dietary supplements, some weight-loss supplements can interact or interfere with other medicines or supplements you take. If you take dietary supplements and medications on a regular basis, be sure to talk about this with your healthcare provider.

Choosing a Sensible Approach to Weight Loss

Weight-loss supplements can be expensive, and they might not work. The best way to lose weight and keep it off is to follow a healthy eating plan, reduce calories, and exercise regularly under the guidance of your healthcare provider.

As a bonus, lifestyle changes that help you lose weight might also improve your mood and energy level and lower your risk of heart disease, diabetes, and some types of cancer.

Where can I find out more?

For general information on weight-loss dietary supplements:

- Office of Dietary Supplements Health Professional Fact Sheet on Weight-Loss Dietary Supplements
- Weighing the Claims in Diet Ads, Federal Trade Commission

For publications about weight control, obesity, physical activity, and nutrition:

- The Weight-control Information Network, National Institute of Diabetes and Digestive and Kidney Diseases, NIH
- Weight Control, MedlinePlus, NIH

For more advice on buying dietary supplements:

- Office of Dietary Supplements Frequently Asked Questions: Which brand(s) of dietary supplements should I purchase?

For information about building a healthy diet:

- *Dietary Guidelines for Americans*
- MyPlate

Disclaimer

This fact sheet by the Office of Dietary Supplements (ODS) provides information that should not take the place of medical advice. We encourage you to talk to your healthcare providers (doctor, registered dietitian, pharmacist, etc.) about your interest in, questions about, or use of dietary supplements and what may be best for your overall health. Any mention in this publication of a specific product or service, or recommendation from an organization or professional society, does not represent an endorsement by ODS of that product, service, or expert advice.

National Institutes of Health

For more information on this and other supplements, please visit our Web site at: http://ods.od.nih.gov or e-mail us at: ods@nih.gov

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Zaida HICKS, Stephanie Vargas, Sumner Davenport, Stephanie Pinghera, Karrie Ruggiero, Marjie Santiago, Kathleen Secor, Gwendolyn Simmons, Nancy Spring, Heidi Trembly, Lisa Turner, and Rebecca Vega, Individually and on Behalf of all others Similarly Situated, Plaintiffs,
v.
L'ORÉAL U.S.A., INC., Defendant.
Sonia Cauchi and Stephanie Branton, Individually and on Behalf of all others Similarly Situated, Plaintiffs,
v.
L'Oréal U.S.A., Inc., Defendant.

22 Civ. 1989 (JPC), 22 Civ. 3926 (JPC)
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Signed September 30, 2023

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OPINION AND ORDER

JOHN P. CRONAN, United States District Judge:

***1** Zaida Hicks, along with thirteen other Plaintiffs, brings this putative class action alleging that Defendant L'Oréal U.S.A., Inc. violated a host of state consumer protection laws by failing to disclose that several of its waterproof mascara products contain Per- and Polyfluoroalkyl Substances ("PFAS"). Plaintiffs also bring several common law causes of action related to the same. Before the Court is L'Oréal's motion to dismiss Plaintiffs' Amended Complaint. Dkt. 29. Because the named Plaintiffs have failed to meet their "burden of demonstrating that they have standing," the Court grants L'Oréal's motion and dismisses the Amended Complaint without prejudice. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021).

I. Background

A. Facts [1]

[1] The following facts, which are assumed true for purposes of this Opinion and Order, are taken from the Amended Complaint, Dkt. 25 ("Am. Compl."), as well as documents incorporated by reference in the Amended Complaint. *See* *Interpharm, Inc. v. Wells Fargo Bank, Nat'l Ass'n*, 655 F.3d 136, 141 (2d Cir. 2011) (explaining that on a motion to dismiss pursuant to Rule 12(b)(6), the court must "assum[e] all facts alleged within the four corners of the complaint to be true, and draw[ ] all reasonable inferences in plaintiff's favor"); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) ("[O]n a motion to dismiss, a court may consider documents attached to the complaint as an exhibit or incorporated in it by reference ...." (internal quotation marks omitted)).

L'Oréal is one of the world's largest cosmetics companies. Am. Compl. ¶¶ 19, 104. It is headquartered in New York City and owns and operates over thirty different brands. *Id.* ¶ 104. L'Oréal sells ten different types of waterproof mascara through its "L'Oréal Paris" makeup line, and additional waterproof mascara products through the Maybelline brand. *Id.* ¶ 110. Plaintiffs allege that from at least 2018 to the filing of their Amended Complaint, L'Oréal engaged in "misleading[ ] and deceptive[ ] advertis[ing]" by representing that the company's waterproof mascaras "were safe, effective, high quality, and appropriate for use on consumers' eyelashes and around their eyes," when many of these products in fact contained "detectable amounts" of "harmful PFAS." *Id.* ¶¶

20-21, 23. For instance, Plaintiffs point to product packaging for L'Oréal's Voluminous Waterproof Mascara, which states that the product is "ophthalmologist and allergy tested. Suitable for sensitive eyes and contact lens wearers." *Id.* ¶ 122. The company's Voluminous Lash Paradise Waterproof Mascara similarly states that it is "ophthalmologist and allergy tested. Suitable for sensitive eyes. Tested under dermatological control for safety." *Id.* ¶ 124. Maybelline Volum' Express the Falsies Waterproof Mascara, Maybelline the Colossal Waterproof Mascara, and Maybelline Great Lash Waterproof Mascara all come in product packaging that contains substantially similar statements. *Id.* ¶¶ 125-126.

1. PFAS

According to the Amended Complaint, "PFAS are human-made, synthetic chemicals that do not exist naturally in the environment" and have been used in a wide variety of consumer products, including cosmetics. *Id.* ¶¶ 42-43, 72. There are many unique varieties of PFAS in existence. *Id.* ¶ 44. They can be divided into long- and short-chain categories, depending on whether they contain seven or more carbon atoms. *Id.* ¶ 46. Despite these differences, "what all PFAS share is that they contain multiple carbon-fluorine bonds, considered one of the strongest in chemistry, making them highly persistent in the environment and in human and animal bodies." *Id.* ¶ 44. Plaintiffs claim that this persistent quality "in the human body gives all PFAS a shared toxicity." *Id.* Indeed, Plaintiffs assert that long- and short-chain PFAS pose similar health and safety risks. *Id.* ¶ 51. More generally, they assert that PFAS "are toxic to humans at extremely low levels," claiming that "PFAS is associated in the medical and scientific literature with harmful and serious health effects in humans and animals," including risks of cancer, pregnancy-induced hypertension, and thyroid disease, among others. *Id.* ¶ 55.

***2** Plaintiffs point to a number of international and domestic efforts to curtail the use of various types of PFAS, including the U.S. Government's 2021 "PFAS Strategic Roadmap" initiative, "an interagency plan to combat the continued use and release of PFAS." *Id.* ¶¶ 47-49. In June 2022, the U.S. Environmental Protection Agency ("EPA") announced "lifetime health advisory levels" for several types of PFAS, including perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonic acid ("PFOS"). *Id.* ¶ 64. Plaintiffs allege that the EPA set the advisory levels for these two PFAS at "below the detection capability of most measurement devices," and thus infer that the "EPA considers any detection of PFOA or PFOS to exceed the lifetime health advisory level." *Id.* ¶ 64.

2. PFAS in Cosmetics: The Notre Dame Study and Plaintiffs' Third-Party Testing of L'Oréal Products

PFAS are used in cosmetics in a variety of ways, including —as relevant to the waterproof mascaras at issue—to make products "more water-resistant, durable, and spreadable." *Id.* ¶ 72. While certain PFAS may be identified on a cosmetic product's label or in its ingredient list, there are no formal federal regulations governing what cosmetic labels must disclose. *Id.* ¶¶ 73, 77.

In 2021, a peer-reviewed analysis published by researchers at the University of Notre Dame (the "Notre Dame Study") screened 231 cosmetic products—to include lip products, eye products, foundations, face products, mascaras, concealers, and eyebrow products—for their total fluorine levels. *Id.* ¶ 81. The Notre Dame Study screened for fluorine levels because, Plaintiffs explain, "all PFAS are comprised of carbon-fluorine bonds" and therefore "analyzing a product for total fluorine is an accepted methodology to investigate whether PFAS are present." *Id.* ¶ 82. The Notre Dame Study found that while foundations had the highest median total fluorine concentration, several mascaras produced the highest fluorine concentrations and mascaras in general were among the three product categories with the highest proportion of fluorine concentrations, along with foundations and lip products. *Id.* ¶ 83. "Researchers found high fluorine levels in products commonly advertised as 'wear-resistant' to water and oils or 'long-lasting,' including foundations, liquid lipsticks, and waterproof mascaras." *Id.* ¶ 84.

The Notre Dame Study entailed further analysis of twenty-nine different foundations, mascaras, and lip products, which revealed short-chain PFAS to be "most commonly detected in these products" and with all twenty-nine containing long-chain PFAS. *Id.* ¶¶ 85, 88. The Amended Complaint does not indicate how the researchers identified these twenty-nine products for further study. Eight percent of the 231 total screened products listed some type of PFAS as an ingredient, and only one of the twenty-nine products listed PFAS as an ingredient. *Id.* ¶ 88. Plaintiffs more generally attribute omissions of PFAS disclosures in cosmetic products' labels to a lack of "formal federal regulations governing what cosmetic labels must disclose," and note that members of Congress have introduced legislation "to curtail the widespread inclusion of PFAS in cosmetics products." *Id.* ¶¶ 77, 93-94.

Notably, however, Plaintiffs do not allege that the Notre Dame Study included any L'Oréal waterproof mascara products. *See id.* ¶ 81 ("Researchers analyzed lip products, eye products, foundations, face products, mascaras, concealers, and eyebrow products purchased from retailers such as Ulta Beauty, Sephora, Target, and Bed Bath & Beyond."). But Plaintiffs—having reviewed the results of the Notre Dame Study—"sought independent third-party testing to determine whether certain L'Or[é]al cosmetic products contained PFAS" ("Plaintiffs' Third-Party Study"). *Id.* ¶ 96. An "independent laboratory ... utilized industry standard techniques to detect PFAS constituents in cosmetic products[,] ... test[ing] for approximately 30 specific PFAS." *Id.* ¶ 97. Plaintiffs' Third-Party Study detected several varieties of PFAS in the following L'Oréal waterproof mascaras that were tested (collectively, the "Tested Products"):

***3** • L'Oréal Voluminous Waterproof Mascara;

• Voluminous Lash Paradise™ Waterproof Mascara;

• Maybelline Volum' Express the Falsies Waterproof Mascara;

• Maybelline Volum' Express Total Temptation Waterproof Mascara;

• Maybelline Great Lash Waterproof Mascara; and

• Maybelline Total Temptation Waterproof Mascara.

Id. ¶¶ 98-99. Plaintiffs further allege that the Tested Products "were shown to have PFAS levels beyond the EPA's lifetime health advisory level." *Id.* ¶ 100. However, Plaintiffs provide no information in the Amended Complaint concerning how many samples were tested in their Third-Party Study, whether all samples of a particular product tested positive for PFAS, from where these samples were sourced, the exact timing of their testing, the levels of PFAS found in each Tested Product, or which types of PFAS were found in each.

3. Individual Plaintiffs

As noted above, Hicks brings this action along with thirteen other Plaintiffs. The Amended Complaint alleges the following about each of them:

Hicks is a New York resident who has purchased L'Oréal Voluminous Waterproof Mascara, Maybelline Volum' Express the Falsies Waterproof Mascara, and Maybelline Great Lash Waterproof Mascara two to three times per year since 2019. [2] *Id.* ¶¶ 4, 128, 134. She has twice undergone eye surgery and has sensitive eyes. *Id.* ¶ 130.

2 The Court reminds Plaintiffs that "residence alone is insufficient to establish domicile for jurisdictional purposes," *Van Buskirk v. United Grp. Cos.*, 935 F.3d 49, 54 (2d Cir. 2019), and, therefore, "a statement of the parties' residence is insufficient to establish their citizenship" in a diversity jurisdiction case, *Leveraged Leasing Admin. Corp. v. PacifiCorp Cap., Inc.*, 87 F.3d 44, 47 (2d Cir. 1996). Should Plaintiffs choose to amend the Amended Complaint and rely on diversity jurisdiction under 28 U.S.C. § 1332, they must allege the citizenship of each individual Plaintiff.

Stephanie Vargas is a New York resident who has purchased Maybelline Volum' Express the Falsies Waterproof Mascara once every four to five months for the past ten years. *Id.* ¶¶ 5, 141. She wears contact lenses. *Id.* ¶ 143.

Sumner Davenport is a California resident who purchased L'Oréal Voluminous Waterproof Mascara on approximately seven occasions from 2017 to 2021. *Id.* ¶¶ 6, 156. She claims to have stopped using the product since she learned that it contains PFAS. *Id.* ¶ 159.

Stephanie Pinghera is a New York resident who purchased L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 7, 165, 168. [3] She used the product daily from January 1, 2020 to approximately November 1, 2021. *Id.* ¶ 168.

3 For several Plaintiffs, the Amended Complaint alleges the purchase of a specific product, followed by more general allegations referencing that Plaintiff's "purchase[ ]" of "Defendant's Products" or "the Products." *E.g.*, Am. Compl. ¶¶ 167-168 (Pinghera), 179-180 (Ruggiero), 191-192 (Santiago), 203-204 (Secor), 215-216 (Simmons), 227-228 (Spring), 239-240 (Trembly), 251-252 (Turner), 263-264 (Vega), 275 (Cauchi), 287 (Branton). It is unclear if the Amended Complaint is referring to the purchase of different items than

the specific product or products identified for each Plaintiff.

***4** Karrie Ruggiero is a New Jersey resident who purchased L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 8, 177, 180. She used the product daily from some time before 2018 until roughly August 1, 2021. *Id.* ¶ 180.

Marjie Santiago is a New York resident who purchased L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 9, 189, 192. She used the product three times a week from some time prior to 2018 until roughly January 1, 2022. *Id.* ¶ 192.

Kathleen Secor is a New York resident who purchased L'Oréal Voluminous Lash Paradise Waterproof Mascara. *Id.* ¶¶ 10, 201, 204. She used the product daily from some time before 2018 until roughly October 1, 2021. *Id.* ¶ 204.

Gwendolyn Simmons is a Michigan resident who purchased L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 11, 213, 216. She used the product three times a week from roughly January 1, 2001 until approximately January 2022. *Id.* ¶ 216. Simons has stopped using the product since she learned that it contains PFAS. *Id.* ¶ 219.

Nancy Spring is a New York resident who purchased L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 12, 225, 228. She used the product approximately five times a week from roughly January 1, 2016 to November 1, 2021. *Id.* ¶ 228.

Heidi Trembly is an Iowa resident who purchased L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 13, 237, 240. She used the product daily from some time before 2018 until approximately January 1, 2020. *Id.* ¶ 240. She stopped using the product before she learned that it contains PFAS. *Id.* ¶ 243.

Lisa Turner is a North Carolina resident who purchased L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 14, 249, 252. She used the product three times a week from approximately January 1, 2016 to January 1, 2020. *Id.* ¶ 252. She stopped using the product after she learned that it contains PFAS. *Id.* ¶ 255.

Rebecca Vega is a New Jersey resident who purchased L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 15, 261, 264. She used the product three times a week for at least one year starting approximately January 1, 2016. *Id.* ¶ 264. She stopped using the product after she learned that it contains PFAS. *Id.* ¶ 267.

Sonia Cauchi is a New York resident who purchased Maybelline Great Lash Waterproof Mascara and L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 16, 273. She most recently purchased these two products in 2022. *Id.* ¶ 276. She stopped using the products after she learned that they contain PFAS. *Id.* ¶ 279.

Stephanie Branton is a New York resident who purchased L'Oréal Voluminous Lash Paradise Waterproof Mascara and Maybelline Volum' Express the Falsies Waterproof Mascara. *Id.* ¶¶ 17, 285. She most recently purchased these products in 2022. *Id.* ¶ 288. She stopped using the products after she learned that they contain PFAS. *Id.* ¶ 292.

Thus, Plaintiffs combined purchased L'Oréal products (the "Purchased Products") which were within the same line of products as the Tested Products. Notably, each Plaintiff posits "on information and belief" that the products they purchased contained detectable levels of PFAS. *Id.* ¶¶ 136, 147, 158, 170, 182, 194, 206, 218, 230, 242, 254, 266, 278, 291. They claim that "[a]s a result of [L'Oréal's] negligent, reckless, and/or knowingly deceptive conduct, [they were] injured by purchasing, at a premium price, the Waterproof Mascara Products that were not of the quality and safety promised and that [they] would not have purchased if [they] had not been misled by [L'Oréal]." *Id.* ¶¶ 139, 152, 163, 175, 187, 199, 211, 223, 235, 247, 259, 271, 283, 296.

***5** Plaintiffs purport to bring this action on behalf of seven different classes, each composed of individuals who purchased products within the product line of the Tested Products: (1) all individuals in the United States who purchased the products from 2018 to present, (2) all individuals in New York who purchased the products from 2018 to present, (3) all individuals in California who purchased the products from 2018 to present, (4) all individuals in Iowa who purchased the products from 2018 to present, (5) all individuals in Michigan who purchased the products from 2016 to present, (6) all individuals in North Carolina who purchased the products from 2018 to present, and (7) all individuals in New Jersey who purchased the products from 2018 to present. *Id.* ¶ 322.

Plaintiffs bring claims on behalf of themselves, the nationwide class, or alternatively the New York subclass for deceptive acts and practices under New York General Business Law section 349 (First Cause of Action) and false advertising under New York General Business Law

section 350 (Second Cause of Action). *Id.* ¶¶ 332-361. They bring breach of express warranty (Third Cause of Action) and breach of implied warranty (Fourth Cause of Action) claims on behalf of themselves, the nationwide class, or alternatively the New York, California, Iowa, Michigan, North Carolina, and New Jersey subclasses. *Id.* ¶¶ 362-379. They similarly bring fraudulent concealment (Fifth Cause of Action) and unjust enrichment (Sixth Cause of Action) claims on behalf of themselves, the nationwide class, or alternatively the New York, California, Iowa, Michigan, and New Jersey subclasses. *Id.* ¶¶ 380-395. Davenport brings claims on behalf of herself and the California subclass for violations of the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.* (Seventh Cause of Action), and the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* (Eighth and Ninth Cause of Action). Am. Compl. ¶¶ 396-420. Trembly brings a claim under the Iowa Private Right of Action for Consumer Frauds Act, Iowa Code §§ 714H.1 *et seq.*, on behalf of herself and the Iowa subclass (Tenth Cause of Action). Am. Compl. ¶¶ 421-442. Simmons brings a claim for violations of the Michigan Consumer Protection Act, Mich. Comp. Laws §§ 445.901 *et seq.*, on behalf of herself and the Michigan subclass (Eleventh Cause of Action). Am. Compl. ¶¶ 443-461. Turner brings a claim for violations of the North Carolina Unfair and Deceptive Acts and Practices Act, N.C. Gen. Stat. §§ 75-1.1 *et seq.*, on behalf of herself and the North Carolina subclass (Twelfth Cause of Action). Am. Compl. ¶¶ 462-479. Vega and Ruggiero bring a claim under the New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 *et seq.*, on behalf of themselves and the New Jersey subclass (Thirteenth Cause of Action). Am. Compl. ¶¶ 480-494.

Plaintiffs seek declaratory relief, in addition to damages and monetary awards, for these alleged violations. *Id.* at 73. [4]

[4] Plaintiffs clarified in their briefing that they "are no longer pursuing injunctive relief." Dkt. 33 ("Opposition") at 15 n.10.

B. Procedural History

With the exception of Cauchi and Branton, Plaintiffs filed the instant action on March 9, 2022. Dkt. 1 (the "*Hicks* Action"). Cauchi and Branton then separately filed their action on May 13, 2022. *See Cauchi v. L'Oréal USA, Inc.*, No. 22 Civ. 3926 (JPC) (S.D.N.Y.) (the "*Cauchi* Action"); *see also* Dkt. 22 at 1. L'Oréal moved to dismiss the Complaint filed in the *Hicks* Action on June 24, 2022, Dkt. 16, but the Court—with the parties' consent—consolidated the *Hicks* Action and the *Cauchi* Action under Federal Rule of Civil Procedure 42(a)(2) on July 20, 2022, Dkt. 22. The parties' stipulation, which was attached to the consolidation order, allowed Plaintiffs to file a consolidated amended complaint, Dkt. 22 at 2, and Plaintiffs accordingly filed the operative Amended Complaint on August 23, 2022, Dkt. 25. The Court then denied L'Oréal's motion to dismiss the original Complaint in the *Hicks* Action as moot. Dkt. 26. L'Oréal moved to dismiss the Amended Complaint on October 7, 2022, seeking dismissal for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6). Dkt. 29.

II. Legal Standards

***6** "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Courts take the uncontroverted facts of the complaint as true, but "[w]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014) (alteration in original) (internal quotation marks omitted).

III. Discussion

A. Article III Standing

The Court begins—and ends—with L'Oréal's challenge to Plaintiffs' standing pursuant to Rule 12(b)(1), "because [standing] is a jurisdictional requirement and must be assessed before reaching the merits." *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 136 (2d Cir. 2023) (internal quotation marks omitted).

Federal courts are of limited subject matter jurisdiction, as Article III of the U.S. Constitution "confines the federal judicial power to the resolution of 'Cases' and 'Controversies.' " *TransUnion*, 141 S. Ct. at 2203 (quoting U.S. Const. art. III, § 2). In turn, "[f]or there to be a case or controversy under Article III, the plaintiff must have a

personal stake in the case—in other words, standing." *Id.* (internal quotation marks omitted). In the class action context, at least "one named plaintiff [must] have standing with respect to each claim." *Hyland v. Navient Corp.*, 48 F.4th 110, 118 (2d Cir. 2022). To satisfy the "irreducible constitutional minimum of standing," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal quotation marks omitted), "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief," *TransUnion*, 141 S. Ct. at 2203. Plaintiffs, as the collective party invoking federal jurisdiction, "bear the burden of demonstrating that they have standing." *Id.* at 2207. "[A]t the pleading stage, 'general factual allegations of injury resulting from the defendant's conduct may suffice." *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). However, even with this relatively lenient pleading standing, plaintiffs still "must plead enough facts to make it plausible that they did indeed suffer the sort of injury that would entitle them to relief." *Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, 19 F.4th 58, 65-66 (2d Cir. 2021) (internal quotation marks omitted).

L'Oréal advances four arguments for why Plaintiffs lack standing. Three of them—which challenge whether the mascaras contained risky forms of PFAS, whether the mascaras contained harmful amounts of PFAS, and "the alleged links between some forms of PFAS and the risk of future health problems," Dkt. 30 ("Motion") at 11—are inappropriate for the Court to parse at this juncture. *Id.* at 7-14.[5] The Court accepts Plaintiffs' allegations as true at the pleadings stage, and, relatedly, fact-specific inquiries are "generally inappropriate for resolution on a motion to dismiss." *Morningstar Films, LLC v. Nasso*, 554 F. Supp. 3d 525, 540-41 (E.D.N.Y. 2021). Here, Plaintiffs allege that "any amount of PFAS in products that may enter the body (such as through the eyes) is of concern and could potentially lead to adverse health effects." Am. Compl. ¶ 101. It may well be that L'Oréal's will be able to disprove this allegation through discovery, but their arguments to the contrary are premature at the motion to dismiss stage.

5 These arguments by L'Oréal appear to present a factual challenge to standing by proffering evidence, as opposed to a facial one based solely on the allegations in the Amended Complaint. *See* *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 57 (2d Cir. 2016). "[W]here the jurisdictional challenge is fact-based, the defendant may 'proffer[ ] evidence beyond the [p]leading,' and the plaintiff 'will need to come forward with evidence of their own to controvert that presented by the defendant if the affidavits submitted on a 12(b) motion ... reveal the existence of factual problems in the assertion of jurisdiction." *Maddy v. Life Time, Inc.*, No. 22 Civ. 5007 (LJL), 2023 WL 4364488, at *2 (S.D.N.Y. July 5, 2023) (quoting *Carter*, 822 F.3d at 57).

Even if the Court were to rely on the evidence presented by L'Oréal, however, they do not appear to contradict the Amended Complaint's plausible allegations. *See* *Carter*, 822 F.3d at 57 ("However, the plaintiffs are entitled to rely on the allegations in the [p]leading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing."). L'Oréal first contends that the failure of the Amended Complaint to "plead what member(s) of the voluminous PFAS category Plaintiffs' units of mascara supposedly contained" undercuts the notion that Plaintiffs' individual mascaras contained harmful forms of PFAS, pointing to the fact that the Amended Complaint's own cited sources concluded that only some PFAS might be toxic. Motion at 8. But Plaintiffs base their allegations at least in part on their testing, which showed that several of the Products contained PFOA. Am. Compl. ¶ 99. And, in turn, the Amended Complaint also alleges that the EPA set lifetime health advisory levels for PFOA. *Id.* ¶ 64. The evidence L'Oréal points to therefore does not contradict the assertions about the types of PFAS plausibly contained in the Products. L'Oréal's proffered evidence concerning toxic quantities of PFAS moves the needle no further. *See* Motion at 8-11. The FDA's and EPA's statements cited by Plaintiffs appear to show uncertainty about the level of PFAS that may be toxic; such an allegation does not contradict the notion that low levels of PFAS could plausibly be toxic at the pleadings stage. The same logic applies to L'Oréal's

> argument about the uncertainties surrounding the links between PFAS and health problems: as L'Oréal notes, the Amended Complaint goes no further than the proffered FDA statements in noting this uncertainty. *Id.* at 11-14. It may well be that L'Oréal's claims could prove meritorious in later stages of litigation. But in the absence of evidence that directly contradicts material claims in the Amended Complaint, as opposed to generally sowing doubts about them, L'Oréal's factual challenge to standing is unavailing.

***7** That leaves L'Oréal's argument that Plaintiffs have not established standing because they have not plausibly alleged that the mascaras they personally purchased—*i.e.*, the Purchased Products—contained PFAS. Motion at 4-6. The question here comes down to whether Plaintiffs have sufficiently pleaded that they have suffered an injury-in-fact. Such injury must be "real, and not abstract." *TransUnion*, 141 S. Ct. at 2204. Concrete injuries include "physical, monetary, or cognizable intangible harm[s] traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 2206.

Plaintiffs present a price-premium theory of injury. Broadly speaking, each Plaintiff alleges that she was injured from buying a Purchased Product "at a premium price," with each containing undisclosed, toxic PFAS. *E.g.*, Am. Compl. ¶¶ 139, 152, 163, 175, 187, 199, 211, 223, 235, 247, 259, 271, 283, 296. Plaintiffs contend that they would not have purchased those mascaras or would have paid less for them had they known that the products contained PFAS or—in the case of four of the named Plaintiffs—because of the "material risk" that the products contain PFAS, *id.* ¶¶ 138, 148, 279, 292. Such a price-premium theory of injury has been broadly accepted in the Second Circuit. *See, e.g.*, *Axon v. Florida's Natural Growers, Inc.*, 813 F. App'x 701, 703-04 (2d Cir. 2020) ("[Plaintiff] has suffered an injury-in-fact because she purchased products bearing allegedly misleading labels and sustained financial injury—paying a premium—as a result."); *Onaka v. Shiseido Ams. Corp.*, No. 21 Civ. 10665 (PAC), 2023 WL 2663877, at *4 & n.3 (S.D.N.Y. Mar. 28, 2023) (collecting cases). The problem, however, is that Plaintiffs have not alleged sufficient facts to allow the inference that the mascaras they individually purchased in fact contained PFAS, or that there was a material risk that they did.

Plaintiffs first rely on the June 2021 Notre Dame Study, which found the presence of PFAS in dozens of cosmetic products. Am. Compl. ¶¶ 82, 85-87. This study, based on the allegations in the Amended Complaint, does not get Plaintiffs very far. Plaintiffs do not allege that any of the Tested Products were included in the Notre Dame Study. In fact, Plaintiffs do not allege that any L'Oréal product whatsoever—whether mascara or other cosmetics, or whether through the "L'Oréal Paris" makeup line, the Maybelline brand, or otherwise—was part of the Notre Dame Study.

Further, with respect to the products tested in the Notre Dame Study, the Amended Complaint is murky as to the study's actual findings. While the Notre Dame Study allegedly tested 231 cosmetic products for total fluorine, and found the highest proportion of fluorine in foundations, mascaras, and lip products, *id.* ¶¶ 81, 83, the Amended Complaint does not allege what proportion of those 231 products were found to have fluorine. The Amended Complaint further alleges that "[s]everal mascaras gave the highest fluorine concentrations measured," *id.* ¶ 83, but does not indicate how many total mascara products were tested or what percentage of those mascaras contained fluorine. With respect to the 231 products tested in the Notre Dame Study, the Amended Complaint discusses the presence of fluorine in at least some of those products, but does not expressly allege that fluorine was found in all of them. Nor does the Amended Complaint allege that the presence of fluorine necessarily means the presence of PFAS (or even that fluorine presence likely also means PFAS presence). Plaintiffs allege that "all PFAS are comprised of carbon-fluorine bonds," *id.* ¶ 82, but that does not mean the converse is true: that the presence of carbon-fluorine bonds necessarily means the presence of PFAS. And while Plaintiffs allege that the Notre Dame Study found that, of the twenty-nine products for which further analysis was performed, "short-chain PFAS were most commonly detected" and all twenty-nine "contained long-chain PFAS," Plaintiffs do not allege how those twenty-nine products were selected for that additional testing. *Id.* ¶¶ 86-87. Were they randomly selected? Were they the ones with the highest fluorine levels? Nor does the Amended Complaint even allege how many of these twenty-nine products were mascaras.

***8** Perhaps to address their obvious inability to rely on the findings of the Notre Dame Study to establish an injury linked to the Purchased Products, Plaintiffs arranged for another study, Plaintiffs' Third-Party Study, to measure PFAS in certain L'Oréal products. *Id.* ¶¶ 96-98. This "analysis tested for approximately 30 specific PFAS," and found PFAS

to be present at levels "beyond the EPA's lifetime health advisory level" in the Tested Products. *Id.* ¶¶ 97-100. But there are also glaring shortcomings when relying on the findings of Plaintiffs' Third-Party Study to establish standing: the findings from that study, as alleged in the Amended Complaint, do not plausibly allege any injury with respect to the Purchased Products. The Amended Complaint does not allege, for instance, how many products were tested in Plaintiffs' Study, whether all those tested products revealed the presence of PFAS, and if not, what percentage of the products had PFAS.

These allegations of injury are considerably weaker than those analyzed by the Second Circuit in *John v. Whole Foods*, where the Second Circuit reversed the district court's dismissal of a putative class action for lack of standing. The plaintiff in *John* alleged that Whole Foods violated New York law by overcharging customers for fourteen types of pre-packaged foods. 858 F.3d at 734-35. Crucially for that case, a 2015 New York City Department of Consumer Affairs investigation revealed that eighty-nine percent of tested packages from Whole Foods were mislabeled. *Id.* The Second Circuit held that the widespread prevalence of overcharging revealed by the study, combined with the plaintiff's allegation that he "regularly purchased Whole Foods packages of cheese and cupcakes throughout the relevant period," sufficed at the pleadings stage to show an injury-in-fact. *Id.* at 737-38. The Circuit also held that the district court erred by attempting to "determine whether the [city government study's] sampling methods justified its declaration of widespread overcharging." *Id.* at 737. The Second Circuit explained that, "[a]t the pleading stage, [the plaintiff] need not prove the accuracy of the [study]'s findings or the rigor of its methodology; he need only generally allege facts that, accepted as true, make his alleged injury plausible." *Id.*

In contrast, Plaintiffs in this case have provided no detailed allegations showing widespread prevalence of PFAS levels in the Purchased Products, on par with the allegations in *John*. Again, Plaintiffs rely entirely on the Notre Dame Study and their Third-Party Study, but their allegations as to the meaningful results of each study with respect to the Purchased Products are exceedingly thin. Of course, none of the actual Purchased Products were tested in either study, so neither features findings as to the products Plaintiffs actually purchased. The Notre Dame Study is not even alleged to have tested any L'Oréal products, so the findings there are particularly unhelpful. And although the Notre Dame Study tested unspecified cosmetics, including mascaras, the Amended Complaint fails to explain how the twenty-nine cosmetic products that were found to contain long-chain PFAS were chosen, how many of these twenty nine or the larger group of 231 products were waterproof mascaras as opposed to other cosmetic products, whether the study detected the same types of PFAS that were detected in the Tested Products, or how many of the 231 total products tested were found to have high fluorine levels, to list just a few uncertainties in the findings as alleged. Such general allegations about the widespread use of PFAS in the cosmetics industry writ large cannot fill that gap and "nudge" their allegation that PFAS was in the Purchased Products "from conceivable to plausible." *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 90 (2d Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

While Plaintiffs' Third-Party Study at least tested mascaras in the same product line as the Purchased Products, critical details are lacking as to that study's results as well. Plaintiffs do not allege how pervasive PFAS was found to be in their Third-Party Study, such as whether PFAS was found in all the L'Oréal products tested or just a subset, or even whether all products within the same product line tested positive for the presence of PFAS. In other words, although Plaintiffs have pleaded that their Third-Party Study found PFAS in certain products, no allegation establishes the prevalence of that presence. The Amended Complaint also fails to allege when Plaintiffs' Third-Party Study occurred to allow an assessment of the proximity to Plaintiffs' purchases, although logically it must have take place at some point between the publication of the Notre Dame study in June 2021 and the filing of the original Complaint in March 2022.

***9** The Amended Complaint's allegations boil down to describing general and unspecific results of testing, without meaningfully linking those results to Plaintiffs' actual Purchased Products beyond Plaintiffs' "information and belief." *Cf. In re Express Scripts/Anthem ERISA Litig.*, 285 F. Supp. 3d 655, 678 (S.D.N.Y. 2018) ("[T]he Court need not credit 'mere conclusory statements' in a complaint." (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))). [6] In the absence of further details, Plaintiffs have not plausibly pleaded that PFAS was present in the Purchased Products in a "systematic and routine" way. *John*, 858 F.3d at 737 (cleaned up). The Second Circuit's analysis in *John*—read in light of *Maddox*'s requirement that Plaintiffs "plead

enough facts to make [their injury] plausible"—thus militates toward concluding that the Amended Complaint, in its current form, does not establish that Plaintiffs suffered an injury-in-fact. This conclusion also comports with other district judges who have recently applied *John* in similar contexts. *See* *Onaka*, 2023 WL 2663877, at *5 (reaching a similar conclusion when the plaintiffs did not "plausibly allege[ ] that the presence of PFAS in the [relevant cosmetics products] is so widespread as to render it plausible that any Plaintiff purchased a mislabeled Product at least once" when "Plaintiffs provide[d] no facts from which the Court could extrapolate that their isolated testing should apply broadly to Defendant's Products, regardless of when they were purchased"); *Wilson v. Mastercard, Inc.*, No. 21 Civ. 5930 (VEC), 2022 WL 3159305, at *5 (S.D.N.Y. Aug. 8, 2022) (concluding that a plaintiff's allegation that overcharging "occurred 'on a majority of days' " did not suffice for a pervasive overcharging theory for foreign currency exchange transactions when, among other issues, the plaintiff "neither allege[d] what those currencies are nor whether she engaged in any transactions in those currencies").

6 Presumably relying on Plaintiffs' Third-Party Study, in conjunction with the Notre Dame Study, each Plaintiff asserts "on information and belief" that the mascaras they individually purchased "contained detectable levels of PFAS." Am. Compl. ¶¶ 136, 147, 158, 170, 182, 194, 206, 218, 230, 242, 254, 266, 278, 291; *see* Opposition at 11 (maintaining that Plaintiffs have "show[n] systematic, ubiquitous contamination of the brand and type of products they purchased"). To be sure, the Court can as a general matter accept as true "facts alleged 'upon information and belief' where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010). That is not the case here. While Plaintiffs allege a number of times in the Amended Complaint that L'Oréal had "exclusive knowledge of the contents and formula of [the Tested] Products, including whether they contained PFAS," Am. Compl. ¶ 311; *see also id.* ¶¶ 318, 436, 456, 473, the Amended Complaint also alleges that "PFAS occurs in cosmetic products both as an intended ingredient and as degradation products and impurities from the production of certain PFAS precursors used in certain products," *id.* at ¶ 79. Plaintiffs claim that "a fair reading of the [Amended Complaint], with inferences drawn in [their] favor, suggests that PFAS are intentionally added by [L'Oréal] rather than a byproduct or impurity." Opposition at 3-4. That conclusion is not apparent to the Court. Plaintiffs provide no citations to the Amended Complaint that could support such an inference, nor can the Court identify any. The theory that PFAS were incidentally added to the products therefore is incorporated into the Amended Complaint's allegations, and, in turn, whether any of the individual Plaintiffs' mascaras contained PFAS is not "peculiarly within the possession and control of [L'Oréal]." The Court therefore need not credit Plaintiffs' allegation of PFAS inclusion in their purchased products based only on their information and belief alone.

It may be the case that another amended complaint, *see infra* III.B, can cure these deficiencies with relative ease by pleading more details concerning Plaintiffs' Third-Party Study to allege a linkage of the results to the Purchased Products. Plaintiffs might be able to allege testing results that show the presence of PFAS with such prevalence in the same product lines as the Purchased Products that PFAS appears in "systematic[ally] and routine[ly]" in those products for purposes of the *John* analysis. *John*, 858 F.3d at 737 (cleaned up). However they do it, Plaintiffs must allege more details than they have in the Amended Complaint to support a "systemic practices" theory. They must plead sufficient facts "to make it plausible that [Plaintiffs] did indeed suffer the sort of injury that would entitle them to relief." *Maddox*, 19 F.4th at 65-66. At the pleading stage, Plaintiffs are not required to "prove the accuracy of the[ir] findings or the rigor of [their] methodology," with their allegations credited and all inferences related thereto drawn in their favor. *John*, 858 F.3d at 737. But there must be a plausible basis to link their findings to the Purchased Products.

***10** The Court therefore concludes that, based on the Amended Complaint, Plaintiffs have not adequately pleaded that the mascaras they purchased contained PFAS nor that there was a material risk thereof. The Court therefore finds that none of the named Plaintiffs have standing based on the allegations in the Amended Complaint, and accordingly dismisses the Amended Complaint without prejudice. *See*

id. at 735 ("[W]here a complaint is dismissed for lack of Article III standing, the dismissal must be without prejudice, rather than with prejudice."). [7]

7 There is also reason to be skeptical of standing for Trembly and Turner, even if Plaintiffs successfully address the aforementioned issues in a second amended complaint. District courts interpreting *John* have noted that the Second Circuit's decision stands for the proposition that plaintiffs can link personal purchases of allegedly defective products that were made "reasonably near in time" to a study's similar finding thereof. *See, e.g.*, *Onaka*, 2023 WL 2663877, at *4 (quoting *Clinger v. Edgewell Personal Care Brands, LLC*, No. 21 Civ. 1040 (JAM), 2023 WL 2477499, at *4 (D. Conn. Mar. 13, 2023)). But Turner and Trembly stopped using the L'Oréal products a year and a half before the publication of the Notre Dame Study in June 2021, Am. Compl. ¶¶ 240, 252, and, as noted above, Plaintiffs' testing would have occurred sometime between the publication of the Notre Dame Study and the filing of their original Complaint in March 2022. Depending on the exact timing of Plaintiffs' study, that gap between Turner and Trembly's use of the products and Plaintiffs' testing might undercut the link between their Purchased Products and the testing.

B. Leave to Amend

Lastly, the Court grants Plaintiffs' request for leave to amend. *See* Opposition at 25. Under Rule 15(a) of the Federal Rules of Civil Procedure, a court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Court will grant Plaintiffs leave to file a second amended complaint, in the event that they believe that they can plead facts that would adequately state a claim upon which relief may be granted and which can cure the standing-related defects identified above. L'Oréal would not be unduly prejudiced by an amendment and is on notice as to the basic circumstances underlying the claims. The Court emphasizes, however, that Plaintiffs should amend only if they are able to resolve the pleading deficiencies outlined in this Opinion and Order.

IV. Conclusion

For the foregoing reasons, the Court grants L'Oréal's motion to dismiss and dismisses the eleven causes of action without prejudice. The Court also grants Plaintiffs' request for leave to amend. Should they choose to do so, Plaintiffs must file a second amended complaint by November 3, 2023.

SO ORDERED.

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United States District Court, S.D. New York.

Zaida HICKS, Stephanie Vargas, Sumner Davenport, Stephanie Pinghera, Karrie Ruggiero, Marjie Santiago, Kathleen Secor, Gwendolyn Simmons, Nancy Spring, Heidi Trembly, Lisa Turner, and Rebecca Vega, Individually and on Behalf of All Others Similarly Situated, Plaintiffs,
v.
L'ORÉAL U.S.A., INC., Defendant.
Sonia Cauchi and Stephanie Branton, Individually and on Behalf of All Others Similarly Situated, Plaintiffs,
v.
L'Oréal U.S.A., Inc., Defendant.

22 Civ. 1989 (JPC), 22 Civ. 3926 (JPC)
|
Signed September 19, 2024

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OPINION AND ORDER

JOHN P. CRONAN, United States District Judge:

***1** Fourteen Plaintiffs, residing in five different states, bring this putative class action alleging that Defendant L'Oréal U.S.A., Inc. ("L'Oréal" or the "Company") failed to disclose that several of its waterproof mascara products contained Per- and Polyfluoroalkyl Substances ("PFAS"), in violation of a host of state consumer protection laws and common law. Plaintiffs' claims are premised on a price-premium theory of injury, as they insist that they would not have purchased the mascaras, or paid the price they did, had they known that the products contained PFAS. The Court dismissed Plaintiffs' prior complaint on standing grounds, faulting them for failing to allege facts that allowed for the plausible inference that PFAS were in the products they in fact purchased. Plaintiffs then filed their Second Amended Complaint on December 4, 2023, adding allegations of recent testing results of the mascara product lines at issue in this case. L'Oréal has now moved to dismiss the Second Amended Complaint, challenging the standing of all but one Plaintiff as well as the merits of Plaintiffs' claims. For reasons that follow, the Court grants in part and denies in part L'Oréal's motion.

I. Background

A. Facts [1]

1 The following facts, which are assumed true for purposes of this Opinion and Order, are taken from that Complaint, Dkt. 43 ("SAC"), as well as documents incorporated by reference in the Second Amended Complaint. *See* *Interpharm, Inc. v. Wells Fargo Bank, Nat'l Ass'n*, 655 F.3d 136, 141 (2d Cir. 2011) (explaining that on a motion to dismiss pursuant to Rule 12(b)(6), the court must "assum[e] all facts alleged within the four corners of the complaint to be true, and draw[ ] all reasonable inferences in plaintiff's favor"); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) ("[O]n a motion to dismiss, a court may consider documents attached to the complaint as an exhibit or incorporated in it by reference ...." (internal quotation marks omitted)).

Headquartered in New York City, L'Oréal is one of the world's largest cosmetics companies, owning and operating over thirty different brands. SAC ¶¶ 19, 132. L'Oréal sells ten different types of waterproof mascara through its "L'Oréal Paris" makeup line and offers a number of waterproof mascara products under its Maybelline brand

as well. *Id.* ¶ 138. Plaintiffs allege that from at least 2016 to December 4, 2023 (*i.e.*, the date they filed the Second Amended Complaint), L'Oréal represented that its waterproof mascaras "were safe, effective, high quality, and appropriate for use on consumers' eyelashes and around their eyes," when in fact many of these products in fact contained "detectable amounts" of "harmful PFAS." *Id.* ¶¶ 20-21; *see id.* ¶¶ 172-340 (alleging the dates individual Plaintiffs purchased and used the subject mascaras). For example, product packaging for L'Oréal Voluminous Lash Paradise Waterproof Mascara assured that the product was "ophthalmologist and allergy tested. Suitable for sensitive eyes. Tested under dermatological control for safety." *Id.* ¶ 154. The packaging for Maybelline Volum' Express the Falsies Waterproof Mascara and Maybelline Total Temptation Waterproof Mascara similarly stated that the products were "ophthalmologist tested. Suitable for contact wearers." *Id.* ¶ 155. Likewise, the packaging for Maybelline Great Lash Waterproof Mascara represented the product to be "contact lens safe" and "hypoallergenic." *Id.* ¶ 156.

1. PFAS

***2** As alleged in the Second Amended Complaint, "PFAS are human-made, synthetic chemicals that do not exist naturally in the environment" and have been used in a wide variety of consumer products, including cosmetics. *Id.* ¶¶ 53-54, 80. PFAS can be divided into long- and short-chain categories, depending on whether they contain seven or more carbon atoms. *Id.* ¶ 57. While there are many unique varieties of PFAS, "what all PFAS share is that they contain multiple carbon-fluorine bonds, considered one of the strongest in chemistry, making them highly persistent in the environment and in human and animal bodies." *Id.* ¶ 55. Plaintiffs claim that the ability of these chemicals to persist "in the human body gives all PFAS a shared toxicity." *Id.*

As alleged, "[h]umans may be exposed to PFAS through a variety of pathways, including ingestion, inhalation, and skin absorption." *Id.* ¶ 65. PFAS exposure, they claim, is "associated in the medical and scientific literature with harmful and serious health effects in humans." *Id.* ¶ 66. These health effects include, but are not limited to:

> (a) altered growth; (b) impacts to learning and behavior of infants and older children; (c) lowering a woman's chance of getting pregnant; (d) interference with the body's natural hormones; (e) increased cholesterol levels; (f) modulation of the immune system; (g) testicular and kidney cancers; (h) thyroid disease; (i) high uric acid levels; (j) elevated liver enzymes; (k) ulcerative colitis; [ ] (l) pregnancy-induced hypertension; (m) increased allergic disease and sensitivity to allergens; (n) dermatitis; (o) eye disease; (p) dermal irritation; and (q) eye irritation.

Id.; *see also id.* ¶¶ 67-69 (alleging other possible health risks associated with exposure to PFAS).

In "June 2022, the [Environmental Protection Agency ('EPA')] announced a lifetime health advisory related to PFAS,"[2] setting "lifetime health advisory levels" for two types of PFAS, perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonic acid ("PFOS"). *Id.* ¶ 72. For PFOA, the level was set at 0.004 parts per trillion ("ppt"), and for PFOS, the level was set at 0.02 ppt. *Id.* "These levels are below the detection capability of most measurement devices, meaning that [the] EPA considers any detection of PFOA or PFOS to exceed the lifetime health advisory level." *Id.* PFOA allegedly "is toxic in extremely small quantities" and "[t]he EPA has characterized PFOA as a 'likely carcinogen' and designated the chemical a 'hazardous substance' under the Comprehensive Environmental Response, Compensation, and Liability Act." *Id.* ¶ 25.

[2] "A health advisory is not a binding regulation but serves as informal technical guidance to assist government officials." SAC ¶ 72 (internal quotation marks omitted).

2. PFAS in Cosmetics and Testing of L'Oréal Products

As alleged, there are various explanations for how PFAS may end up in cosmetics. *Id.* ¶ 80. As most relevant here, Plaintiffs allege that PFAS may be intentionally added as an ingredient to cosmetic products to make them more water-resistant. *Id.*; *see id.* ¶ 90 ("When PFAS is present in a product describing itself as 'waterproof' or 'long-lasting,' it is likely [ ] an intentional ingredient, as PFAS provides hydrophobic, or 'water-resistant qualities.' "). In addition, PFAS "may be present as degradation products and impurities

from the production of certain PFAS precursors used in certain products." *Id.* ¶ 87. "PFAS may also be present in cosmetic products as a result of the manufacturing and/or transportation process" through a range of pathways. *Id.* ¶ 91. Given the many avenues by which PFAS might have ended up in the Company's cosmetic products, Plaintiffs allege that "L'Oréal knew or should have known that PFAS can be present in its cosmetic products as a result of degradation, the use of water or raw materials containing PFAS, or as a result of the manufacturing process of its cosmetics." *Id.* ¶ 93.

***3** "Prior to 2021, no-peer reviewed research had been published analyzing whether PFAS were present in cosmetic products where the label did not disclose the presence of any such compounds." *Id.* ¶ 95. But in June 2021, researchers at Notre Dame published the results of a peer-reviewed study conducted on 231 cosmetic products (the "Notre Dame Study"). *Id.* ¶ 96. The study "screen[ed] for total fluorine" in the products tested, which is "an accepted methodology among researchers to investigate whether PFAS are present" as "all PFAS are comprised of carbon-fluorine bonds." *Id.* ¶¶ 96, 99. Included in "the 231 products analyzed were products, including mascara products, manufactured by [L'Oréal]." *Id.* ¶ 97. The "[r]esearchers did not identify which specific cosmetic products were tested, however, identifying only the manufacturer and product type." *Id.* The researchers sorted the results of the testing into three categories: products with high fluorine levels, defined as a concentration of greater than 0.384 µg F/cm ^{2} ; products with moderate fluorine levels, defined as a concentration between detection and 0.384 µg F/cm ^{2} ; and products with low fluorine, defined as containing a level less than or equal to the level of detection. *Id.* ¶ 98. Fifty-two percent of the 231 products tested contained high fluorine, sixteen percent contained moderate fluorine, and thirty-two percent contained low fluorine. *Id.* "Several mascaras gave the highest fluorine concentrations measured and 47% of the mascara products tested fell within the 'high fluorine' range,' " *id.* ¶ 100, though Plaintiffs do not specify which ones. In addition, the "[r]esearchers found high fluorine levels in products commonly advertised as 'wear-resistant' to water." *Id.* ¶ 101.

The Notre Dame Study also entailed a "further analysis of 29 foundations, mascaras, and lip products." *Id.* ¶ 102. The researchers "did not explain precisely how these 29 products were selected for further analysis," although "they did state that twenty of the products selected were those with high fluorine detections" and thirteen "were mascara products." *Id.* This additional analysis revealed short-chain PFAS to be "most commonly detected in these products," though the researchers "also found that the 29 products contained long-chain PFAS." *Id.* ¶¶ 103-104. Eight percent of the 231 total screened products listed some type of PFAS as an ingredient, and only three percent of the twenty-nine products that underwent further testing listed some type of PFAS as an ingredient. *Id.* ¶ 106.

After reviewing the Notre Dame Study, Plaintiffs pursued "independent third-party testing to determine whether certain [L'Oréal] cosmetic products contained undisclosed PFAS." *Id.* ¶ 113. The first testing was conducted by an independent laboratory "in late 2021" (the "Late 2021 Testing"). *Id.* ¶ 114. This analysis "tested for approximately 30 specific PFAS." *Id.* The Late 2021 Testing examined one tube of each of the following five L'Oréal products: L'Oréal Voluminous Waterproof Mascara, L'Oréal Voluminous Lash Paradise Waterproof Mascara, Maybelline Volum' Express the Falsies Waterproof Mascara, Maybelline Great Lash Waterproof Mascara, and Maybelline Total Temptation Waterproof Mascara (collectively, the "Products"). *Id.* ¶¶ 116, 118. The lab analysis detected PFAS in each of the five tubes, showing the following:

- The L'Oréal Voluminous Waterproof Mascara tube contained 2.0 ng/g of perfluorododecanesulfonic acid.
- The L'Oréal Voluminous Lash Paradise Waterproof Mascara tube contained 390 ng/g of adsorbable organic fluorine.
- The Maybelline Volum' Express the Falsies Waterproof Mascara tube contained 0.22 ng/g of PFOA and 0.31 ng/g of perfluorohexanoic acid ("PFHxA").
- The Maybelline Great Lash Waterproof Mascara tube contained 1.1 ng/g of PFHxA.
- The Maybelline Total Temptation Waterproof Mascara tube contained 0.21 ng/g of PFOA.

Id. ¶ 118.

As discussed below, *see infra* I.B.2, on September 30, 2023, the Court dismissed without prejudice Plaintiffs' first Amended Complaint for lack of standing and granted Plaintiffs leave to amend. *See Hicks v. L'Oréal*, Nos. 22 Civ. 1989 (JPC), 22 Civ. 3926 (JPC), 2023 WL 6386847 (S.D.N.Y. Sept. 30, 2023). Shortly after that dismissal, in October 2023, Plaintiffs "performed a second round of testing" of additional tubes of the same five Products that were the subject of the

Late 2021 Testing (the "October 2023 Testing"). SAC ¶ 119. For that supplemental testing, Plaintiffs purchased four to five tubes of each Product "from multiple major retail outlets in New York City." *Id.* The selected tubes were then sent for testing to "a qualified laboratory different from the laboratory they had used for the [Late 2021 Testing]." *Id.* ¶ 120. The results of the October 2023 Testing were as follows:

***4** • Five L'Oréal Voluminous Waterproof Mascara tubes were tested, with PFAS detected in all of them. Of these tubes, "two contained PFOA concentrations exceeding 3.0 ppt and a third contained PFOA concentrations exceeding 4.0 ppt, meaning that Voluminous products contained PFOA up to 1,000 times greater than the EPA health advisory level." *Id.* ¶ 121.

- Four L'Oréal Voluminous Lash Paradise Waterproof Mascara tubes were tested, with PFAS detected in all four. "PFOA concentrations were detected in quantities of 2.57 ppt, 3.24 ppt, 1.62 ppt, and 1.81 ppt, meaning that Lash Paradise products ranged from 405 times the EPA health advisory level to 810 times the EPA health advisory level." *Id.*

- Five Maybelline Volum' Express the Falsies Waterproof Mascara tubes were tested, with PFAS detected in all five. They "contained PFOA concentrations ranging from 0.31 ppt to 1.26 ppt, meaning these products contained PFOA up to 315 times the EPA health advisory level." *Id.*

- Five Maybelline Great Lash Waterproof Mascara tubes were tested, with PFAS detected in all five. They "contained PFOA concentrations ranging from 0.28 ppt to 1.20 ppt, meaning these products contained PFOA up to 300 times the EPA health advisory level." *Id.*

- Five Maybelline Total Temptation Waterproof Mascara tubes were tested, with PFAS detected in all five. They "contained PFOA in concentrations of 2.04 ppt, 1.94 ppt, 1.69 ppt, 1.53 ppt, and 1.18 ppt, meaning these products contained PFOA over 500 times the EPA health advisory level." *Id.* [3]

At this same time, Plaintiff Zaida Hicks also provided for testing "3 partially used Waterproof Mascara Products" that she had purchased for "personal use in 2021 before learning that [L'Oréal] waterproof mascara products likely contained PFAS." *Id.* ¶ 125. This testing revealed that Hick's two Maybelline Great Lash Waterproof Mascara tubes contained PFOA in concentrations of 1.29 ppt and 1.11 ppt and PFHxA in concentrations of 0.18 ppt for each product, and that her L'Oréal Voluminous Waterproof Mascara tube contained "PFOA at a concentration of 0.73 ppt and PFHxA at a concentration of 0.14 ppt." *Id.* ¶ 126.

3 "Many of the 24 products tested also contained other PFAS in addition to PFOA. For instance, [L'Oréal] Voluminous, [L'Oréal] Lash Paradise, and Maybelline Total Temptation contained PFHxA above the detection limit." SAC ¶ 122.

3. Individual Plaintiffs

The Second Amended Complaint alleges the following about purchases of the Products made by the fourteen Plaintiffs in this action.

Hicks, a New York resident, has purchased L'Oréal Voluminous Waterproof Mascara, Maybelline Volum' Express the Falsies Waterproof Mascara, and Maybelline Great Lash Waterproof Mascara since 2019, making at least two to three purchases per year. *Id.* ¶¶ 4, 172, 178.

Stephanie Vargas, also a New York resident, has purchased Maybelline Volum' Express the Falsies Waterproof Mascara approximately once every four to five months for the past ten years. *Id.* ¶¶ 5, 184. Plaintiffs do not allege the location of Vargas's purchases.

Sumner Davenport, a California resident, purchased L'Oréal Voluminous Waterproof Mascara on approximately seven occasions during the summer from 2017 to 2021. *Id.* ¶¶ 6, 197, 199. Plaintiffs do not allege the location of Davenport's purchases.

Stephanie Pinghera, a New York resident, purchased L'Oréal Voluminous Waterproof Mascara in Bronx County, New York. *Id.* ¶¶ 7, 208, 210. [4] She began purchasing that Product on or about January 1, 2020, and used it on about a daily basis until approximately November 1, 2021. *Id.* ¶ 211.

4 For several Plaintiffs, the Second Amended Complaint alleges the purchase of a specific product or two specific products, followed by more general allegations referencing that Plaintiff's "purchase[ ]" of "Defendant's Products" or "the Products." *E.g.*, SAC ¶¶ 208-211 (Pinghera), 220-223 (Ruggiero), 232-235 (Santiago), 244-247 (Secor), 256-259 (Simmons), 268-271 (Spring),

280-283 (Trembly), 292-295 (Turner), 304-307 (Vega), 316-318 (Cauchi), 328-330 (Branton). Although the Court noted this ambiguity in its prior Opinion dismissing the first Amended Complaint, *see Hicks*, 2023 WL 6386847, at *3 n.3, it was not clarified in the Second Amended Complaint. The Court therefore understands Plaintiffs' pleading to allege that each Plaintiff purchased only the specific Product or Products she is alleged to have purchased.

***5** Karrie Ruggiero, a New Jersey resident, purchased L'Oréal Voluminous Waterproof Mascara in Cumberland County, New Jersey. *Id.* ¶¶ 8, 220, 222. She began purchasing that Product at some point before 2018 and used it on about a daily basis until at least August 1, 2021. *Id.* ¶ 223. Ruggiero stopped using the Product upon learning it contained PFAS. *Id.* ¶ 226.

Marjie Santiago, a New York resident, purchased L'Oréal Voluminous Waterproof Mascara in Queens County, New York. *Id.* ¶¶ 9, 232, 234. She began purchasing that Product prior to 2018 and used it about three times a week until at least January 1, 2022. *Id.* ¶ 235.

Kathleen Secor, a New York resident, purchased L'Oréal Voluminous Lash Paradise Waterproof Mascara in Monroe County, New York. *Id.* ¶¶ 10, 244, 246. She began purchasing that Product some time before 2018 and used it on about a daily basis until at least October 1, 2021. *Id.* ¶ 247.

Gwendolyn Simmons, a Michigan resident, purchased L'Oréal Voluminous Waterproof Mascara in Wayne County, Michigan. *Id.* ¶¶ 11, 256, 258. She began purchasing that Product on or about January 1, 2001, and used it about three times a week until at least January 2022. *Id.* ¶ 259.

Nancy Spring, a New York resident, purchased L'Oréal Voluminous Waterproof Mascara in Monroe County, New York. *Id.* ¶¶ 12, 268, 270. She began purchasing that Product on or about January 1, 2016, and used it about five times a week until at least November 1, 2021. *Id.* ¶ 271.

Heidi Trembly, an Iowa resident, purchased L'Oréal Voluminous Waterproof Mascara in Polk County, Iowa. *Id.* ¶¶ 13, 280, 282. She began purchasing that Product some time before 2018 and used it on about a daily basis until at least January 1, 2020. *Id.* ¶ 283. Trembly stopped using the Product prior to learning that it allegedly contained PFAS. *Id.* ¶ 286.

Lisa Turner, a North Carolina resident, purchased L'Oréal Voluminous Waterproof Mascara in Carteret County, North Carolina. *Id.* ¶¶ 14, 292, 294. She began purchasing that Product on approximately January 1, 2016, and used it about three times a week until approximately January 1, 2020. *Id.* ¶ 295.

Rebecca Vega, a New Jersey resident, purchased L'Oréal Voluminous Waterproof Mascara in Essex County, New Jersey. *Id.* ¶¶ 15, 304, 306. She began purchasing that Product on approximately January 1, 2016, and used it "about three times a week for over a year or more." *Id.* ¶ 307.

Sonia Cauchi, a New York resident, purchased Maybelline Great Lash Waterproof Mascara and L'Oréal Voluminous Waterproof Mascara. *Id.* ¶¶ 16, 316. She apparently made purchases of these two Products on unspecified dates in Queens, with her most recent purchase occurring in 2022 at a Target store in Queens. *Id.* ¶¶ 318-319.

Stephanie Branton, a New York resident, purchased L'Oréal Voluminous Lash Paradise Waterproof Mascara and Maybelline Volum' Express the Falsies Waterproof Mascara. *Id.* ¶¶ 17, 328. She apparently made purchases of these two Products on unspecified dates in Nassau County, New York. *Id.* ¶ 330. Branton's most recent purchase occurred in 2022 from an online retailer, with the items shipped to her home in Nassau County. *Id.* ¶¶ 331-332.

All Plaintiffs aside from Hicks posit "on information and belief" that the Products they purchased contained detectable levels of PFAS. *Id.* ¶¶ 190, 201, 213, 225, 237, 249, 261, 273, 285, 297, 309, 321, 334. Hicks, however, alleges that each of the mascaras she purchased "was found to contain PFOA and PFHxA, among other PFAS compounds, when tested by an independent lab" during the October 2023 Testing discussed above. *Id.* ¶ 173; *see supra* I.A.2. All Plaintiffs claim that "[a]s a result of [L'Oréal]'s negligent, reckless, and/or knowingly deceptive conduct, [they were] injured by purchasing, at a premium price, the Waterproof Mascara Products that were not of the quality and safety promised and that [they] would not have purchased [the Products] if [they] had not been misled by [L'Oréal]." SAC ¶¶ 182, 195, 206, 218, 230, 242, 254, 266, 278, 290, 302, 314, 326, 339.

B. Procedural History

1. The Prior Complaints

***6** Twelve of the current Plaintiffs (all except Cauchi and Branton) commenced this action on March 9, 2022, by filing the original Complaint. Dkt. 1 (the "*Hicks* Action"). Cauchi and Branton then separately filed an action on May 13, 2022. *See Cauchi v. L'Oréal USA, Inc.*, No. 22 Civ. 3926 (JPC) (S.D.N.Y.) (the "*Cauchi* Action"); *see also* Dkt. 22 at 1. L'Oréal moved to dismiss the original Complaint in the *Hicks* Action on June 24, 2022, Dkt. 16, but the Court—with the parties' consent—consolidated the *Hicks* Action and the *Cauchi* Action pursuant Federal Rule of Civil Procedure 42(a)(2) on July 20, 2022, Dkt. 22. The parties' stipulation, which was attached to the consolidation order, allowed Plaintiffs to file a consolidated amended complaint, Dkt. 22 at 2, and Plaintiffs accordingly filed their first Amended Complaint on August 23, 2022, Dkt. 25. The Court then denied L'Oréal's motion to dismiss the original Complaint in the *Hicks* Action as moot. Dkt. 26. The Amended Complaint was brought on behalf of seven different classes of individuals who purportedly purchased the Products and asserted claims under New York, California, Iowa, Michigan, North Carolina, and New Jersey law. [5] *See* Dkt. 25 ¶¶ 321, 332-361, 396-494.

5 The Second Amended Complaint is brought on behalf of the same Plaintiffs, asserting the same claims, as the Amended Complaint. *See infra* I.B.3.

2. The September 30, 2023 Opinion

L'Oréal moved to dismiss the Amended Complaint on October 7, 2022, seeking dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6). Dkts. 29-32. On September 30, 2023, the Court granted L'Oréal's motion, holding that Plaintiffs lacked standing to pursue their claims because they failed to plausibly allege that the mascaras they personally purchased contains PFAS and, therefore, failed to plead an injury-in-fact. *Hicks*, 2023 WL 6386847, at *7-9.

In arriving at this result, the Court determined that the Notre Dame Study failed to establish Plaintiffs' standing, explaining that the Amended Complaint did not even allege that any of the Products at issue were in fact included in that study and further observing that the study's findings, as described in the Amended Complaint, were "murky." *Id.* at *7. The Court also found "glaring shortcomings" in the allegations concerning the Late 2021 Testing—which was not referred to as the "Late 2021 Testing" in that Opinion because its date was not alleged in the Amended Complaint. *Id.* at *8. The Court explained that "[t]he Amended Complaint d[id] not allege, for instance, how many products were tested in [the Late 2021 Testing], whether all those tested products revealed the presence of PFAS, and if not, what percentage of the products had PFAS." *Id.* Thus, the Court observed, the allegations in the Amended Complaint were "considerably weaker than those analyzed by the Second Circuit in *John v. Whole Foods*, where the Second Circuit reversed the district court's dismissal of a putative class action for lack of standing." *Id.* (citing *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732 (2d Cir. 2017)). This led the Court to conclude that Plaintiffs failed to provide "detailed allegations showing widespread prevalence of PFAS levels in the Purchased Products," *id.*, and "that the Amended Complaint ... d[id] not establish that Plaintiffs suffered an injury-in-fact," *id.* at *9. The Court also granted Plaintiffs leave to amend the Amended Complaint in the event that they believed that they could cure these pleading deficiencies as to standing and adequately state a claim. *Id.* at *10.

3. The Second Amended Complaint

Having been granted that leave, Plaintiffs filed the operative Second Amended Complaint on December 4, 2023. Dkt. 43. Plaintiffs purport to bring claims on behalf of seven different classes, each composed of individuals who made purchases within the product line of the Products. Those proposed classes are: (1) all individuals in the United States who purchased the Products from 2018 to present, (2) all individuals in New York who purchased the Products from 2018 to present, (3) all individuals in California who purchased the Products from 2018 to present, (4) all individuals in Iowa who purchased the Products from 2018 to present, (5) all individuals in Michigan who purchased the Products from 2016 to present, (6) all individuals in North Carolina who purchased the Products from 2018 to present, and (7) all individuals in New Jersey who purchased the Products from 2018 to present. SAC ¶ 366.

***7** The Second Amended Complaint pleads thirteen causes of action. Plaintiffs bring claims on behalf of themselves and the nationwide class, or in the alternative the New York subclass, for deceptive acts and practices under New York General Business Law Section 349 ("First Cause of Action") and false advertising under New York General Business Law Section 350 ("Second Cause of Action"). *Id.* ¶¶ 376-405. They bring breach of express warranty ("Third Cause of Action") and breach of implied warranty ("Fourth Cause of Action") claims on behalf of themselves and the nationwide class, or in alternative the New York, California,

Iowa, Michigan, North Carolina, and New Jersey subclasses. *Id.* ¶¶ 406-423. They similarly bring claims for fraudulent concealment ("Fifth Cause of Action") and unjust enrichment ("Sixth Cause of Action") on behalf of themselves and the nationwide class, or in the alternative the New York, California, Iowa, Michigan, and New Jersey subclasses. *Id.* ¶¶ 424-439. Davenport brings claims on behalf of herself and the California subclass for violations of the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.* ("Seventh Cause of Action") and the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("Eighth Cause of Action" and "Ninth Cause of Action"). SAC ¶¶ 440-464. Trembly brings a claim under the Iowa Private Right of Action for Consumer Frauds Act, Iowa Code §§ 714H.1 *et seq.*, on behalf of herself and the Iowa subclass ("Tenth Cause of Action"). SAC ¶¶ 465-486. Simmons brings a claim under the Michigan Consumer Protection Act, Mich. Comp. Laws §§ 445.901 *et seq.*, on behalf of herself and the Michigan subclass ("Eleventh Cause of Action"). SAC ¶¶ 487-505. Turner brings a claim under the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1.1 *et seq.*, on behalf of herself and the North Carolina subclass ("Twelfth Cause of Action"). SAC ¶¶ 506-523. Vega and Ruggiero bring a claim under the New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 *et seq.*, on behalf of themselves and the New Jersey subclass ("Thirteenth Cause of Action"). SAC ¶¶ 524-538. Plaintiffs seek monetary awards for these alleged violations. *Id.* at 82-83. [6]

6 Throughout the Second Amended Complaint, Plaintiffs requests injunctive relief. *See, e.g.*, SAC ¶¶ 375, 390, 405, 448, 537, 538, p. 82. In opposing dismissal, Plaintiffs clarify that they "do not seek injunctive or other prospective relief" and their requests for injunctive relief "remained a part of the operative pleading as an oversight." Dkt. 52 ("Opposition") at 9 n.6. Plaintiffs' requests for injunctive relief in the Second Amended Complaint are thus denied without prejudice.

4. The Pending Motion to Dismiss

On January 26, 2024, L'Oréal moved to dismiss the Second Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim pursuant to Rules 12(b)(1) and 12(b)(6), respectively. Dkts. 49, 50 ("Motion"), 51. On February 27, 2024, Plaintiffs opposed L'Oréal's motion. Dkt. 52. On March 15, 2024, L'Oréal filed its reply. Dkt. 55 ("Reply"). On April 23, 2024, L'Oréal filed a letter regarding supplemental authority. Dkt. 58.

II. Legal Standards

A. Federal Rule of Civil Procedure 12(b)(1)

L'Oréal moves to dismiss the claims of all Plaintiffs aside from Hicks for lack of standing, and thus lack of subject matter jurisdiction, under Federal Rule of Civil Procedure 12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Challenges to the Court's subject matter jurisdiction under Rule 12(b)(1) come in two forms: facial or factual. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). Where, as here, the defendant raises a facial challenge to standing, *i.e.*, one "based solely on the allegations of the complaint or the complaint and exhibits attached to it," the Court's task "is to determine whether the [p]leading alleges facts that affirmatively and plausibly suggest that the plaintiff has standing to sue." *Id.* (internal quotation marks omitted) (alterations in original omitted). The plaintiff bears no evidentiary burden in refuting such a challenge. *Id.* In contrast, "[w]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014) (alteration in original) (internal quotation marks omitted).

B. Federal Rule of Civil Procedure 12(b)(6)

L'Oréal alternatively moves to dismiss all of Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. To survive such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* These "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Although the Court must

"accept[ ] as true the factual allegations in the complaint and draw[ ] all inferences in the plaintiff's favor," *Biro v. Condé Nast*, 807 F.3d 541, 544 (2d Cir. 2015), it need not "accept as true legal conclusions couched as factual allegations," *LaFaro v. N.Y. Cardiothoracic Grp., PLLC*, 570 F.3d 471, 475-76 (2d Cir. 2009).

III. Discussion

A. Article III Standing

***8** The Court begins with L'Oréal's challenge to Plaintiffs' standing pursuant to Rule 12(b)(1) "because [standing] is a jurisdictional requirement and must be assessed before reaching the merits." *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 136 (2d Cir. 2023) (internal quotation marks omitted). As discussed above, *see supra* I.B.2, Plaintiffs' failure to adequately plead standing in the Amended Complaint led to the dismissal without prejudice of that pleading. *Hicks*, 2023 WL 6386847, at *7-9. L'Oréal acknowledges that Hicks now has sufficiently pleaded standing in the Second Amended Complaint based on the alleged results of the October 2023 Testing of three mascara tubes that she actually purchased. *See* Motion at 3. But for all the other Plaintiffs, L'Oréal argues that standing remains lacking because those "Plaintiffs still do not plausibly allege that their units of mascara contained a single molecule of any form of PFAS." *Id.* at 3. That is because, according to L'Oréal, "the sample products Plaintiffs tested are too disconnected by time and place from Plaintiffs' own ... purchase[ ] histories." *Id.* Plaintiffs respond by arguing that the combination of the Notre Dame Study, the Late 2021 Testing, and the October 2023 Testing demonstrates "the pervasive presence of PFAS in the Products" and therefore meets the injury-in-fact requirement to support standing for all Plaintiffs. Opposition at 8; *accord id.* at 6-9. [7]

7 Plaintiffs additionally argue that Cauchi has standing because testing revealed the presence of PFAS in a Product she actually purchased. Opposition at 6. There is no mention of such testing in the Second Amended Complaint, however. *See generally* SAC. Rather, Plaintiffs point to their counsel's mention of that supposed testing in a correspondence with the Court. Opposition at 6 (citing Dkt. 45). As noted above, L'Oréal brings a facial challenge to subject matter jurisdiction, relying on only the allegations of the Second Amended Complaint. In considering such a facial challenge, the Court is constrained to the pleadings. *Cf. Carter*, 822 F.3d at 57 ("Alternatively, a defendant is permitted to make a fact-based Rule 12(b)(1) motion, proffering evidence beyond the Pleading." (citation omitted)). The Court therefore rejects Plaintiffs' attempt to rely on information not pleaded in the Second Amended Complaint to establish Cauchi's standing.

Article III of the U.S. Constitution "confines the federal judicial power to the resolution of 'Cases' and 'Controversies.' " *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (quoting U.S. Const. art. III, § 2). "For there to be a case or controversy under Article III, the plaintiff must have a personal stake in the case—in other words, standing." *Id.* (internal quotation marks omitted). In the class action context, at least "one named plaintiff [must] have standing with respect to each claim." *Hyland v. Navient Corp.*, 48 F.4th 110, 118 (2d Cir. 2022) (internal quotation marks omitted). To satisfy the "irreducible constitutional minimum of standing," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal quotation marks omitted), "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief," *TransUnion*, 594 U.S. at 423. Plaintiffs, as the collective party invoking federal jurisdiction, "bear the burden of demonstrating that they have standing." *Id.* at 430-31. "[A]t the pleading stage, 'general factual allegations of injury resulting from the defendant's conduct may suffice.' " *John*, 858 F.3d at 736 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Notwithstanding this relatively lenient pleading standard, Plaintiffs still "must plead enough facts to make it plausible that they did indeed suffer the sort of injury that would entitle them to relief." *Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, 19 F.4th 58, 65-66 (2d Cir. 2021) (internal quotation marks omitted).

Plaintiffs rely on a price-premium theory of injury. *See, e.g.*, SAC ¶¶ 182, 195, 206, 218, 230, 242, 254, 266, 278, 290, 302, 314, 326, 339. In other words, Plaintiffs insist that they would not have purchased the Products, or would not have paid as much for them, had they known the mascaras contained PFAS. *See, e.g.*, *id.* ¶ 34 ("Had Plaintiffs known these products contained PFAS, including PFOA, they would have paid less for the products or purchased a different, non-

toxic product altogether."). [8] This theory of injury "has been broadly accepted in the Second Circuit." *Hicks*, 2023 WL 6386847, at *7 (citing *Axon v. Fla.'s Nat. Growers, Inc.*, 813 F. App'x 701, 703-04 (2d Cir. 2020); *Onaka v. Shiseido Ams. Corp.* ("*Onaka I*"), No. 21 Civ. 10665 (PAC), 2023 WL 2663877, at *4 & n.3 (S.D.N.Y. Mar. 28, 2023)).

8 For four Plaintiffs, the Second Amended Complaint appears to additionally contemplate a theory of harm based on the "material risk" that the products contained PFAS. *See* SAC ¶¶ 181, 191, 322, 335. Plaintiffs do not rely on a risk-based theory of injury in their briefing, however. Nor could they: the "mere risk that [a] product was contaminated with an injurious substance does not establish an economic injury." *Brown v. Coty, Inc.* ("*Brown II*"), No. 22 Civ. 2696 (AT), 2024 WL 894965, at *4 (S.D.N.Y. Mar. 1, 2024) (internal quotation marks omitted) (alterations in original omitted)).

***9** To validly assert an injury under a price-premium theory, a plaintiff must "allege[ ] facts demonstrating it is at least plausible that a plaintiff purchased a misbranded product." *Hernandez v. Wonderful Co. LLC*, No. 23 Civ. 1242 (ER), 2023 WL 9022844, at *5 (S.D.N.Y. Dec. 29, 2023) (internal quotation marks omitted). Where, as here, the misbranding allegations are that a product contained PFAS but was not labeled to reveal that presence, a plaintiff must plausibly allege that the purchased product was in fact "misbranded, *i.e.*, that [it] contained PFAS," to support a price-premium theory of injury. *Onaka v. Shiseido Ams. Corp.* ("*Onaka II*"), No. 21 Civ. 10665 (PAC), 2024 WL 1177976, at *2 (S.D.N.Y. Mar. 19, 2024) (internal quotation marks omitted); *accord Lurenz v. Coca-Cola Co.*, No. 22 Civ. 10941 (NSR), 2024 WL 2943834, at *3 (S.D.N.Y. June 10, 2024); *see Kell v. Lily's Sweets, LLC*, No. 23 Civ. 147 (VM), 2024 WL 1116651, at *3 (S.D.N.Y. Mar. 13, 2024) ("Kell must ... plausibly allege that she ... purchased chocolate that contained lead. Her theory of standing is that lead-contaminated chocolate is worth less than chocolate free from any amount of lead; unless she has a basis to allege that her chocolate contained lead, she has no basis to allege that she overpaid for her chocolate.").

An obvious way to do this is by testing the actual product that the plaintiff purchased; if the purchased product did not disclose the presence of PFAS yet testing revealed PFAS in that same product, then the plaintiff has sufficiently alleged that the product was misbranded. *See Onaka II*, 2024 WL 1177976, at *2 ("The most direct route would be for Plaintiffs to test their own purchases for PFAS."). Such direct proof is the cleanest and most effective way to establish such an injury. Thus, there is no dispute here that Hicks has standing. *See* SAC ¶¶ 125-126 (alleging that direct testing of three mascara tubes that Hicks actually purchased revealed the presence of PFAS).

Caselaw in this Circuit recognizes, however, that it may not always be possible to test the actual product purchased by a plaintiff. Indeed, as alleged here, several "Plaintiffs had used the Waterproof Mascara Products and therefore were unable to have them tested." *Id.* ¶ 128. Thus, in certain circumstances, a plaintiff may plausibly allege the presence of a contaminant in the purchase via indirect means, provided the plaintiff sufficiently links the results of independent testing of the same product line to the product actually purchased.

The leading case in this Circuit in this regard is *John v. Whole Foods Marketing Group, Inc.*, 858 F.3d 732 (2d Cir. 2017), which involved allegations that the plaintiff was overcharged at two Whole Foods stores in Manhattan in 2014 because he purchased products marked with inflated weight totals. *Id.* at 734. "The complaint [did] not identify a specific food purchase as to which Whole Foods overcharged" the plaintiff. *Id.* Instead, the plaintiff relied on a press release from the New York City Department of Consumer Affairs that announced that Whole Foods stores in New York City "routinely overstated the weights of its pre-packaged products" and noted that "89 percent of the packages tested" overstated their weights. *Id.* (internal quotation marks omitted). The investigation that gave rise to this press release "took place from fall 2014 to winter 2015, the same period in which [the plaintiff] allegedly" made the purchases in question. *Id.* at 735. Furthermore, "[t]he investigation focused on the eight Whole Foods stores operating in New York City during that period, which included the two stores that [the plaintiff] patronized." *Id.* The Second Circuit held that this plausibly alleged that the plaintiff suffered an injury-in-fact at the motion to dismiss stage. *Id.* at 738.

Accordingly, as reflected in *John*, it is not necessarily fatal to standing if the product actually purchased was not tested. But a plaintiff relying on indirect means to assert an injury-in-fact must "meaningfully link the results of their independent testing to" the products actually purchased. *Onaka II*, 2024

WL 1177976, at *2 (internal quotation marks omitted) (alteration in original omitted); *see Hernandez*, 2013 WL 9022844, at *4 (explaining that even if the plaintiff "did not actually test the bottle she purchased and consumed," she may be able to establish standing if "the testing was reasonably near in time to her purchase"); *see also Hicks*, 2023 WL 6386847, at *8 (finding the Notre Dame Study particularly unhelpful because while Plaintiffs allegedly purchased L'Oréal products, the study was "not even alleged to have tested any L'Oréal products"). As one judge in this District put it, "[a]t the pleading stage, *John* permits a court to infer that the plaintiff purchased a specific product with a defect that had been plausibly reported by third-party tests to be widespread, systematic, routine, or uniform." *Kell*, 2024 WL 1116651, at *5 (citing *John*, 858 F.3d at 736-38).

***10** Since *John*, district judges in this Circuit have considered various factors to determine whether a meaningful link exists between the results of testing and a plaintiff's actual purchases to allow the plausible inference of the presence of unlabeled contaminants.[9] Perhaps most significant is temporal proximity; any testing must have occurred "reasonably near in time" to the plaintiffs' purchases. *Onaka II*, 2024 WL 1177976, at *2 (citing *Clinger v. Edgewell Pers. Care Brands*, No. 21 Civ. 1040 (JAM), 2023 WL 2477499, at *4 (D. Conn. Mar. 13, 2023)); *see Kell*, 2024 WL 1116651, at *4 (rejecting testing where the complaint "lack[ed] any factual allegations about whether" the products in question were purchased at a "similar time" as those in the study on which the plaintiffs sought to rely); *Brown II*, 2024 WL 894965, at *4 n.3 (critiquing the plaintiffs for attempting to use the Notre Dame Study because they did not allege "the time period analyzed by" that study); *Hernandez*, 2023 WL 9022844, at *6 (commenting favorably on the allegation that "both the testing of the Product and [the plaintiff's] purchase occurred in July 2022"). The pleading also should disclose the number of samples tested, and the testing should involve more than a small number. *See Lurenz*, 2024 WL 2943834, at *4 ("Unlike the plaintiff in *John*, Plaintiff alleges that he tested only a single sample."); *Kell*, 2024 WL 1116651, at *4 (rejecting testing where it was "based on just two or three samples"); *Brown II*, 2024 WL 894965, at *4 (faulting the plaintiffs for failing to "allege how many lots or tubes of" the products in question "were tested"); *Esquibel v. Colgate-Palmolive Co.*, No. 23 Civ. 742 (LTS), 2023 WL 7412169, at *2 (S.D.N.Y. Nov. 9, 2023) (critiquing the plaintiffs for failing to allege how many units of the product in question were tested). To the extent relevant to the product at issue, courts also have considered the geographic proximity of the testing to the plaintiff's purchases. *See John*, 858 F.3d at 735 (noting that the investigation focused on eight Whole Food stores operating in New York City, including the two where the plaintiff had patronized); *see also Kell*, 2024 WL 1116651, at *4 (rejecting testing where the complaint "lack[ed] any factual allegations about whether" the products in question, chocolate bars, were purchased at a "similar ... place" as those in the study on which the plaintiff sought to rely); *Esquibel*, 2023 WL 7412169, at *2 (critiquing the plaintiffs for failing to plead where the units tested were acquired). These factors, taken together, help a judge answer the ultimate question of whether "the presence of [the unlabeled contaminant] in the [products] is so widespread as to render it plausible that any Plaintiff purchased a mislabeled Product at least once." *Onaka II*, 2024 WL 1177976, at *2 (internal quotation marks omitted) (quoting *Onaka I*, 2023 WL 2663877, at *5).

9 As the Court explained in its prior Opinion, Plaintiffs' allegations that their purchased products contained detectable levels of PFAS that are premised only "[o]n information and belief," SAC ¶¶ 190, 201, 213, 225, 237, 249, 261, 273, 285, 297, 309, 321, 334, are insufficient to plead that those items contained PFAS for purposes of standing. *See Hicks*, 2023 WL 6386847, at *9 n.6. Establishing an injury through indirect means as laid out in *John* cannot be so easily circumvented by merely alleging the presence of a contaminant based on information and belief alone. And indeed, in opposing the pending motion to dismiss, Plaintiffs do not assert that they have established standing based only on such "[o]n information and belief" allegations.

With those guideposts in mind, the Court turns to whether the non-Hicks Plaintiffs have adequately pleaded an injury-in-fact through indirect means, beginning with the Notre Dame Study. As discussed in the Court's prior Opinion, significant obstacles preclude reliance on this study to find an injury allegedly suffered by Plaintiffs. *See Hicks*, 2023 WL 6386847, at *7. First and foremost, the "[r]esearchers did not identify which specific cosmetic products were tested ... identifying only the manufacturer and product type." SAC ¶ 97. While the Notre Dame Study allegedly included mascaras manufactured by L'Oréal, there is no allegation that the study

even analyzed any of the specific product lines at issue in this case. *See id.* ("Among the 231 products analyzed were products, including mascara products, manufactured by L'Oréal."). Second, testing for fluorine, an indicator of the presence of PFAS, revealed that fifty-two percent of the tested products had high fluorine levels, sixteen percent had moderate fluorine levels, and thirty-two percent contained "low fluorine, or a level less than or equal to the level of detection." *Id.* ¶ 98. But the Second Amended Complaint does not allege into which category of fluorine concentration level the tested L'Oréal products fell. Likewise, there are no allegations as to whether any L'Oréal products were among the twenty-nine selected for additional testing. *See id.* ¶¶ 102-106. Nor are there allegations as to when the tested products were purchased, frustrating any ability to evaluate temporal proximity with Plaintiffs' purchases. The Notre Dame Study therefore is entitled to no weight in assessing whether the non-Hicks Plaintiffs have sufficiently alleged that they suffered an injury linked to their purchases.

***11** The next testing occurred in late 2021, not long before the commencement of this action. As discussed above, the Late 2021 Testing was conducted by an independent laboratory at the behest of Plaintiffs and entailed testing one tube of each of the five Products. And as also discussed above, in the September 30, 2023 Opinion granting L'Oréal's first motion to dismiss, the Court identified "glaring shortcomings" in the allegations as to this study that prevented it from establishing Plaintiffs' standing. *Hicks*, 2023 WL 6386847, at *8. The Court noted that, while the Late 2021 Testing "at least tested mascaras in the same product line as" Plaintiffs' purchases (unlike the Notre Dame Study), "critical details [were] lacking as to that study's results," such as "how many products were tested ..., whether all those tested products revealed the presence of PFAS, and if not, what percentage of the products had PFAS." *Id.* The Court also faulted Plaintiffs for not alleging in the Amended Complaint when the testing "occurred to allow an assessment of the proximity to Plaintiffs' purchases." *Id.*

The Second Amended Complaint addresses these criticisms of the Late 2021 Testing by alleging details that were previously lacking. The Second Amended Complaint now alleges, with regard to that testing, how many products were tested (one tube for each of the five Products), whether the tests revealed the presence of PFAS (they did), the percentage of the tested samples that had PFAS (100 percent), and the general timeframe of the testing (late 2021). SAC ¶¶ 114-118. As further alleged, two of those tubes—the tubes of L'Oréal Voluminous Lash Paradise Waterproof Mascara and Maybelline Volum' Express the Falsies Waterproof Mascara—additionally revealed the presence of PFAO. *See id.* ¶¶ 117-118. But even with these added details, the Late 2021 Testing still has shortcomings, though certainly not as fatal as the Notre Dame Study's. Plaintiffs do not allege, for instance, when the five sample mascara tubes were purchased, although presumably it would have been at some point in or before "late 2021" yet after the publication of the Notre Dame Study in June 2021, *id.* ¶ 96, given that the Late 2021 Testing was conducted after Plaintiffs reviewed that study, *id.* ¶ 113. The absence of more specific allegations as to the dates when the samples were purchased poses a challenge in assessing temporal proximity to Plaintiffs' purchases. In addition, the sample size for the Late 2021 Testing was small, as it involved only one tube of each Product. *Id.* ¶ 116. The study also did not entail any direct testing, as none of the products Plaintiffs actually purchased were analyzed. If only the results of the Late 2021 Testing were before the Court, these shortcomings might very well preclude finding an alleged injury under a price-premium theory. But any concerns as to the sufficiency of the Late 2021 Testing are largely ameliorated by the October 2023 Testing that followed the Court's September 30, 2023 dismissal of the Amended Complaint.

The October 2023 Testing was performed by a different independent laboratory and was more comprehensive than the Late 2021 Testing, involving four to five tubes of each of the five Products. *Id.* ¶¶ 119-120. These tests, as discussed above, detected PFAS in all of the tubes, with the overwhelming majority also containing PFAO concentrations well above the EPA health advisory level. *Id.* ¶ 121. In addition, as part of this testing, three mascara tubes actually purchased by Hicks—two tubes of Maybelline Great Lash Waterproof Mascara and one tube of L'Oréal Voluminous Waterproof Mascara—were tested and similarly came back with high levels of PFAS. *Id.* ¶¶ 125-126. These findings of PFAS levels in all mascaras tested as part of the October 2023 Testing therefore were consistent with the results of testing from about two years prior in late 2021. Combining the results from the Late 2021 Testing and October 2023 Testing, thirty-two tubes of the Products were tested, with all of them revealing the presence of PFAS and twenty-seven of those tubes (or 84.375%) revealing the presence of significant levels of PFAO. *See* *John*, 858 F.3d at 736-37 (finding an injury sufficiently pleaded where the plaintiff alleged that he was overcharged based on a press release announcing that eighty-nine percent of pre-packaged products from Whole Foods that were tested by the New York City Department of Consumer Affairs were

mislabeled). Plaintiffs' allegations pertaining to the October 2023 Testing, considered along with the allegations pertaining to the Late 2021 Testing, allow for the plausible inference at this stage that there was a pervasive PFAS presence in the Products going back to "late 2021." [10]

10 L'Oréal urges the Court to disregard the October 2023 Testing for lack of geographic proximity to where Plaintiffs made their purchases. *See* Motion at 4. As alleged, the samples of the Product analyzed in the October 2023 Testing were obtained "from multiple major retail outlets in New York City," SAC ¶ 119, yet many Plaintiffs are not alleged to have made their purchases in New York City. The Second Amended Complaint also alleges, however, that the Products were produced in a consistent manner through a standardized manufacturing process. *See id.* ¶¶ 159 ("Upon information and belief, [L'Oréal] utilizes, and has utilized throughout the class period, consistent manufacturing and production processes that ensure its cosmetic products, including the Waterproof Mascara Products, are of consistent quality across large-scale production runs."), 160 ("To achieve this, [L'Oréal] uses standardized manufacturing and production protocols designed to minimize variations in the production process. These protocols include strict quality control measures, standardized ingredient sourcing, and rigorous testing procedures to ensure that the final product meet[ ] the company's quality standards."), 161 ("Additionally, [L'Oréal] utilizes automated manufacturing processes, which reduce the risk of human error ...."), 162 ("These stringent quality control measures and standardized protocols ensure consistency in [L'Oréal]'s cosmetic products and ensure[ ] that [L'Oréal] understands all of the constituents of its final product, including the Waterproof Mascara Products."). The Court assumes the truth of these allegations at this stage of the litigation. It also is logical to assume that the mass production of mascara by "one of the largest cosmetic companies in the world," *id.* ¶¶ 19, 132, would be consistent regardless of the part of the country where the product is sold, unless there is a specific reason for particularized production in certain regions. It also is unsurprising that Plaintiffs would lack significant visibility into those manufacturing processes, especially at the pleading stage. *See id.* ¶ 32 ("[A]t all times pertinent hereto, [L'Oréal] kept its manufacturing process strictly confidential."). Thus, this is not a case where the failure to allege geographic proximity of testing is fatal to standing.

***12** The Court next turns to each Plaintiff whose standing remains at issue. And for them, the question boils down to the temporal proximity of their purchases to this testing. [11] For certain Plaintiffs, this analysis is straightforward. Vargas allegedly made purchases going through the filing of the Second Amended Complaint, so she clearly has established standing. *See* SAC ¶ 184 (alleging that "[f]or the last 10 years," Vargas has purchased Maybelline Volum' Express the Falsies Waterproof Mascara). Cauchi and Branton allegedly made purchases of certain Products—Maybelline Great Lash Waterproof Mascara and L'Oréal Voluminous Waterproof Mascara for Cauchi, and L'Oréal Voluminous Lash Paradise Waterproof Mascara and Maybelline Volum' Express the Falsies Waterproof Mascara for Branton—through 2022. *Id.* ¶¶ 316, 319, 328, 331. They too have sufficiently alleged standing.

11 For nine Plaintiffs, the Second Amended Complaint alleges the first purchase date and then that they purchased the Products during the "Class Period," using a capitalized term that is never defined in the Second Amended Complaint. SAC ¶¶ 210 (Pinghera), 222 (Ruggiero), 234 (Santiago), 258 (Simmons), 270 (Spring), 282 (Trembly), 306 (Vega), 318 (Cauchi), 330 (Branton). Presumably, Plaintiffs intend the "Class Period" to cover the particular timeframe alleged for the proposed nationwide class and the applicable proposed state subclasses, which is 2016 to December 3, 2023, for the Michigan and New Jersey subclasses, and 2018 to December 3, 2023, for the nationwide class and the other state subclasses. *See id.* ¶ 366. Even assuming that to be the case, the Second Amended Complaint largely does not allege when within those timeframes Plaintiffs made their last purchases. Thus, general allegations that purchases were made within the "Class Period" is of little help to the Court's temporal proximity analysis.

Meanwhile, other Plaintiffs have not established standing. Several Plaintiffs do not even allege that they were still using any of the Products into late 2021. As alleged, Davenport last purchased L'Oréal Voluminous Waterproof Mascara at some point in the summer of 2021, *id.* ¶ 199; Ruggiero

began purchasing L'Oréal Voluminous Waterproof Mascara prior to 2018 and used that Product "until at least August 1, 2021," *id.* ¶¶ 220, 223; Secor began purchasing L'Oréal Voluminous Lash Paradise Waterproof Mascara prior to 2018 and used that Product "until at least October 1, 2021," *id.* ¶¶ 244, 247; Trembley began purchasing L'Oréal Voluminous Waterproof Mascara prior to 2018 and used that Product "until at least January 1, 2020," *id.* ¶¶ 280, 283; Turner began purchasing L'Oréal Voluminous Waterproof Mascara on or about January 1, 2016 and used that Product "until about January 1, 2020," *id.* ¶¶ 292, 295; and Vega began purchasing L'Oréal Voluminous Waterproof Mascara on or about January 1, 2016, and used that Product "for over a year or more," *id.* ¶¶ 304, 307. The Second Amended Complaint does not allege when Ruggiero, Secor, Trembly, Turner, and Vega last purchased the Product—the relevant data point to assess temporal proximity—although obviously that last purchase would have occurred at some point prior to their last usage. Given the sizable temporal gap between the date of any alleged last purchase of a Product and the relevant testing, the allegations of the Second Amended Complaint do not allow for the plausible inference that any Product purchased by Davenport, Ruggiero, Secor, Trembley, Turner, or Vega contained PFAS. The claims brought by these six Plaintiffs therefore are dismissed without prejudice for lack of subject matter jurisdiction.

That leaves four Plaintiffs—Pinghera, Santiago, Simmons, and Spring. Although these individuals also do not allege when they last purchased the mascara, they at least allege to have continued using one of the Products through at least November 1, 2021. As alleged, Pinghera began purchasing L'Oréal Voluminous Waterproof Mascara on or about January 1, 2020, and last used that Product on or about November 1, 2021, *id.* ¶¶ 208, 211; Santiago began purchasing L'Oréal Voluminous Waterproof Mascara prior to 2018 and used that Product "until at least January 1, 2022," *id.* ¶¶ 232, 235; Simmons began purchasing L'Oréal Voluminous Waterproof Mascara on or about January 1, 2001, and used that Product "until at least approximately January 2022," *id.* ¶¶ 256, 259; and Spring began purchasing L'Oréal Voluminous Waterproof Mascara on or about January 1, 2016, and used that Product "until at least November 1, 2021," *id.* ¶¶ 268, 271. For these Plaintiffs, their last use of the Product (and thus, presumably, the date before then when they last purchased the Product) is close enough in proximity to the Late 2021 Testing to allow for a plausible inference that they purchased a Product that contained PFAS.

***13** In sum, Davenport, Ruggiero, Secor, Trembley, Turner, and Vega have failed to sufficiently allege that they suffered an injury-in-fact to support a price-premium theory of liability. Their claims are dismissed without prejudice. Because among these Plaintiffs are the sole named Plaintiffs for the Seventh, Eighth, Ninth, Tenth, Twelfth, and Thirteenth Causes of Action, which assert claims under California, Iowa, North Carolina, and New Jersey state law, those causes of action are dismissed without prejudice. *See Hyland v. Navient Corp.*, 48 F.4th 110, 118 (2d Cir. 2022) (holding that at least one "one named plaintiff [must] have standing with respect to each claim" (internal quotation marks omitted)); *see also Green v. Dep't of Educ. of City of New York*, 16 F.4th 1070, 1074 (2d Cir. 2021) (per curiam) ("When subject matter jurisdiction is lacking, the district court lacks the power to adjudicate the merits of the case, and accordingly Article III deprives federal courts of the power to dismiss the case with prejudice." (internal quotation marks omitted) (alteration in original omitted)); *John*, 858 F.3d at 735 ("[W]here a complaint is dismissed for lack of Article III standing, the dismissal must be without prejudice, rather than with prejudice." (internal quotation marks omitted)). Because Plaintiffs have sufficiently alleged standing for Hicks, Vargas, Pinghera, Santiago, Simmons, Spring, Cauchi, and Branton (the "Surviving Plaintiffs"), the Court turns to L'Oréal's Rule 12(b)(6) arguments for dismissal of the causes of action that implicate those Plaintiffs.

B. Preemption

L'Oréal first seeks dismissal under Rule 12(b)(6) on the grounds that Plaintiffs' claims are preempted by the federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.*, and regulations promulgated thereunder. In doing so, L'Oréal relies on to the FDCA's broad preemption provision for cosmetic labels and packaging. *See* Motion at 6-11. That provision states that, with certain exceptions, "no State ... may establish or continue in effect any requirement for labeling or packaging of a cosmetic that is different from or in addition to, or that is otherwise not identical with, a requirement specifically applicable to a particular cosmetic or class of cosmetics under this chapter" and two other federal laws. 21 U.S.C. § 379s(a).

When "a federal law contains an express preemption clause, [courts] focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent," and do not apply the usual presumption against preemption. *Buono v. Tyco Fire Prods., LP*, 78 F.4th

490, 495 (2d Cir. 2023) (quoting *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011)). But a federal statute's express pre-emption clause "does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Id.* at 495-96 (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008)). "[W]hen considering a preemption argument in the context of a motion to dismiss, the factual allegations relevant to preemption must be viewed in the light most favorable to the plaintiff." *Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437, 444 (2d Cir. 2015). "A district court may find a claim preempted only if the facts alleged in the complaint do not plausibly give rise to a claim that is not preempted." *Id.* "[T]he party asserting that federal law preempts state law bears the burden of establishing preemption." *Marentette v. Abbott Lab'ys, Inc.*, 886 F.3d 112, 117 (2d Cir. 2018) (quoting *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013)). The question here therefore becomes whether "the state-law claims [Plaintiffs] assert[ ] ... impose[ ] a labeling requirement that is 'different from' or 'in addition to' those provided by the FDCA." *Critcher v. L'Oréal USA, Inc.*, 959 F.3d 31, 36 (2d Cir. 2020).

L'Oréal accuses Plaintiffs of seeking to impose labeling requirements that are "in addition to" the labeling requirements mandated by federal law, rendering their claims preempted under 21 U.S.C. § 379s(a). Motion at 6-10. The argument is that federal law requires only the disclosure of "ingredients" in cosmetic products, yet Plaintiffs have not plausibly alleged PFAS to qualify as such with respect to the Products. *Id.* at 10. Plaintiffs respond, *inter alia*, that L'Oréal was required to include PFAS on the ingredients list under the governing federal regulations, so their state law claims are not preempted. Opposition at 11-13. [12]

12 L'Oréal maintains that the Second Amended Complaint's pleading that "there are no formal federal regulations governing what cosmetic labels must disclose," SAC ¶ 86, precludes Plaintiffs from arguing that the additional labeling Plaintiffs seek to impose is in accordance with federal regulations. Motion at 9. Whether there are federal regulations on point is a legal conclusion that cannot be determined based only on allegations in a complaint. *See* *Iqbal*, 556 U.S. at 678.

***14** The Food and Drug Administration requires that "[t]he label on each package of a cosmetic shall bear a declaration of the name of each ingredient in descending order of predominance." 21 C.F.R. § 701.3(a). An ingredient is defined as "any single chemical entity or mixture used as a component in the manufacture of a cosmetic product." *Id.* § 700.3(e). "[I]ncidental ingredients that are present in a cosmetic at insignificant levels and that have no technical or functional effect in [a] cosmetic" do not have to be declared. *Id.* § 701.3(l). Incidental ingredients are defined as "[p]rocessing aids" and "[s]ubstances that have no technical or functional effect in the cosmetic but are present by reason of having been incorporated into the cosmetic as an ingredient of another cosmetic ingredient." *Id.* § 701.3(l)(1)-(2). L'Oréal argues that Plaintiffs have not alleged PFAS to be present in the products as a "component" used "in the manufacture of a cosmetic product," 21 C.F.R. § 700.3(e), but rather as "impurities," SAC ¶ 87, "degradation products," *id.*, or contaminants, *id.* ¶ 165, and federal regulations do not require the disclosure of such chemicals. Motion at 8.

To start, the Second Amended Complaint alleges, at least for purposes of this stage of the litigation, that the concentrations of PFAS present in the Products were not so small as to be dismissed as insignificant. As alleged, the October 2023 Testing revealed that all six tested L'Oréal Voluminous Waterproof Mascara tubes contained PFAS, with PFAO found in four of them at concentrations of 750 times the EPA health advisory level for two tubes, 1,000 times the advisory level for another tube, and 182 times the advisory level for the other tube; that all four tested L'Oréal Voluminous Lash Paradise Waterproof Mascara tubes contained PFAS, with PFAO found in all of them at concentrations ranging from 405 times to 810 times the EPA health advisory level; that all five tested Maybelline Volum' Express the Falsies Waterproof Mascara tubes contained PFAS, with PFOA found in all of them at concentrations ranging from 77 times to 315 times the EPA health advisory level; that all seven tested Maybelline Great Lash Waterproof Mascara tubes contained PFAS, with PFOA found in all of them at concentrations ranging from 70 times to 322 times the EPA health advisory level; and that all five tested Maybelline Total Temptation Waterproof Mascara tubes contained PFAS, with PFOA found in all of them at concentrations ranging from 295 to 510 times the EPA health advisory level. *See* SAC ¶¶ 121-122, 126. [13]

[13] L'Oréal asks the Court to take judicial notice of two EPA releases, *see* Dkt. 51, in support of its argument that concentrations above the health advisory limit "simply means that the EPA is unable to make its health assurance about a lifetime of drinking that water, not that drinking it is dangerous." Motion at 18 n.8. Even were the Court to take judicial notice of these materials, the Court is not persuaded by this interpretation of the EPA guidance as it pertains to the question of whether the PFAS detected in the Products were at levels so small as to be insignificant.

The Second Amended Complaint also alleges that PFAS are included in waterproof mascara as intentional ingredients because the chemicals make the product water-resistant. *See, e.g.*, *id.* ¶¶ 87 ("PFAS is present in cosmetic products as an intended ingredient and may be present as degradation products and impurities from the production of certain PFAS precursors used in certain products."); 90 ("When PFAS is present in a product describing itself as 'waterproof' or 'long-lasting,' it is likely [ ] an intentional ingredient, as PFAS provides hydrophobic, or 'water-resistant' qualities."). And each of the Products tested was in L'Oréal's line of waterproof mascaras. *Id.* ¶ 23. To the extent a dispute exists as to how PFAS made their way into the Products, and how that in turn bears on L'Oréal's disclosure obligations, that presents a question of fact not appropriate for resolution at the pleading stage.

Viewing the allegations in the light most favorable to the Surviving Plaintiffs, their claims accord with federal regulations by seeking to hold L'Oréal liable for not identifying either an intentional ingredient or an incidental ingredient present in sufficient levels to require disclosure under federal law. *See* *O'Connor v. Henkel Corp.*, No. 14 Civ. 5547 (ARR), 2015 WL 5922183, at *5 (E.D.N.Y. Sept. 22, 2015) ("It is well-established that 'the FDCA does not preempt state laws that allow consumers to sue manufacturers that label or package their products in violation of federal law.' " (quoting *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 757 (9th Cir. 2015))). L'Oréal has therefore failed to carry its burden of demonstrating that the surviving claims are preempted. [14]

[14] Given this conclusion on preemption, the Court need not reach at this juncture whether the Surviving Plaintiffs may pursue a theory of liability based on the presence of PFAS in the products as a result of "impurities," SAC ¶ 87, "degradation products," *id.*, or contaminants, *id.* ¶ 165.

C. Reasonable Expectations

***15** In support of their overarching price-premium theory, the Surviving Plaintiffs assert that "[a] reasonable consumer would not have paid the price premium for the Products if they had known that the Waterproof Mascara Products contained PFAS," SAC ¶ 346, and that reasonable consumers in fact "would have refused to purchase the Waterproof Mascara Products entirely if they had known that the Products contained PFAS," *id.* ¶ 347. The Second Amended Complaint further alleges that any such reliance was reasonably foreseeable to L'Oréal, maintaining that "[a]ny reasonable consumer would consider the packaging and labeling of a cosmetic product," *id.* ¶ 350, and that "[c]onsumers reasonably relied upon [L'Oréal]'s misleading packaging claims as objective statements that communicated, represented, and advertised that the Waterproof Mascara Products had specific product characteristics," *id.* ¶ 351. In their motion, L'Oréal argues that the Second Amended Complaint should "dismiss[ed] in total because the liability theory animating each cause of action lacks a plausible basis in the objective expectations of [a] reasonable consumer." Motion at 12. The Company's argument continues, "each claim ultimately rests of Plaintiffs' assumption that their mascaras had no chance of containing any trace of PFAS," yet the Second Amended Complaint "pleads no plausible basis for such an expectation." *Id.*

L'Oréal advances four arguments challenging the reasonableness of Plaintiffs' expectations: [15] (1) neither the Products' labeling statements nor their ingredient lists form the basis for an objective expectation that the mascaras did not contain a detectable level of PFAS, *id.* at 13-16; (2) Plaintiffs' allegations that PFAS are widespread undercuts the notion that a reasonable customer could expect the Products not to contain PFAS, *id.* at 16-18; (3) Plaintiffs have not sufficiently alleged that PFAS in mascaras is harmful, *id.* at 18-20; and (4) Plaintiffs cannot succeed on an omissions-based theory because the Second Amended Complaint does not allege that L'Oréal knew PFAS chemicals were in the Products when Plaintiffs purchased them, *id.* at 20-23. [16] Although L'Oréal does not specify to which causes of action these arguments apply, they only present caselaw governing New York consumer protection law. *See* Motion at 12. The Court therefore treats L'Oréal's arguments in this regard as seeking dismissal of only the First, Second, Third, and Fourth

Causes of Action insofar as they are asserted under New York law. [17]

15 L'Oréal's moving brief also includes a terse, passing mention of its belief that the Second Amended Complaint runs afoul of Rule 9(b) of Federal Rules of Civil Procedure, *see* Motion at 20, presumably aimed at least in part at Plaintiffs' Fifth Cause of Action for fraudulent concealment, *see, e.g.*, *Hodges v. Glenholme Sch.*, 713 F. App'x 49, 51 (2d Cir. 2017) ("The elements of fraudulent concealment must be pled with particularity under Rule 9(b)."). *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). The Court does not reach this argument, where L'Oréal has done so little to develop it. *See* *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)). The Court notes, however, that the Second Amended Complaint repeatedly alleges that L'Oréal advertised, labeled, and sold the Products; that the Products contained PFAS; that L'Oréal knew or should have known that PFAS was in the Products; and that L'Oréal failed to disclose that fact on the packaging for the Products. *E.g.*, SAC ¶¶ 32, 93, 139, 142, 143, 146-151, 153-156, 164-168, 354-356; *see* *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004) (explaining that Rule 9(b) "require[s] that a complaint '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent' " (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993))).

16 L'Oréal also asserts that the statements on its website are inactionable puffery. Motion at 13-14. In their Opposition, Plaintiffs clarify that they "do not contend that the website statements are the misrepresentations and omissions forming the basis for their claims." Opposition at 15 n.13. Rather, Plaintiffs contend that they invoke those statements as "context" for their claims. *See id.* Accordingly, the Court does not consider whether those website statements would have misled a reasonable consumer.

17 The Fifth and Sixth Causes of Action—for fraudulent concealment and unjust enrichment—do not have a reasonable expectation requirement. *See* *Garcia v. Chrysler Grp. LLC*, 127 F. Supp. 3d 212, 234 (S.D.N.Y. 2015) (noting that, in New York and many other states, "the basic elements of a fraudulent concealment claim are generally: (1) a duty to disclose on the part of defendant; (2) concealment or failure to disclose by defendant; (3) reliance by the plaintiff (or inducement of plaintiff to act); (4) damages; and (5) proximate causation"); *Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 591 (S.D.N.Y. 2021) ("To sufficiently plead unjust enrichment, a plaintiff must allege that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) ... it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff." (internal quotation marks omitted)).

***16** To state a claim under New York General Business Law Sections 349 and 350 (the First and Second Causes of Action), "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Eidelman v. Sun Prods. Corp.*, No. 21-1046-cv, 2022 WL 1929250, at *1 (2d Cir. June 6, 2022) (quoting *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015)). This requires a plaintiff to "establish that [the defendant]'s allegedly deceptive advertisements were likely to mislead a reasonable consumer acting reasonably under the circumstances." *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013); *see also* *Mantikas v. Kellogg Co.*, 910 F.3d 633, 636 (2d Cir. 2018) (applying this standard to claims under Section 349 and 350). [18] A claim for breach of an express warranty (the Third Cause of Action) "requires a plaintiff to allege that the defendant made an affirmation of fact or promise which was false or misleading when made and which had a

natural tendency to induce a buyer to purchase the offending product, and that the plaintiff relied on the express warranty to her detriment." *Brown v. Coty, Inc.*, No. 22 Civ. 2696 (AT), 2023 WL 2691581, at *2 (S.D.N.Y. Mar. 29, 2023). This requires the plaintiff to "point to a specific, express statement that is false or misleading and that a reasonable consumer can interpret as a material claim about the product." *Id.* A determination regarding the expectation of a reasonable consumer may also affect a breach of implied warranty claim (the Fourth Cause of Action). *See, e.g.*, *Schleyer v. Starbucks Corp.*, No. 22 Civ. 10932 (JPO), 2023 WL 5935695, at *5 (Sept. 12, 2023) (noting that, where "the Plaintiffs have plausibly alleged that [the defendant's] representations could mislead a reasonable consumer," the implied warranty claim would survive in the absence of other developed arguments). "While it is well settled that in appropriate circumstances, a court may determine at the motion to dismiss stage that an allegedly deceptive misrepresentation would not have misled a reasonable consumer as a matter of law, multiple courts have indicated that such relief should rarely be granted, ... because the question of whether a representation is materially misleading is generally a question of fact not suited for resolution at the motion to dismiss stage." *Colpitts*, 527 F. Supp. 3d at 581 (collecting cases) (internal quotation marks omitted) (citations omitted).

18 As discussed, Simmons also has adequately alleged standing to pursue the Eleventh Cause of Action under the Michigan Consumer Protection Act. That statute similarly prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." Mich. Comp. Laws § 445.903(1). Such conduct includes, as relevant here, "[r]epresenting that goods or services have ... characteristics [or] ingredients ... that they do not have," *id.* § 445.903(1)(c), "[r]epresenting that goods or services are of a particular standard ... if they are of another," *id.* § 445.903(1)(e), "[f]ailing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not be reasonably known by the consumer," *id.* § 445.903(1)(s), "[m]aking a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is," *id.* § 445.903(1)(bb), and "[f]ailing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner," *id.* § 445.903(1)(cc). A misrepresented fact is material if it is "important to the transaction" or if it "affect[s] the consumer's decision to enter into the transaction," whereas with respect to omissions, the inquiry is " 'whether the consumer could reasonably be expected to discover the omission at issue.' " *In re General Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 420-21 (S.D.N.Y. 2017) (quoting *Zink v. Chrysler Corp.*, 236 Mich. App. 261, 600 N.W.2d 384, 398 (1999)).

The Second Amended Complaint sufficiently pleads allegations that support an objective expectation that the mascaras did not contain a detectable level of PFAS. Plaintiffs allege that PFAS are "toxic to humans at extremely low levels[,] ... [and are] associated in the medical and scientific literature with harmful and serious health effects in humans and animals." SAC ¶ 66. Plaintiffs point to the following health issues in this regard:

> (a) altered growth; (b) impacts to learning and behavior of infants and older children; (c) lowering a woman's chance of getting pregnant; (d) interference with the body's natural hormones; (e) increased cholesterol levels; (f) modulation of the immune system; (g) testicular and kidney cancers; (h) thyroid disease; (i) high uric acid levels; (j) elevated liver enzymes; (k) ulcerative colitis; [ ] (l) pregnancy-induced hypertension; (m) increased allergic diseases and sensitivity to allergens; (n) dermatitis; (o) eye disease; (p) dermal irritation; and (q) eye irritation.

***17** *Id.* Plaintiffs also alleges that "PFAS exposure is positively correlated with certain metabolic diseases, such as diabetes, overweight [sic], obesity, and heart disease," that "exposure to PFAS may impact the immune system and reduce antibody response to vaccines," and that "[w]omen

exposed to PFAS during pregnancy have higher risks of gestational diabetes and preeclampsia, and their babies are more likely to undergo abnormal growth in utero, leading to low birth weight, and later face an increased risk of childhood obesity and infections." *Id.* ¶¶ 67-69. And as for PFOA, which was detected in 84.375% of the tubes of the Products tested in late 2021 and October 2023, Plaintiffs allege that PFOA "is toxic in extremely small quantities" and that "[t]he EPA has characterized PFOA as a 'likely carcinogen' and designated the chemical a 'hazardous substance' under the Comprehensive Environmental Response, Compensation, and Liability Act." *Id.* ¶ 25.

Five ailments in Plaintiff's parade of maladies—*i.e.*, "increased allergic diseases and sensitivity to allergens," "dermatitis," "eye disease," "dermal irritation," and "eye irritation"—are particularly relevant to the representations that L'Oréal made on its packaging. Plaintiffs allege that PFAS chemicals are associated with increased allergic diseases and sensitivity to allergens, yet the packaging for the L'Oréal's Voluminous Lash Paradise Waterproof Mascara stated that it was "allergy tested," *id.* ¶ 154, and the packaging for the Maybelline Great Lash Waterproof Mascara represented that it was "hypoallergenic," *id.* ¶ 156. Plaintiffs allege that PFAS chemicals are associated with eye irritation, which a reasonable consumer might find inconsistent with the representations that L'Oréal's Voluminous Lash Paradise Waterproof Mascara was "[s]uitable for sensitive eyes," *id.* ¶ 154, that Maybelline Volum' Express the Falsies Waterproof Mascara and Maybelline Total Temptation Waterproof Mascara were "[s]uitable for contact wearers," *id.* ¶ 155, and that Maybelline Great Lash Waterproof Mascara was "contact lens safe," *id.* ¶ 156. Likewise, a reasonable consumer might consider the possibility of eye irritation to be inconsistent with the representation that L'Oréal's Voluminous Lash Paradise Waterproof Mascara, Maybelline Volum' Express the Falsies Waterproof Mascara, and Maybelline Total Temptation Waterproof Mascara were "ophthalmologist tested." *Id.* ¶¶ 154-155.

At this juncture, the question is whether "*no* reasonable consumer would believe" that the Products did not contain PFAS. *Colpitts*, 527 F. Supp. 3d at 583 (emphasis added). Given the allegedly serious health conditions associated with PFAS exposure, and PFAO exposure in particular, as well as the tension between various representations of the packaging of the Products and the alleged health risks posed by PFAS, the Surviving Plaintiffs sufficiently allege the expectations of a reasonable consumer at this stage.

L'Oréal's remaining arguments on the question of reasonable consumer expectations are unavailing. Its argument that PFAS are ubiquitous so no reasonable consumer could have expected the Products not to contain it is not persuasive in light of the alleged serious health risks discussed above, along with certain assurances and representations made on the packaging of the Products. L'Oréal's argument that Plaintiffs have not sufficiently alleged PFAS chemicals to be harmful—an argument that is dubious on its face given the aforementioned alleged health risks—fails because this is not a personal injury action. Plaintiffs' claims are premised on the notion that they were misled by L'Oréal into believing the Products they purchased did not contain PFAS chemicals and therefore paid more than they would have otherwise. For such claims, "a showing of personal injury" is "not require[d]." *Harris v. Pfizer*, 586 F. Supp. 3d 231, 239 (S.D.N.Y. 2022) (citing *Bellevue S. Assocs. v. HRH Constr. Corp.*, 579 N.E.2d 195 (N.Y. 1991)). Finally, L'Oréal's omission-based argument fails because the Second Amended Complaint repeatedly alleges that L'Oréal knew or should have known that PFAS were in the Products and that PFAS had harmful effects. *See, e.g.*, Am. Compl. ¶¶ 93, 158, 165, 166, 168, 344. Moreover, this omission-based argument, even if successful, would not result in dismissal of the surviving consumer protection claims given the misrepresentation theory pleaded.

D. Third Through Sixth Causes of Action

***18** The Court now turns to L'Oréal's additional arguments challenging the four claims brought by the Surviving Plaintiffs in the Third through Sixth Causes of Action. These claims are for breach of express warranty, breach of implied warranty, fraudulent concealment, and unjust enrichment. *See* SAC ¶¶ 406-439.

1. Express Warranty

L'Oréal argues that the express warranty claim, pleaded in the Third Cause of Action, fails for lack of pre-suit notice, citing the standard under New York law. Motion at 24. L'Oréal is correct that under New York law, "a plaintiff must ... give notice of the breach [of the express warranty] to the seller before he can recover under an express warranty claim." *Colpitts*, 527 F. Supp. 3d at 589 (citing N.Y. U.C.C. § 2-607(3)(a)). This notice requirement applies to consumer fraud actions such as this case. *See id.* Plaintiffs, however, do not allege or argue that they provided any form of pre-suit notice to L'Oréal. Indeed, perhaps recognizing this infirmity,

Plaintiffs purport to voluntarily withdraw this Cause of Action to the extent asserted under New York law. Opposition at 24 n.17. Accordingly, Plaintiffs' Third Cause of Action to the extent asserted under New York law is dismissed. The Surviving Plaintiffs, however, also include Simmons whose express warranty claim is brought under Michigan law. Because L'Oréal presents no argument for the dismissal of the Third Cause of Action under Michigan law, the claim survives insofar as it is brought by Simmons under Michigan law.

2. Implied Warranty

The Fourth Cause of Action asserts a claim for breach of implied warranty. Here too, New York law applies to the implied warranty claim brought by each of the Surviving Plaintiffs except Simmons, whose claim is governed by Michigan law. "Under New York law, a plaintiff must allege privity with the defendant for a claim of breach of an implied warranty." *Colpitts*, 527 F. Supp. 3d at 591. No Plaintiff is alleged to have purchased the Products directly from L'Oréal, so privity is lacking. Plaintiffs also purport to withdraw this Cause of Action to the extent asserted under New York law. Opposition at 24 n.17. Accordingly, Plaintiffs' Fourth Cause of Action is dismissed insofar as it is brought under New York law. Yet again, L'Oréal makes no argument for dismissal of the Fourth Cause of Action under Michigan law, so it survives to the extent asserted by Simmons.

3. Fraudulent Concealment

L'Oréal's motion to dismiss does not address the Fifth Cause of Action, brought for fraudulent concealment, aside from a single parenthetical in a string cite in the midst of its argument regarding reasonable consumer expectations, *see* Motion at 20-21, and, arguably, its passing contention that the Second Amended Complaint runs afoul of Federal Rule of Civil Procedure 9(b), *see id.* at 20. Both are insufficiently developed to provide a basis for granting L'Oréal's motion. *See supra* n.15. Accordingly, the Fifth Cause of Action, to the extent brought by the Surviving Plaintiffs, survives dismissal.

4. Unjust Enrichment

Finally, in the Sixth Cause of Action, Plaintiffs allege that L'Oréal has been unjustly enriched as "the intended and expected result of the conscious wrongdoing alleged" in the Second Amended Complaint. SAC ¶ 434. Again, New York law applies to whether Hicks, Vargas, Pinghera, Santiago, Spring, Cauchi, and Branton have adequately pleaded this claim, while Michigan law controls the question as to Simmons. And here too, L'Oréal only presents arguments under New York law. Plaintiffs do not allege any distinct factual bases for the Sixth Cause of Action, instead incorporating by reference all the other factual allegations in the Second Amended Complaint. *Id.* ¶¶ 433-439. To sufficiently plead unjust enrichment under New York law, a plaintiff must allege that "(1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) ... it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff." *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 290 (S.D.N.Y. 2014) (quoting *Baron v. Pfizer, Inc.*, 840 N.Y.S.2d 445, 448 (3d Dep't 2007)). "[A]n unjust enrichment claim cannot survive 'where it simply duplicates, or replaces, a conventional contract or tort claim.' " *Id.* (quoting *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790-91 (2012)).

***19** Without any unique factual allegations supporting the unjust enrichment claim brought by Hicks, Vargas, Pinghera, Santiago, Spring, Cauchi, and Branton "must be dismissed because it merely duplicates [their] other claims." *Colpitts*, 527 F. Supp. 3d at 592. The claim is a "mere repackaging of [Plaintiffs'] other claims based on the alleged misrepresentations on the Product[s]' packaging." *Id.* Accordingly, Plaintiffs' Sixth Cause of Action is dismissed insofar as it is brought under New York law. But once again, L'Oréal presents no argument for dismissal of the unjust enrichment claim under Michigan law, so the Sixth Cause of Action survives to the extent it is brought by Simmons.

E. Leave to Amend

Finally, the Court considers whether to grant Plaintiffs leave to amend yet again. Plaintiffs have not requested leave to file another amended complaint in their briefing. Accordingly, the Court declines to *sua sponte* grant leave to amend. *See Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 126 (2d Cir. 2013) ("While leave to amend under the Federal Rules of Civil Procedure is freely granted, no court can be said to have erred in failing to grant a request that was not made." (internal quotation marks omitted)).

IV. Conclusion

For the foregoing reasons, L'Oréal's motion is granted in part and denied in part. Plaintiffs' Seventh, Eighth, Ninth, Tenth, and Twelfth Causes of Action are dismissed without prejudice for lack of standing. Plaintiffs' Third, Fourth, and Sixth Causes of Action are dismissed with prejudice for failure to state a claim insofar they are asserted by Plaintiffs Zaida Hicks, Stephanie Vargas, Stephanie Pinghera, Marjie Santiago, Nancy Spring, Sonia Cauchi, and Stephanie Branton, these causes of action survive dismissal to the extent they are brought by Plaintiff Gwendolyn Simmons under Michigan law, and they are dismissed without prejudice to the extent they are brought by Plaintiffs who lack standing. The First, Second, Fifth, and Eleventh Causes of Action survive to the extent they are brought by Plaintiffs Zaida Hicks, Stephanie Vargas, Stephanie Pinghera, Marjie Santiago, Gwendolyn Simmons, Nancy Spring, Sonia Cauchi, and/or Stephanie Branton, and these causes of action are dismissed without prejudice to the extent they are brought by Plaintiffs who lack standing.

SO ORDERED.

All Citations

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2016 WL 1260713
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

INTERLINK PRODUCTS INTERNATIONAL, INC., Plaintiff,
v.
F & W TRADING LLC, et al., Defendants.

Civil Action No. 15-1340 (MAS) (DEA)
|
Signed 03/31/2016

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OPINION

MICHAEL A. SHIPP, UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court on two motions. Plaintiff/Counterclaim Defendant Interlink Products International, Inc. ("Interlink") moves to dismiss Defendant/Counterclaim Plaintiff F & W Trading LLC's ("F&W") Amended Counterclaims (ECF No. 23) for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 25.) Additionally, Defendants F&W and Gideon Products, LLC (collectively, "Defendants") move to dismiss Interlink's Third Amended Complaint (ECF No. 28) for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 30.) The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Civil Rule 78.1. For the reasons stated below, Interlink's motion to dismiss is granted in part and denied in part, and Defendants' motion to dismiss is granted in part and denied in part.

I. Background

This is a commercial dispute between two competitors that manufacture and distribute showerheads. Interlink originally brought this action against F&W for false advertising, trademark infringement, and unfair competition. Now, in its Third Amended Complaint, Interlink alleges that "[t]his case arises out of Defendants' wide-sweeping unfair and deceptive competitive practices and their infringement of Interlink's trade dress and trademarks." (Third Am. Compl. ¶ 7, ECF No. 28.) Specifically, Interlink alleges that it is a research and development company specializing in the development, manufacturing, and marketing of high quality healthcare products, including showerheads. (*Id.* ¶ 8.) Interlink alleges that it owns or is the exclusive licensee of several federally registered trademarks for its showerhead brands, including AQUASPA®, AQUASTORM®, AQUADANCE®, and SPIRALFLO®. (*Id.* ¶ 10.) Interlink sells its products through websites, including Amazon.com ("Amazon") and Groupon.com ("Groupon"), and through major retailers, including Wal-Mart and Bed Bath & Beyond. (*Id.* ¶ 9.) Additionally, Interlink alleges that Defendants compete directly with it for sales of showerheads to online consumers. (*Id.* ¶ 13.)

In the Third Amended Complaint, Interlink alleges that Defendants sell illegal products on Amazon and Groupon by falsely representing to Amazon and Groupon that their products comply with all applicable laws when Defendants' showerheads do not comply with the flow rate and marking requirements under the Energy Policy Act, 42 U.S.C. §§ 6291-6309, and the regulations promulgated pursuant thereto. (*Id.* ¶¶ 14-46.) Additionally, Interlink alleges that Defendants "set out to copy Interlink's successful trademark, product designs and product descriptions in order to trade on the goodwill established by Interlink, pass off their goods as Interlink products, and otherwise unfairly compete with Interlink." (*Id.* ¶ 47.) Specifically, Interlink alleges that Defendants: (1) "copied the images and product descriptions for Interlink's showerheads and then used them to sell Defendants' products"; (2) "adopted the trademark AQUAFLOW for their showerheads" to closely resemble Interlink's marks; (3) "falsely mark[ed] ... their AQUAFLOW products with the indicia of federal trademark registration (the ® symbol) when, in fact, AQUAFLOW is not a federally registered trademark"; and (4) "mimic[ed] or closely resemble[d] the listings, packaging and promotional materials for Interlink's products." (*Id.* ¶¶ 49-56.) Furthermore, Interlink alleges that Defendants copied their trade dress, which includes:

***2** (1) [t]he use of circular pictures arranged in a vertical column showing the various function modes of the showerheads. together with the terminology used to describe the functions and the font and positioning of the function descriptions beneath the pictures;

(2) photographs of Interlink's products;

(3) the look, feel and style of the presentation of product images;

(4) the non-functional aspects of the design of the products, specifically the shape of the shower handle, head and shower jet design ...; and

(5) the trademarks used in connection with the products.

(*Id.* ¶ 57.)

Moreover, Interlink alleges that Defendants used excessive professional product reviewers to inflate their product ratings and rankings on Amazon. (*Id.* ¶¶ 70-80.) Additionally, Interlink alleges that Defendants deceive customers regarding the installation of their dual showerheads by advertising that installation requires "absolutely no tools," but the product instructions state to use a "wrench or pliers to tighten all connections." (*Id.* ¶¶ 81-88.) Based on these facts, Interlink asserts eight counts against Defendants: (1) false advertising, 15 U.S.C. § 1125(a); (2) false advertising/deceptive practices, N.J.S.A. 56:8-2; (3) federal trademark infringement, 15 U.S.C. § 1114; (4) federal unfair competition, 15 U.S.C. § 1125(a); (5) federal trade dress infringement, 15 U.S.C. § 1125(a); (6) unfair competition. N.J.S.A. 56:4-1; (7) common law unfair competition; and (8) tortious interference with prospective economic advantage. Interlink seeks an accounting and disgorgement of all profits, compensatory damages of no less than $2.2 million, treble damages, reasonable attorneys' fees and costs, and punitive damages of no less than $12 million.

Defendant F&W also asserts Amended Counterclaims against Interlink. (Am. Counterclaims, ECF No. 23.) In its Amended Counterclaims, F&W alleges that many of Interlink's dual showerheads do not comply with the Energy Policy Act's flow rate requirements or the U.S. Department of Energy's Showerhead Enforcement Guidance of March 4, 2011. (*Id.* ¶ 5-14.) Specifically, F&W alleges that it "purchased and tested an Interlink Model 1141 AquaDance Drencher 3-Setting 8-inch Curved Square Rainfall Showerhead with Waterfall mode" and it did not contain a water flow regulator even though Interlink represented that the product complied with the Energy Policy Act. (*Id.* ¶ 15.) Additionally, F&W alleges that it purchased and tested other Interlink models that also represented that they complied with the Energy Policy Act but actually put out more water than the Energy Policy Act limit. (*Id.* ¶¶ 16-19.) F&W also alleges that Interlink's products violate the Energy Policy Act because they are not marked with the country of origin. (*Id.* ¶ 20.) Furthermore, F&W alleges that the instruction manuals that come with Interlink's showerheads teach users how to remove flow rate regulators. (*Id.* ¶¶ 31-38.) F&W additionally alleges that Interlink does not comply with Amazon's Product Image Requirements because the backgrounds are supposed to be pure white but Interlink's showerhead product images are dark. (*Id.* 39-43.) Based on these facts, F&W asserts four counterclaims against Interlink: (1) false advertising, 11 U.S.C. § 1125(a); (2) false advertising/deceptive practices, N.J.S.A. 56:8-2; (3) common law unfair competition; and (4) tortious interference with prospective economic advantage. F&W seeks an injunction, an accounting, treble damages, and punitive damages.

II. Legal Standard

***3** Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds on which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544. 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). On a motion to dismiss for failure to state a claim, a "defendant bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005).

A district court conducts a three-part analysis when considering a Rule 12(b)(6) motion. *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011). "First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.'" *Id.* (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009)). Second, the court must accept as true all of a plaintiff's well-pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). The court, however, must disregard any conclusory allegations proffered in the complaint. *Id.* Finally, once the well-pleaded facts

have been identified and the conclusory allegations ignored, a court must next "determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* at 211 (quoting *Iqbal*, 556 U.S. at 679).

III. Analysis

A. Motion to Dismiss Amended Counterclaims

In its Amended Counterclaims, F&W alleges that Interlink: (1) teaches users, through its instruction manual, how to make its showerheads non-compliant with the Energy Policy Act; (2) uses images with dark backgrounds as opposed to white backgrounds in violation of Amazon's Product Image Requirements; (3) falsely represents that its showerheads comply with the Energy Policy Act's maximum flow rate; and (4) does not list the country of origin on its products. Interlink moves to dismiss all four counts of F&W's Amended Counterclaims based on these allegations.

1. Count One-False Advertising (15 U.S.C. § 1125(a))

In Count One, F&W asserts that Interlink made false and misleading statements of fact in its commercial advertising or promotion in violation of Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a). "Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) ... creates a cause of action for any false description or representation of a product. This proscription extends to misleading descriptions or representations." *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 921 (3d Cir. 1990). To state a false advertising claim under the Lanham Act, a plaintiff must allege:

1) that the defendant has made false or misleading statements as to his own product [or another's];

2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience;

3) that the deception is material in that it is likely to influence purchasing decisions;

4) that the advertised goods traveled in interstate commerce; and

5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.

Warner-Lambert Co. v. Breathasure, Inc., 204 F.3d 87, 91-92 (3d Cir. 2000).

a. Product Instructions

F&W argues that the product instructions constitute false advertising because they "serve the purpose of influencing the customer who purchased the item to continue purchasing Interlink showerhead products and to also influence other potential customers who become aware of them through contact with the initial purchaser." (Defs.' Opp'n Br. 3, ECF No. 26.)

***4** In support of its motion, Interlink cites *Gillette Co. v. Norelco Consumer Products Co.* for the proposition that product instructions do not constitute advertising or promotion for a Lanham Act claim. (Pl.'s Moving Br. 5 (citing *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 135 (D. Mass. 1996)), ECF No. 25.) In *Gillette*, the District of Massachusetts, in interpreting the phrase "advertising or promotion" in the Lanham Act, found that:

> Advertising or promotion implies that the statements are made to influence a consumer in his or her choice to purchase a product. Statements made inside the product's packaging, available to consumers only after the purchase has been made, do not affect the choice to purchase, that choice having been made at an earlier point.

Gillette Co., 946 F. Supp. at 135. Based on this reasoning, the court in *Gillette* held that the packaging inserts at issue were not "commercial advertising or promotion as the phrase is used in the Lanham Act." *Id.*; *see also* *Marcyan v. Nissen Corp.*, 578 F. Supp. 485, 507 (N.D. Ind. 1982), *aff'd sub nom.*, *Marcyan v. Marcy Gymnasium Equip. Co.*, 725 F.2d 687 (7th Cir. 1983) (holding that a user manual that is provided to purchaser of product is not an advertising under

the Lanham Act). Although not binding on this Court, *Gillette* is persuasive and F&W has not directed this Court to any binding precedent that it must follow. Accordingly, the Court grants Interlink's motion to dismiss Count One based on the product instructions.

b. Product Image Backgrounds

F&W states that it does not dispute that the allegations regarding the product image backgrounds are not the basis of the Lanham Act claim. (Defs.' Opp'n Br. 4.) Accordingly, the Court grants Interlink's motion to dismiss Count One based on the product image backgrounds.

c. False Representations of Compliance with Flow Rate

Interlink argues that Count One, based on the allegations of Interlink's violation of the Energy Policy Act. should be dismissed because F&W has "not pled facts sufficient to support the inference that [it has] suffered or [is] likely to suffer any harm as a result of alleged nonconformance with the DOE enforcement guidance." (Pl.'s Moving Br. 9.) Specifically, Interlink argues that because F&W does not plead "that [it] actually compl[ies] or ha[s] complied with the standard [it] scek[s] to impose" on Interlink, F&W does not have a plausible claim for damages or harm. (*Id.*) In opposition, F&W states that Interlink has failed to cite any case law in support of its argument. (Defs.' Opp'n Br. 6.) Additionally, F&W directs this Court to its allegations in the Counterclaims that provide: "Interlink's false statements that its showerheads put out no more than 2.5 gpm at 80 p.s.i. of water pressure are material to consumers, many of whom would not have purchased Interlink's showerheads if they had known that these representations were false." (*Id.* (citing Defs.' Counterclaim 23).)

The Court agrees with F&W. If, as alleged, Interlink falsely represented that its products complied with the Energy Policy Act, and consumers purchased Interlink's products based on those representations, F&W may have suffered damages due to the allegedly false representations because consumers chose Interlink's product over F&W's based on false representations. Therefore, at this stage in the litigation, F&W has pled sufficient facts to base its claims on Interlink's alleged false representations of compliance with the Energy Policy Act.

***5** Additionally, Interlink moves to dismiss Count One to the extent it is founded on alleged misrepresentations because the Lanham Act requires that a party identify the allegedly false statements with particularity, consistent with the requirements of Rule 9(b). (Pl.'s Moving Br. 1516.) In opposition, F&W argues that an intermediate pleading standard applies to Lanham Act daims, and Interlink knows exactly which misrepresentations F&W refers to in its Counterclaims. (Defs.' Opp'n Br. 10-11.) "In litigation in which one party is charged with making false statements, it is important that the party charged be provided with sufficiently detailed allegations regarding the nature of the alleged falsehoods to allow him to make a proper defense." *Max Daetwyler Corp. v. Input Graphics, Inc.*, 608 F. Supp. 1549, 1556 (E.D. Pa. 1985) (regarding Lanham Act claim). After review of the Counterclaims, the Court finds that F&W has pled sufficient factual allegations to allow Interlink to defend those allegations. Accordingly, the Court denies Interlink's motion to dismiss Count One based on its alleged false representation of compliance with flow rate regulations.

2. Count Two-False Advertising/ Deceptive Practices (N.J.S.A. 56:8-2)

In Count Two, F&W asserts that Interlink "used and employed unconscionable commercial practices, deception, fraud, and misrepresentations concerning the nature of its showerheads and has knowingly misrepresented or concealed material facts concerning the nature of its showerheads with the intent that potential purchasers rely upon such misrepresentations or concealment" in violation of the New Jersey Consumer Fraud Act. (Defs.' Counterclaims ¶ 51.) Based on the Court's reasoning, *infra* III. B. 2., in regards to F&W's motion to dismiss Interlink's New Jersey Consumer Fraud Act claim for lack of standing, the Court also grants Interlink's motion to dismiss F&W's counterclaim for violation of the New Jersey Consumer Fraud Act.

3. Count Three – Common Law Unfair Competition

In Count Three, F&W asserts a counterclaim for unfair competition under New Jersey common law. (Defs.' Counterclaims ¶¶ 54-59.) New Jersey's "law of unfair competition is an amorphous area of jurisprudence." *N.J. Optometrie Ass'n v. Hillman-Kohan Eyeglasses, Inc.*, 144 N.J. Super. 411, 427 (Ch. Div. 1976), *aff'd*, 160 N.J. Super.

81 (App. Div. 1978). "It knows clear boundaries.... The concept is as flexible and elastic as the evolving standards of commercial morality demand [and] .... [t]he judicial tendency is to promote and advocate higher ethical standards in the business world." *Id.*; *see also Am. Shops v. Am. Fashion Shops of Journal Square*, 13 N.J. Super. 416, 421 (App. Div. 1951) ("No catalogue exists of all acts which constitute unfair competition. No prophet has undertaken to foretell what acts will be held to constitute unfair competition in the future, because equity broadly concerns itself with the suppression of injurious deception and fraud whatever the means by which they are wrongfully accomplished."). "[T]he essence of unfair competition is fair play." *Columbia Broad. Sys. v. Melody Recordings*, 134 N.J. Super. 368, 376 (App. Div. 1975). "The judicial goal should be to discourage, or prohibit the use of misleading or deceptive practices which renders competition unfair." *Ryan v. Carmona Bolen Home for Funerals*, 341 N.J. Super. 87, 92 (App. Div. 2001). "Furthermore, unfair competition claims under New Jersey statutory and common law generally parallel those under § 43(a) of the Lanham Act." *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384, 454 (D.N.J. 2009). Accordingly, to the extent this Court granted Interlink's motion to dismiss Count One of F&W's Counterclaims, the Court also grants Interlink's motion to dismiss Count Three.

4. Count Four – Tortious Interference with Prospective Economic Advantage

In Count Four, F&W asserts a counterclaim for tortious interference due to Interlink's intentional and improper interference with F&W's prospective customers. (Defs.' Counterclaims ¶¶ 60-64.) "Under New Jersey law, the elements of a claim for tortious interference with prospective business advantage are as follows: 1) a prospective economic relationship from which the plaintiff has a reasonable expectation of gain: 2) intentional and unjustifiable interference with that expectation, and 3) a causative relationship between the interference and the loss of the prospective gain." *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 281 (3d Cir. 1995) (citing *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739 (1989)). "In order to prevail on a claim for tortious interference with a prospective economic advantage, the plaintiff must prove that the defendant acted with malice." *Herbert v. Newton Mem'l Hosp.*, 933 F. Supp. 1222, 1229 (D.N.J. 1996), *aff'd* 116 F.3d 468 (3d Cir. 1997). "Malice, in the context of a tortious interference claim, is not used in its literal sense to mean defendants' ill will or spite toward the plaintiff, but rather it means an intentional doing of a wrongful act without justification or excuse." *Id.* at 1229-30. "While the wrongful act need not be illegal per se to establish tort liability, ... it nevertheless must be 'transgressive of generally accepted standards of common morality or law.'" *Id.* (quoting *Assoc. Grp. Life, Inc. v. Catholic War Veterans*, 120 N.J. Super. 85, 98 (App. Div. 1971)).

***6** First, F&W merely asserts the same arguments it made in support of its unfair competition claim, in regards to the product instructions, to support its tortious interference claim. As the Court has granted Interlink's motion to dismiss the unfair competition claims on the product instruction allegations, it also grants Interlink's motion to dismiss Count Four of those grounds.

Next, with respect to the product image backgrounds, F&W argues that Interlink "purposefully and intentionally contravenes the Amazon.com image requirement ... to unfairly take legitimate customers away from [F&W]." (Defs.' Opp'n Br. 10.) For purposes of tortious interference, however, when "a loss occurs by reason of lawful competition, however sharp, the loss is one for which the law affords no redress." *Melveney v. McCrane*, 138 N.J. Super. 456, 462 (App. Div. 1976); *see also Raul Int'l Corp. v. Sealed Power Corp.*, 586 F. Supp. 349. 358 (D.N.J. 1984). Furthermore, F&W provides no support for its argument that the violation of a website's image requirements gives a third-party user of the website a cause of action for unlawful competition. Interlink's compliance with Amazon's image requirements is a matter Amazon.com and Interlink. *See, e.g., Lexington Nat'l Ins. Corp. v. Ranger Ins. Co.*, 326 F.3d 416 (3d Cir. 2003) (denied theory of tort liability as extending New Jersey law too far based on a theory of a competitor unlawfully reducing its costs by underpaying its taxes). The Court, even accepting F&W's allegations as true, will not extend tort liability to the facts of this case without citation to persuasive legal authority by F&W. Thus, the Court grants Interlink's motion to dismiss Count Four with respect to the product image backgrounds.

Last, with respect to the allegations of false representation of compliance with flow rate, Interlink repeats its argument from the previous counts which this Court already denied. Thus, F&W's motion to dismiss Count Four based on its

allegedly false representation of compliance with the flow rate is denied.

5. Country of Origin Designation

Additionally, Interlink argues that the Court should dismiss F&W's allegation that some of Interlink's showerheads are not marked with the country of origin in violation of 19 C.F.R. § 134. Specifically, without any citation to case law, Interlink argues that because F&W admitted in its Answer to Interlink's Second Amended Complaint, [1] that at least some of F&W's showerheads are not marked with the country of origin, F&W cannot now claim that it was damaged by the same alleged conduct. (Pl.'s Moving Br. 18.) In opposition, F&W argues, again without any citation to case law, that the admission concerned past practices and it should be allowed to assert a claim now that it is in full compliance and Interlink is not. (Defs.' Opp'n Br. 11.) At this juncture, because Interlink has not provided the Court with any case law that supports dismissal on this basis, the Court denies Interlink's motion to dismiss based on F&W's claims regarding the country of origin designation.

[1] The Second Amended Complaint however is not the operative pleading here, as Interlink has filed a Third Amended Complaint.

Accordingly, Interlink's motion is granted in part and denied in part. All Counterclaims based on the product instructions and product image background are dismissed and Count Two is dismissed with prejudice.

B. Motion to Dismiss Third Amended Complaint

***7** In its Third Amended Complaint, Interlink alleges that Defendants have: (1) "represented in their advertising and promotional materials that their dual showerheads require 'absolutely no tools' to install when, in fact, the instructions provided with the showerheads clearly indicate that tools are required"; (2) used deceptive tactics in the form of professional reviewers to enhance their online product ratings; (3) "misrepresented the nature and qualities of their products by using images of Interlink's products"; (4) sold products without regulating the water flow; and (5) adopted "a trademark that is confusingly similar to federally registered marks used by Interlink" and falsely indicated that their trademark is federally registered. (Third Am. Compl. ¶ 7.) F&W moves to dismiss all eight counts of the Third Amended Complaint based on these allegations.

1. Count One – False Advertising (15 U.S.C. § 1125(a))

In Count One, Interlink alleges five separate false or misleading statements F&W made that are "literally false" and constitute false advertising under the Lanham Act. (Third Am. Compl. ¶¶ 89-95.) Those five factual basis are: (1) misrepresentation with respect to legality of product; (2) misrepresentation that F&W's products were Interlink's products or of the same quality as Interlink's products; (3) misrepresentation that AQUAFLOW is a registered trademark; (4) use of professional reviewers; and (5) misrepresentation that no tools were required for installation. (*Id.* ¶ 90.) Defendants move to dismiss Count One on all five bases.

As stated above, to state a false advertising claim under the Lanham Act, a plaintiff must allege:

1) that the defendant has made false or misleading statements as to his own product [or another's];

2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience;

3) that the deception is material in that it is likely to influence purchasing decisions;

4) that the advertised goods traveled in interstate commerce; and

5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.

Warner-Lambert Co., 204 F.3d at 91-92.

a. Alleged Misrepresentation of Illegal Showerheads

With respect to Interlink's allegation that Defendants' showerheads fail to comply with federal law and regulations, Defendants argue that because Interlink failed to allege that Defendants represent in their advertisement that their products comply with any of the federal laws or regulations that Interlink cites, this claim fails based on the reasoning in *Eli Lilly & Co. v. Roussel Corp.*, 23 F. Supp. 2d 460 (D.N.J.

1998). Interlink does not oppose dismissal of this allegation for its false advertising claim. Therefore. Interlink's allegation of Defendants' alleged misrepresentation of the legality of its products in support of Count One is dismissed.

b. Alleged Misrepresentation that Defendants' Products Were, or the Same as, Interlink's

With respect to Interlink's allegation that Defendants' use of Interlink's pictures and product descriptions constitute false advertising, Defendants argue that the pictures used show the different functions of the showerhead and Interlink has not alleged that either of these functions are not available in Defendants' products or that Defendants' products are inferior, such that the use of the pictures would constitute false advertising under *L'Aiglon Apparel v. Lana Lohell, Inc.*, 214 F.2d 649 (3d Cir. 1954). (Defs.' Moving Br. 5-6, ECF No. 30.) In opposition, Interlink argues that its false advertising claim on this basis is not limited to the pictures displaying the functions, but that Defendants are misrepresenting that their product is in fact Interlink's product. (Pl.'s Opp'n Br. 14-15.) Additionally, Interlink argues that the allegations of the Third Amended Complaint adequately allege that the nature and quality of the products are different. (*Id.*)

***8** "It is well established that a person's use of a picture or other depiction of a competitor's product to sell his own product violates [Section] 43(a)." *Upjohn Co. v. Riahom Corp.*, 641 F. Supp. 1209, 1222 (D. Del. 1986) (citing *L'Aiglon Apparel, Inc.*, 214 F.2d at 649). "In such situations, unfair competition exists because the defendant unfairly seeks to trade on the plaintiff's reputation and goodwill by representing plaintiff's product as his own or by creating the false impression that some association exists between the two products or their sources." *Id.* At the motion to dismiss stage, Interlink's allegations, taken as true, state a cognizable claim under Section 43(a) of the Lanham Act based on F&W's use of Interlink's pictures and descriptions to either misrepresent that F&W's products are Interlink's or that they are of the same nature and quality. Defendants' motion to dismiss is denied on this basis.

c. Alleged Misrepresentation of Registered Trademark Symbol

With respect to Interlink's allegation that Defendants misrepresent that AQUAFLOW is a registered trademark, Defendants state that the symbol was used by mistake and that Defendants have ceased using the trademark symbol. (Defs.' Moving Br. 7.) Additionally, Defendants argue that there is no case law in this Circuit that addresses such a claim, and any facts to support a claim for damages. (*Id.*) In opposition, Interlink argues, based on the Southern District of New York decision in *Perfect Pearl Co. v. Majestic Pearl & Stone, Inc.*, 889 F. Supp. 2d 453. 460 (S.D.N.Y. 2012), that the false use of the trademark symbol can support a claim for false advertising. (Pl.'s Opp'n Br, 16.)

The "use of ... the ® adjacent a mark not federally registered is ... a form of false advertising which may result in serious repercussions." 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 19:146 (4th ed. 2011) (citing *Sports Auth., Inc. v. Abercrombie & Fitch, Inc.*, 965 F. Supp. 925, 933 (E.D. Mich. 1997) (placement of the "U.S. PAT. OFF." notice near non-registered mark in a composite designation might constitute false advertising under Lanham Act § 43(a))). Accordingly, Interlink's allegations regarding F&W's false use of the trademark symbol next to AQUAFLOW is sufficient to plead a plausible claim for false advertising. Defendants' motion to dismiss is denied on this basis.

d. Alleged Manipulation of Product Reviews

With respect to Interlink's allegation that Defendants' manipulation of product reviews through the excessive use of professional reviewers constitutes false advertising, Defendants argue that Interlink's actual complaint is with Amazon's product review reporting process and, otherwise, Defendants have not made a false statement of fact in commercial advertising to support Interlink's claim. (Defs.' Moving Br. 9-12.) In opposition, Interlink argues that its false advertising claim is "concerned only with [Defendants'] manipulation of numerical product ratings through the excessive use of professional reviewers." (Pl.'s Opp'n Br. 5-6.) Additionally, Interlink argues that it has pled sufficient facts to support a claim of false advertising based on Defendants' rating manipulation under both literal falsity and implied falsity grounds and under either direct or contributory liability. (*Id.* 6-10.)

In the Third Amended Complaint, Interlink alleges that Defendants' "core business strategy is founded on taking business from competitors though massive continuous ratings manipulation [by] ... sending excessive quantities of free samples of products to professional reviewers so that the Amazon reviews for those products are flooded with professional reviews" and "professional reviews are inherently biased and tend to favor the seller." (Third Am. Compl. ¶¶ 73-74.) Additionally, Interlink alleges that "[w]hen not abused, there is nothing wrong with the use of professional product reviewers." (*Id.* ¶ 72.)

***9** Here, Defendants have not supported their argument for dismissal with citation to any persuasive legal authority and the Court finds that Interlink has pled sufficient facts at this stage to state a claim for false advertising based on the alleged business practice of using professional reviewers to drive up product ratings. The Lanham Act makes statements that are literally false actionable. "A 'literally false' message may be either explicit or conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586-87 (3d Cir. 2002) (internal quotation marks omitted). As alleged, Defendants purposefully drive up Amazon product ratings by enlisting inherently biased professional reviewers intending for consumers to rely on the misleading heightened reviews when selecting a product for purchase. The Court finds these allegations sufficient to state a claim on implied falsity grounds. Accordingly, Defendants' motion to dismiss is denied on this basis.

e. Alleged Misrepresentation of No Tools Required Installation

With respect to Interlink's allegation that Defendants' dual showerhead requires tools for installation even though it is advertised as "no tools required," Defendants argue that Interlink's claim for literal falsity fails because Interlink has not alleged that Defendants' showerhead cannot be installed without tools. (Defs.' Moving Br. 12.) In opposition, Interlink argues that its allegations in the Third Amended Complaint support a plausible inference that tools are required to install Defendants' dual showerhead products and that the instructions confirm that tools are required. (Pl.'s Opp'n Br. 3.) Interlink argues that these allegations are sufficient to state a plausible claim. (*Id.*)

In the Third Amended Complaint, Interlink alleges that: (1) Defendants advertise that the installation of their dual showerhead requires "absolutely no tools"; (2) this statement is "literally false"; and (3) the product instructions "clearly instruct the purchasers to use" tools. (Third Am. Compl. ¶¶ 82-84.) Based on these allegations, and making all inferences in favor of Interlink, it has pled a plausible claim for relief. Accordingly, Defendants' motion to dismiss is denied on this basis.

2. Count Two – False Advertising/ Deceptive Practices (N.J.S.A. 56:8-2)

In Count Two, Interlink alleges that it is a "purchaser" and "direct competitor," Defendants used unconscionable commercial practices in connection with the sale and advertisement of their showerheads, and as a result Interlink has suffered damages including the purchase price of the product, lost sales, and lost market share. (Third Am. Compl. ¶¶ 96-101.) Defendants move to dismiss Count Two, Interlink's claim under the New Jersey Consumer Fraud Act, arguing that Interlink lacks standing as a competitor to assert such a claim. (Defs.' Moving Br. 12-13.) In opposition, Interlink argues that there is a split in this District as to whether a competitor has standing to assert a claim under the New Jersey Consumer Fraud Act, and, in any case, Defendants are judicially estopped from making that argument because they asserted a similar Counterclaim. (Pl.'s Opp'n Br. 17-21.)

The New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to-181, "provides relief to consumers from 'fraudulent practices in the market place.'" *Lee v. Carter-Reed Co.*, 203 N.J. 496, 521 (2010) (quoting *Furst v. Einstein Moomjy, Inc.*, 182 NJ. 1, 11 (2004)). To establish a cause of action under the New Jersey Consumer Fraud Act, a consumer must plead "(1) an unlawful practice, (2) an ascertainable loss, and (3) a causal relationship between the unlawful conduct and the ascertainable loss." *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 576 (2011); *see also Lee*, 203 N.J. at 521.

The Court agrees with the Honorable Freda L. Wolfson, U.S.D.J.'s holding in *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmBH*, and finds that "the NJCFA is not intended to protect competitors such as Plaintiff that

do not suffer a consumer-like injury." No. 10-453, 2010 WL 5239238, at *10-11 (D.N.J. Dec. 16, 2010). In *Church & Dwight*, Judge Wolfson reasoned:

> ***10** While there are no New Jersey state court cases that directly address this issue, the Court finds persuasive recent district court cases that have rejected the notion that competitors, direct or otherwise, suffering non-consumer like injuries have standing to sue under the NJCFA. In *Trans USA Products, Inc. v. Howard Berger Co., Inc.*, No. 07-5924, 2008 WL 3154753 (D.N.J. Aug. 4, 2008), the court explained: "Plaintiff does not have standing to bring a cause of action under NJCFA. Plaintiff bases the NJCFA claim on allegations of unfair competition and Plaintiffs status as a competitor to Defendants. Importantly, Plaintiff is not a direct purchaser of the wiring devices alleged to bear fraudulent UL marks and, has not used or diminished those goods". Plaintiff does not assert that it has been "victimized by being lured into a purchase through fraudulent, deceptive or other similar kind of selling or advertising practices." *Daaleman*, supra, 77 N.J. at 271, 390 A.2d 566. For those reasons, the Court finds that the NJCFA is not intended to protect competitors such as Plaintiff that do not suffer a consumer-like injury. *Id.* at *20.

Id. Here, Interlink and Defendants are competitors and neither alleges suffering any consumer oriented injuries. Instead, each only purchased the others' product in support of this litigation and already under the assumption that the other's product contained some type of misrepresentation. Thus, the Court finds that both parties lack standing to sue under the New Jersey Consumer Fraud Act. Accordingly, Defendants' motion to dismiss Count Two is granted.

3. Count Three-Federal Trademark Infringement (15 U.S.C. § 1114)

In Count Three, Interlink alleges that Defendants have used the mark AQUAFLOW which is confusingly similar to Interlink's federally registered marks in violation of 15 U.S.C. § 1114. (Third Am. Compl. ¶¶ 102-07.) In support of dismissal of this claim, Defendants argue that Interlink has pled only conclusory statements that Defendants have used marks confusingly similar to the registered marks and, in any regard, when AQUAFLOW is compared with Interlink's marks, AquaSpa and SpiralFlo, there is no plausible claim made for trademark infringement. (Defs.' Moving Br. 13-15.) In opposition, Interlink argues that the likelihood of confusion is a fact issue that is not appropriate to decide on a motion to dismiss. (Pl.'s Opp'n Br. 22-24.)

"To prove trademark infringement, a plaintiff must show that: (1) the mark is valid and legally protectable; (2) the mark is owned by the plaintiff[2]; and (3) the defendant's use of the mark to identify goods or services is likely to create confusion concerning the origin of the goods or services." *Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, 30 F.3d 466, 472 (3d Cir. 1994). "Several factors must be evaluated to determine whether a likelihood of confusion exists: (1) the strength of the plaintiff's mark; (2) the similarity of the marks; (3) the similarity of the products sold; (4) the marketing and retailing channels used; (5) the defendant's intent in adopting the mark; (6) the sophistication of the buyers; and (7) actual confusion." *Eagles Eye, Inc. v. Ambler Fashion Shop, Inc.*, 627 F. Supp. 856. 859 (E.D. Pa. 1985) (citing *Universal City Studios, Inc. v. Nintendo Co., Ltd.*, 746 F.2d 112, 116 (2d Cir. 1984); *AMF, Inc. v. Steekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979)). At the pleading stage, the court must accept as true all of a plaintiffs well-pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff. "Against this procedural background, and buttressing it, lies the rule that generally speaking likelihood of confusion is a question of fact.... [and] the plaintiff is not required to prove the likelihood of confusion at the pleading stage." *Id.* (citing *Universal City Studios, Inc.*, 746 F.2d at 116; 2 McCarthy, *Trademarks and Unfair Competition*, § 23:22 at 107, § 32:37 at 745 (2d ed. 1984)); *CSC Holdings, LLC v. Optimum Networks, Inc.*, 731 F. Supp. 2d 400, 406 (D.N.J. 2010) ("The third element required to prove infringement or unfair competition —likelihood of confusion—is a question of fact."). Here, Interlink has sufficiently pled enough facts, taken as true, that support an inference of the likelihood of confusion, and Defendants' argument is better left for a jury to decide. Accordingly, Defendants' motion to dismiss Count Three is denied.

2 Interlink also argues that it has standing to sue as the exclusive licensee for "AQUASPA®" and "AQUADANCE®." (Pl.'s Opp'n Br. 21-22.) The Court will not address Defendants' motion on standing grounds with respect to Count Three because Defendants stated, for the purposes of the

motion to dismiss, that they were not contesting the validity of the marks and provided no support besides attaching copies of the certificates of the trademark registration to their motion, as to why Interlink lacks standing.

4. Count Four-Federal Unfair Competition (15 U.S.C. § 1125(a))

***11** In Count Four, Interlink alleges that Defendants' use of a trademark that is confusingly similar to Interlink's marks is likely to cause confusion and that Defendants are attempting to pass off their products as Interlink's in violation of 15 U.S.C. § 1125(a). (Third Am. Compl. ¶¶ 108-14.) Defendants move to dismiss Count Four based on the same arguments that they made in support of dismissal of Counts One [3] and Three, (Defs.' Moving Br. 16.) "The Third Circuit has stated that it 'measure[s] federal trademark infringement [under Section 32], 15 U.S.C. § 1114, and federal unfair competition [under Section 43], 15 U.S.C. § 1125(a)(1)(A), by identical standards.'" *CSC Holdings, LLC*, 731 F. Supp. 2d at 405 (quoting *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000)). The Court already denied Defendants' motion to dismiss with respect to Counts One and Three, and therefore, denies Defendants' motion with respect to Count Four.

[3] Count One was granted in party only to the extent the allegation was unopposed.

5. Count Five – Federal Trade Dress Infringement (15 U.S.C. § 1125(a))

In Count Five, Interlink alleges that Defendants' copying of Interlink's trade dress and Defendants' false designation of origin causes confusion and a misleading impression that Defendants' showerheads are associated with Interlink. (Third Am. Compl. ¶¶ 115-20.) Defendants argue that Count Five "should be dismissed as it is based on allegations of trade dress infringement of nothing more than a combination of non-distinctive product designs and marketing ideas with no facts alleged to even support a plausible claim that anything about the trade dress has acquired secondary meaning." (Defs.' Moving Br. 20.) In opposition, Interlink argues that Defendants' factual arguments "are not appropriate for resolution on a motion to dismiss." (Pl.'s Opp'n Br. 26.)

"To establish trade dress infringement under the Lanham Act, a plaintiff must prove that (1) the allegedly infringing design is non-functional; (2) the design is inherently distinctive or has acquired secondary meaning; and (3) consumers are likely to contuse the source of the plaintiff's product with that of the defendant's product." *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 357 (3d Cir. 2007). "In addition to satisfying these three elements, it is the plaintiff s duty to 'articulat[e] the specific elements which comprise its distinct dress.'" *Fair Wind Sailing, Inc. v. Dempster*, 764 F.3d 303, 309 (3d Cir. 2014) (quoting *See Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 381 (2d Cir. 1997)). "[T]he alleged trade dress must create *some* visual impression on consumers." *Id.* Trade dress, however, which is clearly functional is not protectable. "A functional feature is one that is 'essential to the use or purpose of the article,' 'affects the cost or quality of the article,' or one that, if kept from competitors, would put them at a 'significant non-reputation-related disadvantage.'" *Id.* at 310-11 (quoting *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33 (2001)). "By contrast, a feature is nonfunctional where it 'is unrelated to the consumer demand ... and serves merely to identify the source of the product' or business." *Id.* at 311 (*Prufrock Ltd., Inc. v. Lasater*, 781 F.2d 129, 133 (8th Cir. 1986)).

In the Third Amended Complaint, Interlink alleges that the elements of its trade dress are:

(1) The use of circular pictures arranged in a vertical column showing the various function modes of the showerheads, together with the terminology used to describe the functions and the font and positioning of the function descriptions beneath the pictures;

(2) photographs of Interlink's products;

(3) the look, feel and style of the presentation of product images;

***12** (4) the non-functional aspects of the design of the products, specifically the shape of the shower handle, head and shower jet design ...; and

(5) the trademarks used in connection with the products.

(Third Am. Compl. ¶ 57.) Here, Interlink has adequately alleged non-functional elements of its alleged trade dress for which it seeks protection. Specifically, the package design's use of the circular pictures in a vertical column with certain fonts, words, and pictures. Additionally, Interlink's trademarks can be a part of its trade dress. Moreover, the remainder of Defendants' arguments are not appropriate on amotion to dismiss. Accordingly, Defendants' motion to dismiss Count Five is denied.

6. Count Six-Unfair Competition (N.J.S.A. 56:4-1) and Count Seven-Common Law Unfair Competition

In Counts Six and Seven, Interlink asserts claims for unfair competition pursuant to N.J.S.A. 56:4-1 and New Jersey common law. (Third Am. Compl. ¶¶ 121-26.) Defendants argue that to the extent this Court dismisses Count Four, Interlink's federal unfair competition claim, it should dismiss the New Jersey statutory and common law unfair competition claims. (Defs.' Moving Br. 21.) As stated *supra* III. A. 3., "unfair competition claims under New Jersey statutory and common law generally parallel those under [Section] 43(a) of the Lanham Act." *Bracco Diagnostics, Inc.*, 627 F. Supp. 2d at 454. Accordingly, as this Court denied Defendants' motion to dismiss Count Four of Interlink's Third Amended Complaint, the Court also denies Defendants' motion to dismiss Counts Six and Seven.

7. Count Eight – Tortious Interference with Prospective Economic Advantage

In Count Eight, Interlink alleges that "[b]y deceiving Amazon and Groupon into believing that their illegal showerheads comply with the law," and through other conduct, Defendants intentionally and improperly interfered with Interlink's prospective sales to customers. (Third Am. Compl. ¶¶ 127-33.) Defendants argue that Count Eight should be dismissed because Interlink has not sufficiently alleged economic damages. (Defs.' Moving Br. 21-22.)

As this Court stated *supra* III. A. 4., in regard to F&W's tortious interference claim, to the extent the conduct complained of in support of Interlink's claim for tortious interference rests on Defendants' violation of a website's requirements or policies, those claims are dismissed as the Court will not extend tort liability that far. *See, e.g., Lexington Nat'l Ins. Corp.*, 326 F.3d at 416. However, in the Third Amended Complaint, Interlink asserts other allegations that are sufficient to plead a claim for tortious interference and at this juncture the Court refrains from entirely dismissing the cause of action.

IV. Conclusion

For the reasons set forth above, Interlink's motion to dismiss is granted in part and denied in part, and Defendants' motion to dismiss is granted in part and denied in part. An order consistent with this Opinion will be entered.

All Citations

Not Reported in Fed. Supp., 2016 WL 1260713, 2016-1 Trade Cases P 79,625

End of Document

CONFIDENTIAL Settlement Communication (FRE 408)
June 14, 2024

Class Action Settlement Agreement

This Settlement Agreement and Release ("Agreement"), effective upon the date of the last signature below, is made by and between Dr. Dennis Gross Skincare, LLC ("**DDG**" or "**Defendant**") and **Plaintiffs** Mocha Gunaratna, Renee Camenforte, and Jami Kandel, individually and as representatives of the Settlement Class as defined below) (individually a "**Party**," and collectively the "**Parties**"), in the matters of *Gunaratna v. Dr. Dennis Gross Skincare, LLC*, Case No. 2:20-cv-02311-MWF-GJS (C.D. Cal.) ("***Gunaratna***") and *Kandel et al. v. Dr. Dennis Gross Skincare LLC*, Case No. 1:23-cv-01967-ER (S.D.N.Y.) ("***Kandel***") (collectively, the "**Actions**").

WHEREAS, on March 10, 2020, Plaintiff Mocha Gunaratna filed *Gunaratna* alleging various claims regarding Defendant's C+Collagen Deep Cream, C+Collagen Serum, C+Collagen Mist, C+Collagen Mask, and C+Collagen Eye Cream (collectively, the "Class Products");

WHEREAS, on March 7, 2023, Plaintiff Jami Kandel filed *Kandel*, alleging similar claims as in the *Gunaratna* Action;

WHEREAS, on April 4, 2023, the Hon. Michael W. Fitzgerald, U.S. District Judge, certified the following class in the *Gunaratna* Action:

> All persons who purchased the Products in the State of California, for personal use and not for resale during the time period of four years prior to the filing of the complaint through the date of court order approving or granting class certification.

WHEREAS, in the *Kandel* Action, no class has yet been certified, but Plaintiff has sought to represent a class comprising:

> All persons who purchased the Products in the United States, excluding California purchasers, for personal use and not for resale during the time period of six years prior to the filing of the complaint through the date of court order approving or granting class certification; and a subclass of individuals who purchased the Products in the State of New York.

WHEREAS, Plaintiffs filed an amended complaint in *Kandel* to facilitate the *Gunaratna* and *Kandel* Plaintiffs' pursuit and resolution of all claims on behalf of all Settlement Class Members in a single action in the Southern District of New York;

WHEREAS, collectively, the Actions allege claims under the consumer fraud laws of California and New York (specifically, Cal. Bus. & Prof. Code §§ 17200 and 17500, Cal. Civ. Code § 1750, and N.Y. Gen. Bus. Law §§ 349 and 350), breach of express warranty, breach of implied warranty and unjust enrichment; the Parties in the Actions engaged in substantial direct settlement discussions, and conducted several full-day mediations, the third of which was overseen by the Hon. Peter D. Lichtman on February 8, 2024, at which time they reached an agreement in principle to resolve all claims in both Actions. Because Defendant is headquartered in New York, the parties intend to pursue a nationwide settlement in federal court in the State of New York, subject to approval by the Honorable Edgardo Ramos of the United States District Court for the Southern District of New York, and stay the *Gunaratna* action accordingly;

WHEREAS, Plaintiffs and Class Counsel believe that the claims asserted in the Actions have merit and have examined and considered the benefits to be obtained under this Settlement, the risks associated with the continued prosecution of this complex and time-consuming litigation, and the likelihood of ultimate success on the merits, and have concluded that the Settlement is fair, adequate, reasonable, and in the best interests of the Settlement Class;

WHEREAS, Defendant denies Plaintiffs' claims in all respects, but it is the intention of this Agreement to resolve all potential claims with respect to the Class Products' labeling, packaging, and marketing, and to provide compensation to all purchasers of the Class Products with respect to any statement by Defendant on the Class Products and their labels or packages, or in its marketing of the Class Products. Defendant denies all of the allegations made in the Actions and denies that it did anything unlawful or improper, and its agreement to this Settlement is not an admission of guilt or wrongdoing of any kind;

WHEREAS, since the *Gunaratna* Action was filed, Defendant has discontinued sale of the Class Products which contain the advertising claims challenged in the Actions;

WHEREAS, the Plaintiffs and Class Counsel have analyzed and evaluated the merits of all Parties' contentions and this Settlement as it affects all Parties and the Settlement Class Members and, after taking into account the foregoing, along with the risks and costs of further litigation, are satisfied that the terms and conditions of this Agreement are fair, reasonable, adequate, and equitable, and that a settlement of the Actions and the prompt provision of effective relief to the Settlement Class are in the best interests of the Settlement Class Members;

WHEREAS, Defendant hereby agrees, solely for the purposes of the settlement set forth herein, that it will not oppose Plaintiffs' request to certify the Settlement Class and appoint Class Counsel as counsel for the Settlement Class and the Settlement Class Representatives as representatives of the Settlement Class; provided, however, that if this Agreement fails to receive Court approval or otherwise fails to be executed, including but not limited to, the judgment not becoming final, then the Parties retain all rights that they had immediately preceding the execution of this Agreement, and the Actions will continue as if the Settlement Class had never been certified. The fact that Defendant did not oppose certification of the Settlement Class shall not be used against Defendant by any Party or non-party for any purpose in these Actions or any other action, litigation, lawsuit, or proceeding of any kind whatsoever. The Parties agree, subject to approval by the Court, that the Actions between Plaintiffs, on the one hand, and Defendant, on the other hand, shall be fully and finally compromised, settled, and released on the terms and conditions set forth in this Agreement;

WHEREAS, this Agreement is contingent upon the issuance by the *Kandel* Court of both preliminary approval and final approval, and dismissal with prejudice of the *Gunaratna* Action. Should the *Kandel* Court not issue preliminary approval and/or final approval, the Parties do not waive, and instead expressly reserve, all rights and remedies in the Actions;

WHEREAS, this Agreement reflects a compromise between the Parties and shall in no event be construed as or be deemed an admission or concession by any Party of the truth, or lack thereof, of any allegation or the validity, or lack thereof, of any purported claim or defense asserted in any of the pleadings or filings in the Actions, any threatened but not yet filed claim, or of any

fault on the part of Defendant, and all such allegations are expressly denied. Nothing in this Agreement shall constitute an admission of liability or be used as evidence of liability by or against any Party;

WHEREAS, Defendant and the Settlement Class Representatives on behalf of the Settlement Class (as defined below) wish to resolve any and all past, present, and future claims that the Settlement Class has or may have against Defendant on a nationwide basis, of any nature whatsoever, as they relate to the allegations in the Actions and the Class Products;

NOW THEREFORE, the Parties, for good and valuable consideration, the sufficiency of which is hereby acknowledged, understand and agree to the following terms and conditions.

1. DEFINITIONS.

As used in this Agreement, the following capitalized terms have the meanings specified below.

1.1 "**Actions**" means *Gunaratna v. Dr. Dennis Gross Skincare, LLC*, Case No. 2:20-cv-02311-MWF-GJS (C.D. Cal.) ("***Gunaratna***") and *Kandel et al. v. Dr. Dennis Gross Skincare LLC*, Case No. 1:23-cv-01967-ER (S.D.N.Y.) ("***Kandel***").

1.2 "**Agreement" or "Settlement Agreement"** means this Class Action Settlement Agreement.

1.3 **"Cash Award"** means a cash payment from the Settlement Fund to a Settlement Class Member with an Approved Claim.

1.4 **"Claim"** means a request for relief submitted by or on behalf of a Settlement Class Member on a Claim Form filed with the Settlement Administrator in accordance with the terms of this Agreement.

1.4.1 **"Approved Claim"** means a claim approved by the Settlement Administrator, according to the terms of this Agreement.

1.4.2 **"Claimant"** means any Settlement Class Member who submits a Claim Form for the purpose of claiming benefits, in the manner described in Section 4 of this Agreement.

1.4.3 **"Claim Form"** means the document to be submitted by Claimants seeking direct monetary benefits pursuant to this Agreement substantially in the form that is attached to this Agreement as Exhibit 1.

1.4.4 **"Claims Deadline"** means the date by which a Claimant must submit a Claim Form to be considered timely. The Claims Deadline shall be sixty (60) calendar days after the Settlement Notice Date.

1.4.5 **"Claims Process"** means the process by which Settlement Class Members may make claims for relief, as described in Section 4 of this Agreement.

1.5 "DDG" or **"Defendant"** means Dr. Dennis Gross Skincare, LLC, the defendant in the Actions.

1.6 "Class Period" means March 10, 2016, to the date of entry of preliminary approval of this Agreement.

1.7 "**Class Products**" include DDG's C+Collagen Deep Cream, C+Collagen Serum, C+Collagen Mist, C+Collagen Eye Cream and C+Collagen Mask, and any other products sold with the C+Collagen label, whether sold alone or in combination with other products.

1.8 "Settlement Class" means all persons who, between March 10, 2016, and the date of entry of preliminary approval of this Agreement (the "Class Period"), purchased in the United States, for personal or household use and not for resale or distribution, one of the Class Products as defined herein. Excluded from the Settlement Class are: (1) the presiding judges in the Actions; (2) any member of those judges' immediate families; (3) Defendant; (4) any of Defendant's subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; (5) counsel for the Parties; and (6) any persons who timely opt-out of the Settlement Class.

1.9 "Settlement Class Member" means any person who is a member of the Settlement Class other than those persons who validly request exclusion from the Settlement Class as set forth in Section 6.6 this Agreement.

1.10 "Settlement Administrator" means the independent company agreed upon by the Parties and approved by the Court to provide the Class Notice and conduct the Claims Administration. The parties agree to designate EAG Gulf Coast, LLC as the Settlement Administrator, subject to approval by the Court.

1.11 "Claims Administration" means the administration of the Claims Process by the Settlement Administrator.

1.12 "Class Counsel" means the following attorneys of record for the Settlement Class Representatives and Settlement Class in the Actions, unless otherwise modified by the Court:

Ryan J. Clarkson
Yana Hart
Clarkson Law Firm, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265
Phone: (213) 788-4050

1.13 "Class Notice" means the three documents notifying Settlement Class Members, pursuant to the Notice Plan, of the Settlement, and the substance of those documents.

1.13.1 "Long Form Notice" refers to the proposed full Class Notice (also referred to as Notice of Settlement of Class Action) substantially in the form that is attached to this Agreement as Exhibit 2.

1.13.2 "Short Form Notice" means the proposed summary Class Notice substantially in the form that is attached to this Agreement as Exhibit 3.

1.13.3 "**Postcard Notice**" refers to the proposed Postcard Notice substantially in the form that is attached to this Agreement as Exhibit 4.

1.13.4 "Notice Plan" means the plan for dissemination of Class Notice to be submitted to the Court in connection with a motion for preliminary approval of this Settlement, attached to this Agreement as Exhibit 5.

1.13.5 "Settlement Notice Date" means the date that the Settlement Administrator will send out notice to the Settlement Class. This is the first date on which notice is emailed or mailed to the Settlement Class, provided, however, that any re-emailing or re-mailing of such notice (including mailing the Postcard Notice to members of the Settlement Class as discussed in the Section 6.2 below) shall not affect or extend the Notice Date. The Notice Date shall be thirty (30) days after the Court issues the Preliminary Approval Order.

1.14 "Settlement Class Representatives" means named plaintiffs Mocha Gunaratna, Renee Camenforte, and Jami Kandel.

1.15 "Court" means the United States District Court for the Southern District of New York.

1.16 "Effective Date" means the first day after which all of the following events and conditions of this Settlement Agreement have occurred or have been met: (a) the Court has entered a Final Approval Order approving the Settlement; (b) the Court has entered judgment that has become final ("Final") in that the time for appeal or writ of certiorari has expired or, if an appeal or writ of certiorari is taken and the Settlement is affirmed, the time period during which further petition for hearing, appeal, or writ of certiorari can be taken has expired. If the Final Judgment is set aside, materially modified, or overturned by the trial court or on appeal, and is not fully reinstated on further appeal, the Final Judgment shall not become Final. In the event of an appeal or other effort to obtain review, the Parties may agree jointly in writing to deem the Effective Date to have occurred; however, there is no obligation to agree to advance the Effective Date.

1.17 "Fees and Costs Award" means the amount of attorneys' fees and reimbursement of expenses and costs awarded by the Court to Class Counsel, which will be paid out of the Settlement Fund.

1.18 "Final Approval Hearing" means the hearing to be conducted by the Court to determine whether to grant final approval of the Settlement and to enter Judgment.

1.19 "Final Approval Order" means the order to be submitted to the Court in connection with a motion for final approval and the Final Approval Hearing substantially in the form attached hereto as Exhibit 6.

1.20 "Judgment" means the Court's act of entering a final judgment on the docket. The Final Judgment is substantially in the form attached hereto as Exhibit 7.

1.21 "Labeling" or **"Label"** means all written, printed, or graphic matter appearing upon the packaging or labeling of any of the Class Products, as well as all written, printed, or graphic matter used in the distribution or sale of any of the Class Products, including, without limitation, all information, representations, instructions, communications, statements, and pictorial content published or appearing in any advertising, promotions, commercials, displays, print media, websites, social media, television, and all other media platforms and outlets, describing, explaining, communicating about, and/or promoting any of the Class Products.

1.22 "**Notice and Other Administrative Costs**" means all costs and expenses actually incurred by the Settlement Administrator in administering the Settlement, including e-mailing, mailing and publication of Class Notice as provided herein and in the Notice Plan, establishment of the Settlement Website, the processing, handling, reviewing, and paying of claims made by Claimants, and paying taxes and tax expenses related to the Settlement Fund (including all federal, state, or local taxes of any kind and interest or penalties thereon, as well as expenses incurred in connection with determining the amount of and paying any taxes owed and expenses related to any tax attorneys and accountants). All taxes on the income of the Settlement Fund, and any costs or expenses incurred in connection with the taxation of the Settlement Fund shall be paid out of the Settlement Fund, shall be considered to be a Notice and Other Administrative Cost, and shall be timely paid by the Settlement Administrator without prior order of the Court. The Parties shall have no liability or responsibility for the payment of any such taxes.

1.23 "Objection Deadline" means the date by which Settlement Class Members must file with the Court a written statement objecting to any terms of the Settlement or to Class Counsel's request for fees or expenses. The Parties will request that the Court set the Objection Deadline to be sixty (60) calendar days after the Settlement Notice Date.

1.24 "Opt-Out Deadline" means the deadline by which a Settlement Class Member must exercise their option to opt out of the Settlement so as not to release their claims as part of the Released Claims. The parties will request that the Court set the Opt-Out Deadline to coincide with the Objection Deadline.

1.25 "Person" means any individual, corporation, partnership, association, or any other legal entity.

1.26 "Plaintiffs" means the Settlement Class Representatives, either individually or on behalf of the Class.

1.27 "Preliminary Approval Date" means the date of entry of the Court's order granting preliminary approval of the Settlement.

1.28 "Preliminary Approval Order" means the proposed order to be submitted to the Court in connection with the motion for preliminary approval, substantially in the form attached hereto as Exhibit 8.

1.29 "Non-Monetary Relief" means the relief as set forth in detail in paragraph 5.1 below.

1.30 "Proof of Purchase" means a receipt or other purchase record from Defendant, a third party commercial source, a Released Party, a removed UPC code, or other documentation reasonably establishing confirmation of purchase of the applicable Class Product during the Class Period in the United States.

1.31 "Released Claims" means the claims released by the Settlement Class Members via this Agreement.

1.32 "Released Parties" means all manufacturers, distributors, retailers, sellers, suppliers, and resellers of any of the Class Products, together with each of their direct and indirect parent companies, predecessor entities, successor entities, related companies, direct and indirect subsidiaries, divisions, holding entities, past and present affiliates and banners, franchisees, distributors, wholesalers, retailers, advertising and production agencies, ingredient suppliers, licensors, and agents, including all current and former officers, directors, managers, members, partners, owners, contractors, employees, shareholders, consultants, attorneys, legal representatives, insurers, agents, assigns, and other equity interest holders of any of the foregoing, and their heirs, executors, administrators, and assigns. For the avoidance of doubt, Released Parties includes, but is not limited to Defendant, Main Post Partners, Shiseido Americas Corporation, Dr. Dennis Gross, and Carrie Gross.

1.33 "**Releasing Parties**" means Plaintiffs, all Settlement Class Members, and any Person claiming by or through them, including any Person claiming to be their spouse, parent, child, heir, guardian, associate, co-owner, agent, insurer, administrator, devisee, predecessor, successor, assignee, equity interest holders or representatives of any kind (other than Class Counsel), shareholder, partner, member, director, employee or affiliate, and their heirs, executors, administrators, and assigns.

1.34 "Request for Exclusion" means the written submission submitted by a Settlement Class Member to be excluded from the Settlement consistent with the terms of this Agreement, which request shall include the requestor's name, address, the name of the Action, and lawful signature.

1.35 "**Service Award**" means any award approved by the Court that is payable to the Settlement Class Representatives from the Total Settlement Fund.

1.36 "Settlement" means the resolution of this Action embodied in the terms of this Agreement.

1.37 "Total Settlement Fund" means the qualified settlement fund this Agreement obligates Defendant to fund in the amount of $9,200,000, which is in the form of a non-reversionary common fund and is established in accordance with 26 C.F.R. §§ 1.468B-1(c) and (e)(1).

1.38 "Settlement Payment" means the amount to be paid to valid Claimants as detailed in Section 4.

1.39 "Settlement Website" means a website maintained by the Settlement Administrator to provide the Settlement Class with information relating to the Settlement.

1.40 "Undertaking" means an agreement between Clarkson Law Firm, P.C. and Defendant substantially in the form that is attached to this Agreement as Exhibit 9.

2. SETTLEMENT FUND.

2.1 Settlement Consideration. Defendant agrees to establish a non-reversionary common fund of $9,200,000 (the "Total Settlement Fund"), which shall be used to pay all Settlement expenses, including Notice and Other Administrative Costs; Fees and Costs Award; Service Awards; and Class Members' Claims. Defendant shall not be liable to pay more than the amount of the Total Settlement Fund or to pay anything apart from the Total Settlement Fund. The Total Settlement Fund shall be established to pay the following: (1) Settlement Class Members' claims, (2) the costs of class notice, (3) the costs of settlement administration, (4) Plaintiffs' service awards, (5) Plaintiffs' litigation expenses (in an amount awarded by the Court), and (6) Plaintiffs' attorneys' fees (in an amount awarded by the Court). The "Net Settlement Fund" shall be the amount of the Total Settlement Fund less any notice costs, settlement administration costs, Plaintiffs' attorneys' fees, and litigation expenses (in an amount awarded by the Court), and service awards (in an amount awarded by the Court).

2.2 Creation and Administration of Qualified Settlement Fund. The Settlement Administrator is authorized to establish the Settlement Fund under 26 C.F.R. §§ 1.468B-1(c) and (e)(1), to act as the "administrator" of the Settlement Fund pursuant to 26 C.F.R. § 1.468B-2(k)(3), and to undertake all duties as administrator in accordance with the Treasury Regulations promulgated under § 1.468B of the Internal Revenue Code of 1986. All costs incurred by the Settlement Administrator operating as administrator of the Settlement Fund shall be construed as costs of Claims Administration and shall be borne solely by the Total Settlement Fund. Interest on the Settlement Fund shall inure to the benefit of the Settlement Class.

2.3 Defendant shall fund the Total Settlement Fund within 30 days following the Preliminary Approval Order.

3. ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS.

3.1 Application for Attorneys' Fees and Costs. At least thirty (30) calendar days before the Objection Deadline, Class Counsel and Settlement Class Representatives shall file a motion, set for hearing on the same date as the Final Approval Hearing, requesting any Fees and Costs Award to be paid from the Settlement Fund. Class Counsel shall also apply for reimbursement of reasonable litigation costs and expenses to be paid from the Settlement Fund. Class Counsel will seek reimbursement of attorneys' fees and costs of no more than $3,900,000.00 in the aggregate. The Parties have not agreed on the amount of any attorneys' fees, costs or expenses, and Defendant reserves the right to oppose or object to such amounts.

3.2 Application for Service Awards. Class Counsel shall also apply for Service Awards to the Settlement Class Representatives to be paid from the Settlement Fund. The Parties have not agreed on the amount of any service awards , and Defendant reserves the right to oppose or object to such amounts.

3.3 Distribution of Attorneys' Fees and Costs. The Settlement Administrator shall pay to Class Counsel from the Settlement Fund the amount of attorneys' fees and costs awarded

by the Court within fourteen (14) calendar days of entry of Judgment, notwithstanding any appeals or any other proceedings which may delay the Effective Date of the Settlement, subject to an Undertaking from Clarkson Law Firm, P.C. Notwithstanding the foregoing, if for any reason the settlement, plaintiffs' attorneys' fees or litigation costs are overturned, reduced, vacated, or otherwise modified, Class Counsel shall be obligated by Court order to return any difference between the amount of the original award and any reduced award. If the Settlement remains in force, the difference shall be returned to the Settlement Fund; if the Settlement is not in force, the difference shall be returned to Defendant.

3.4 Distribution of Service Awards. Each Settlement Class Representative agrees she will not seek a Service Award of greater than $5,000. Any Service Award approved by the Court for the Settlement Class Representatives shall be paid from the Settlement Fund in the form of a check or wire transfer to the Settlement Class Representatives that is sent care of Class Counsel within the earlier of thirty (30) calendar days after the Effective Date, or the date the Settlement Administrator begins making distributions to Claimants.

3.5 Settlement Independent of Award of Fees, Costs, and Service Awards. The awards of attorneys' fees and costs, and payment to the Settlement Class Representatives are subject to and dependent upon the Court's approval. However, this Settlement is not dependent or conditioned upon the Court's approving any requests by Class Counsel or the Settlement Class Representatives for such payments or awarding the particular amounts sought by Class Counsel and Settlement Class Representatives. In the event the Court declines Class Counsel's or the Settlement Class Representatives' requests or awards less than the amounts sought, this Settlement will continue to be effective and enforceable by the Parties, provided, however, that the Class Representatives and Class Counsel retain the right to appeal the amount of the Fees and Costs Award, even if the Settlement is otherwise approved by the Court.

4. CLAIMS PROCESS.

4.1 General Process. To obtain monetary relief as part of the Settlement, a Settlement Class Member must fill out and submit a Claim Form, completed online or in hard copy mailed to the Settlement Administrator.

4.1.1 Those Settlement Class Members who submit a Claim Form ("Claimants") will be asked to provide identifying information. The Claimant will have the opportunity to upload or otherwise provide proof of purchase evidencing their purchases.

4.1.2 The Claimant will be asked to identify how many Class Products they have purchased for personal or household use since March 10, 2016, and to certify that such Class Products were purchased for personal or household use and not for distribution or resale.

4.1.3 The Class Payment shall be fifty dollars ($50) per Class Product purchased, up to a cap of two (2) Class Products without proof of purchase or ten (10) Class Products with proof of purchase. If the amount of the Net Settlement Fund is either less or more than the amount of the total direct payments and valid cash claims submitted by the Settlement Class Members, then the claims of each Settlement Class Member shall be decreased or increased, respectively, *pro rata,* to ensure the Net Settlement Fund is exhausted, with no reversion to Defendant, provided,

however, that the per Class Product Class Payment shall not exceed one hundred dollars ($100) per Class Product purchased ("**Payment Cap**").

4.1.4 If, after Class Payments are increased to the Payment Cap, $50,000 or more would remain in the Net Settlement Fund, the Parties will meet and confer regarding possible additional notice or other steps (to be paid for from the Net Settlement Fund) to increase total claims, and/or may agree to modify the allocation plan without notice to the Settlement Class, provided any such modification is approved by the Court.

4.1.5 Those Settlement Class Members whose payments are not cleared within one hundred and eighty (180) calendar days after issuance will be ineligible to receive a cash settlement benefit and the Settlement Administrator will have no further obligation to make any payment from the Settlement Fund pursuant to this Settlement Agreement or otherwise to such Class Member. Any amounts in the Net Settlement Fund not paid to Settlement Class Members shall be distributed to an appropriate *cy pres* charity or charities agreed upon by the Parties and approved by the Court; if the Parties cannot agree, they shall submit their respective proposals as part of preliminary and/or final approval briefing for a *cy pres* charity or charities to the Court and the Court shall select the *cy pres* charity or charities. Any uncashed or expired checks shall be distributed *cy pres* to a charity or charities selected according to the process described herein.

4.2 The Claim Form and Timing. The Claim Form will be available on the Settlement Website, and may be submitted to the Settlement Administrator online or by mail. A maximum of one Claim Form may be submitted for each Claimant and subsequent Claim Forms received from persons residing at the same address without proof of purchase will be rejected. Claim Forms must be submitted or postmarked on or before the Claims Deadline to be considered timely. The Claims Deadline shall be clearly and prominently stated in the Preliminary Approval Order, the Class Notice, on the Settlement Website, and on the Claim Form.

4.3 Substance of the Claim Form. In addition to information about the number of Class Products as set forth in Section 4.1 above, the Claim Form will request customary identifying information (including the Claimant's name, address, email address, and telephone number), and may seek limited additional information from Claimants to provide reasonable bases for the Settlement Administrator to monitor for and detect fraud. Such additional information may include, for purchases at physical stores, retailers and locations (city and state) or, for online purchases, the website, at which the Class Products were purchased, the name of each Class Product, and the date (month and year) the purchase was made. The Claim Form also will require the Claimant to declare that the Class Products were not purchased for resale or distribution. In addition, the Claim Form will require the Claimant to declare that the information provided is true and correct to the best of the Claimant's memory and understanding.

4.4 Claim Validation. The Settlement Administrator shall be responsible for reviewing all claims to determine their validity. The Settlement Administrator shall reject any Claim that does not comply in any material respect with the instructions on the Claim Form or with the terms of this Section 4, that is submitted after the Claims Deadline, or that the Settlement Administrator identifies as fraudulent. The Settlement Administrator shall retain sole discretion in accepting or rejecting claims.

4.5 Timing of Distribution. The Settlement Administrator shall pay out approved Claims in accordance with the terms of this Agreement commencing within thirty (30) calendar days after the Effective Date, or as otherwise ordered by the Court. The Parties shall work with the Settlement Administrator to choose a manner of payment that is secure, cost-effective, and convenient for Claimants.

4.6 Taxes on Distribution. Any person that receives a Cash Award will be solely responsible for any taxes or tax-related expenses owed or incurred by that person by reason of that Award. Such taxes and tax-related expenses will not be paid from the Settlement Fund. In no event will Defendant, the Settlement Class Representatives, Class Counsel, the Settlement Administrator, or any of the other Released Parties have any responsibility or liability for taxes or tax-related expenses arising in connection with the issuance of Cash Awards or other payments made from the Settlement Fund to Settlement Class Representatives, Settlement Class Members, or any other person or entity.

4.7 No Unclaimed Property Rights. This Agreement does not create any vested property interest or unclaimed property rights for Settlement Class Members who do not file valid Claims.

5. NON-MONETARY RELIEF.

5.1 Defendant discontinued sale of the Class Products, which contained the advertising claims challenged in the Actions, in 2022. As part of this settlement, Defendant and its successors in interest agree not to relaunch cosmetics using the "C+Collagen" name and without actual collagen.

5.1.1 Exhaustion of Inventory. For the avoidance of doubt, the Released Parties, including Defendant, (i) shall be permitted to sell existing Class Product inventory and Class Products manufactured prior to 2022; (ii) shall not be required to withdraw, destroy, or recall any Class Products; and (iii) shall not be obligated to modify or replace existing promotional materials already in the hands of third parties.

6. CLASS NOTICE AND CLAIMS ADMINISTRATION.

6.1 Email Notice. Defendant will provide to the Settlement Administrator (but not to Class Counsel) the names, addresses, and email addresses for all members of the Settlement Class for whom it has records within 30 days of the date of entry of the Preliminary Approval Order. The Parties have obtained contact information from certain of DDG's resellers. The Settlement Administrator shall commence e-mailing the Short Form Notice on the Settlement Notice Date.

6.2 Postcard Notice. For members of the Settlement Class for whom Defendant and/or the Settlement Administrator has street addresses, the Settlement Administrator will mail to each such member of the Settlement Class for whom a mailing address can be located a Postcard Notice. The Settlement Administrator shall commence mailing of Postcard Notice on the Settlement Notice Date.

6.3 Publication Notice. The Settlement Administrator shall implement published notice of the Settlement to the Settlement Class through advertisements in suitable media,

including through appropriate internet and social media channels, to be agreed upon by the Parties in consultation with the Settlement Administrator and set forth in the Notice Plan to be submitted to and approved by the Court. Published notice will be implemented by the Settlement Administrator and shall commence on the Settlement Notice Date and continue for 30 days thereafter. The ads will provide a link to the Settlement Website and contact information for the Settlement Administrator. The selection of websites and the content of the ads shall be subject to Defendant's approval.

6.4 Settlement Administrator. The Settlement Administrator shall assist with various administrative tasks including, without limitation:

6.4.1 Establishing and operating the Settlement Fund;

6.4.2 Arranging for the dissemination of the Class Notice pursuant to the Notice Plan agreed to by the Parties and approved by the Court;

6.4.3 Assisting in the distribution to the United States Department of Justice and to State Attorneys General, within ten (10) days after the Parties present this Agreement to the Court for Preliminary Approval, of the notices of settlement required by the Class Action Fairness Act;

6.4.4 Making any other mailings required under the terms of this Agreement or any Court order or law, including handling returned mail;

6.4.5 Answering inquiries from Settlement Class Members and/or forwarding such inquiries to Class Counsel;

6.4.6 Receiving and maintaining Requests for Exclusion;

6.4.7 Establishing a Settlement Website;

6.4.8 Establishing a toll-free informational telephone number for Settlement Class Members;

6.4.9 Receiving and processing (including monitoring for fraud and validating or rejecting) Settlement Class Member Claims and distributing payments to Settlement Class Members;

6.4.10 Providing regular updates on the Claims status to counsel for all Parties;

6.4.11 Preparing a declaration attesting to compliance with the Notice Plan; and

6.4.12 Otherwise assisting with the implementation and administration of the Settlement.

6.5 Timing of Class Notice. Class Notice will commence no later than thirty (30) calendar days following entry of the Preliminary Approval Order ("Settlement Notice Date").

6.6 Opt-Out Procedures. Settlement Class members who wish to opt out of and be excluded from the Settlement must submit a Request for Exclusion to the Settlement Administrator, postmarked or received no later than the Opt-Out Deadline. The Request for Exclusion must be personally completed and submitted by each Settlement Class member or their attorney, and so-called "mass" or "class" opt-outs shall not be permitted or recognized. The Settlement Administrator shall periodically notify Class Counsel and Defendant's counsel of any Requests for Exclusion. All Settlement Class members who submit a timely, valid Request for Exclusion will be excluded from the Settlement Class and will not be bound by the terms of this Agreement, and all Settlement Class Members who do not submit a timely, valid Request for Exclusion will be bound by this Agreement and the Judgment, including the releases in Section 8 below.

6.7 Procedures for Objecting to the Settlement. Settlement Class Members have the right to appear and show cause why the Settlement should not be granted final approval, subject to each of the provisions of this paragraph:

6.7.1 Timely Written Objection Required. Any objection ("Objection") to the Settlement must be in writing, postmarked on or before the Objection Deadline, and sent to the Claims Administrator at the addresses set forth in the Class Notice. The Settlement Administrator shall immediately forward to Class Counsel and Defendant's counsel any Objection submitted to the Settlement Administrator, after which Class Counsel shall timely file any Objection with the court.

6.7.2 Form of Written Objection. Any objection regarding or related to the Settlement must contain (i) a caption or title that clearly identifies the Action and that the document is an objection, (ii) information sufficient to identify and contact the objecting Settlement Class Member or their attorney if represented, (iii) information sufficient to establish the person's standing as a Settlement Class Member, (iv) a clear and concise statement of the Settlement Class Member's objection, as well as any facts and law supporting the objection, (v) identification of the case name, case number, and court for any prior class action lawsuit in which the objector and the objector's attorney (if applicable) has objected to a propose class action settlement, the general nature of such prior objection(s), and the outcome of said prior objection(s), (vi) the objector's signature, and (vii) the signature of the objector's counsel, if any. The Court may, but is not required to, hear Objections in substantial compliance with these requirements, so Settlement Class Members should satisfy all requirements.

6.7.3 Authorization of Objections Filed by Attorneys Representing Objectors. Settlement Class Members may object either on their own or through an attorney hired at their own expense, but a Settlement Class Member represented by an attorney must sign either the Objection itself, or execute a separate declaration stating that the Class Member authorizes the filing of the Objection.

6.7.4 Effect of Both Opting Out and Objecting. If a Settlement Class Member submits both an Opt-Out Form and Objection, the Settlement Class Member will be deemed to have opted out of the Settlement, and thus to be ineligible to object. However, any objecting Settlement Class Member who has not timely submitted a completed Opt-Out Form will be bound by the terms of the Agreement and Judgment upon the Court's final approval of the Settlement.

6.7.5 Appearance at Final Approval Hearing. Objecting Settlement Class Members may appear at the Final Approval Hearing and be heard. If an objecting Settlement Class Member chooses to appear at the Final Approval Hearing, a notice of intention to appear must be filed with the Court or postmarked no later than the Objection Deadline.

6.7.6 Right to Discovery. Upon Court order, the Parties will have the right to obtain document discovery from and take depositions of any Objecting Settlement Class Member on topics relevant to the Objection.

6.7.7 Response to Objections. The Parties shall have the right, but not the obligation, either jointly or individually, to respond to any objection, with a written response due the same day as the motion for final approval, or as otherwise ordered by the Court.

6.7.8 Effect of Non-Objection. A Settlement Class Member who does not file and serve a timely written objection is bound by this Settlement and the final Judgment in the Actions and may not later object or appeal from the entry of any order approving the Settlement.

7. COURT APPROVAL.

7.1 Preliminary Approval. Plaintiffs will submit to the Court this Agreement, and will request via unopposed motion that the Court enter the Preliminary Approval Order in substantially similar form as the proposed order attached as Exhibit 7. In the motion for preliminary approval, Plaintiffs will request that the Court grant preliminary approval of the proposed Settlement, provisionally certify the Class for settlement purposes and appoint Class Counsel, approve the forms of Notice and find that the Notice Plan satisfies Due Process, and schedule a Final Approval Hearing to determine whether the Settlement should be granted final approval, whether an application for attorneys' fees and costs should be granted, and whether an application for service awards should be granted. Class Counsel shall submit filings pertaining to this preliminary approval in a neutral manner where doing so would not prejudice the Settlement Class.

7.2 Final Approval. A Final Approval Hearing to determine final approval of the Agreement shall be scheduled as soon as practicable, subject to the calendar of the Court, Court, but no sooner than one hundred twenty (120) calendar days after the Preliminary Approval Date. If the Court issues the Preliminary Approval Order and all other conditions precedent of the Settlement have been satisfied, no later than fourteen (14) calendar days before the Final Approval Hearing all Parties will request, individually or collectively, that the Court enter the Final Approval Order in substantially similar form as the proposed order attached as Exhibit 4, with Class Counsel filing a memorandum of points and authorities in support of the motion and in response to any objections. Defendant may, but is not required to, file a memorandum in support of the motion or in response to any objections. Class Counsel shall submit filings pertaining to this Final Approval in a neutral manner where doing so would not prejudice the Settlement Class.

7.3 Failure to Obtain Approval. If this Agreement is not given preliminary or final approval by the Court, or if an appellate court reverses final approval of the Agreement, the Parties will be restored to their respective places in the litigation. In such event, the terms and provisions of this Agreement will have no further force or effect; the Parties' rights and defenses will be

restored, without prejudice, to their respective positions as if this Agreement had never been executed; and any orders entered by the Court in connection with this Agreement will be vacated.

8. RELEASE.

8.1 Effect. By executing this Agreement, the Parties acknowledge that, upon both the entry of the Final Approval Order by the Court, and the passing of the Effective Date, and the Settlement amount being fully funded, the Actions shall be dismissed with prejudice, and all Released Claims shall thereby be conclusively settled, compromised, satisfied, and released as to the Released Parties. The Final Approval Order and Judgment shall provide for and effect the full and final release, by the Releasing Parties, of all Released Claims, consistent with the terms of this Agreement. The relief provided for in this Agreement shall be the sole and exclusive remedy for any and all claims of Settlement Class Members against the Released Parties related to the Released Claims.

8.2 Scope of Release. The Releasing Parties hereby fully release and forever discharge the Released Parties from any and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, asserted or unasserted, claims, demands, liabilities, rights, debts, obligations, liens, contracts, agreements, judgments, actions, suits, causes of action, contracts or agreements, extra-contractual claims, damages of any kind, punitive, exemplary or multiplied damages, expenses, costs, penalties, fees, attorneys' fees, and/or obligations of any nature whatsoever (including "Unknown Claims" as defined below), whether at law or in equity, accrued or unaccrued, whether previously existing, existing now or arising in the future, whether direct, individual, representative, or class, of every nature, kind and description whatsoever, based on any federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States, against the Released Parties, or any of them, relating in any way to any conduct prior to the date of the Preliminary Approval Order and that: (a) is or are based on any act, omission, inadequacy, statement, communication, representation (express or implied), harm, injury, matter, cause, or event of any kind related in any way to any Class Product; (b) involves legal claims related to the Class Products that have been asserted in the Actions or could have been asserted in the Actions; or (c) involves the advertising, marketing, promotion, purchase, sale, distribution, design, testing, manufacture, application, use, performance, warranting, communications or statements about the Class Products, packaging or Labeling of the Class Products (collectively, the "Released Claims").

8.3 Waiver. Without limiting the foregoing, the Released Claims specifically extend to and include claims related to the Class Products that the Releasing Parties do not know or suspect to exist in their favor at the time that the Settlement and the releases contained herein become effective, including, without limitation, any Released Claims that if known, might have affected the Plaintiffs' settlement with and release of the Releasees, or might have affected a decision to object to or Opt-Out of this Settlement (the "Unknown Claims"). This paragraph constitutes a waiver of, without limitation as to any other applicable law, section 1542 of the California Civil Code, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF

KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

8.4 Later Discovered Facts. The Releasing Parties understand and acknowledge the significance of these waivers of section 1542 of the California Civil Code and any other applicable federal or state statute, case law, rule, or regulation relating to limitations on releases. In connection with such waivers and relinquishment, the Releasing Parties acknowledge that they are aware that they may hereafter discover facts in addition to, or different from, those facts that they now know or believe to be true with respect to the subject matter of the Actions and the Settlement, but that it is their intention to release fully, finally and forever all Released Claims with respect to the Released Parties, and in furtherance of such intention, the release of the Released Claims will be and remain in effect notwithstanding the discovery or existence of any such additional or different facts at any time.

8.5 Claim Preclusion. Each of the Releasing Parties shall forever refrain, whether directly or indirectly, from instituting, filing, maintaining, prosecuting, assisting with or continuing any suit, action, claim, or proceeding against any of the Released Parties in connection with any of the Released Claims (a "Precluded Action"). If any of the Releasing Parties do institute, file, maintain, prosecute, or continue any such Precluded Action, Plaintiffs and Class Counsel shall cooperate with the efforts of any of the Released Parties to obtain dismissal with prejudice. The releases provided for herein shall be a complete defense to, and will preclude, any Released Claim in any suit, action, claim, or proceeding. The Final Approval Order shall further provide for and effect the release of all known or unknown claims (including Unknown Claims) actions, causes of action, claims, administrative claims, demands, debts, damages, costs, attorney's fees, obligations, judgments, expenses, compensation, or liabilities, in law or in equity, contingent or absolute, that the Released Parties now have against Plaintiffs, Settlement Class Representatives, or Class Counsel, by reason of any act, omission, harm, matter, cause, or event whatsoever arising out of the initiation, prosecution, or settlement of the Actions, except with respect to any breach of the terms of this Agreement by any of Plaintiffs, Settlement Class Representatives, or Class Counsel.

8.6 Court Retains Jurisdiction. The Court shall retain jurisdiction over the Parties and this Agreement with respect to the future performance of the terms of this Agreement, and to assure that all payments and other actions required of any of the Parties by the Settlement are properly made or taken.

8.7 Covenant Not to Sue. Plaintiffs agree and covenant, and each Settlement Class Member who has not opted out will be deemed to have agreed and covenanted, not to sue any of Released Parties, with respect to any of the Released Claims, or otherwise to assist others in doing so, and agree to be forever barred from doing so, in any court of law or equity, or any other forum.

8.8 Release of Settlement Class Representatives and Class Counsel. Upon the Effective Date, Defendant will be deemed to have, and by operation of the Judgment will have, fully, finally, and forever released, relinquished, discharged, and covenanted not to sue Settlement Class Representatives and Class Counsel from any and all claims, demands, rights, suits, liabilities, and causes of action, whether past, present, or future, known or unknown, asserted or unasserted, that arise out of or relate to the filing and conduct of the Actions.

9. TERMINATION.

9.1 Exclusion list. No later than fifteen (15) days after the Opt-Out Deadline, the Settlement Administrator will provide Class Counsel and DDG's Counsel with the list of persons who have timely and validly excluded themselves from the Settlement.

9.2 Defendant's Option to Terminate. If 5% or more of the members of the Settlement Class validly and timely exclude themselves from the Settlement, then Defendant shall have the option to rescind this Agreement, in which case all of Defendant's obligations under this Agreement shall cease to be of any force and effect, and this Agreement shall be rescinded, cancelled, and annulled. If Defendant exercises this option, it shall provide Plaintiffs with written notice of its election within fifteen (15) days of receiving the exclusion list from the Settlement Administrator, at which point the Parties shall return to their respective positions that existed prior to the execution of this Agreement. No term of this Agreement or any draft thereof, or the negotiation, documentation, or other part of aspect of the Parties' settlement discussions, or any filings or orders respecting the Settlement or any aspect of the Settlement, shall have any effect or be admissible as evidence for any purpose in the Actions, or in any other proceeding.

10. NO ADMISSION OF LIABILITY.

10.1 No Admission of Liability. Defendant, while continuing to deny all allegations of wrongdoing and disclaiming all liability with respect to all claims, considers it desirable to resolve the Actions on the terms stated in this Agreement to avoid further expense, inconvenience, and burden, and therefore has determined that this Settlement Agreement on the terms set forth herein is in Defendant's best interests. Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in the Actions, and denies the material allegations of all the complaints filed in the Actions. Neither the Settlement Agreement nor any actions taken to carry out the Settlement are intended to be, nor may they be deemed or construed to be, an admission or concession of liability, or of the validity of any claim, defense, or of any point of fact or law on the part of any Party, including but not limited to an admission that the Actions are properly brought on a class or representative basis, or that a class or classes may be certified, other than for settlement purposes. Neither the Settlement Agreement, nor the fact of settlement, nor the settlement proceedings, nor the settlement negotiations, nor any related document, shall be used as an admission, concession, presumption, inference, or evidence thereof of any wrongdoing by Defendant or of the appropriateness of these or similar claims for class certification in any proceeding.

11. DEFENDANT'S POSITION ON CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS.

11.1 Conditional Certification of Settlement Class. Solely for purposes of avoiding the expense and inconvenience of further litigation, Defendant does not oppose the certification of the Settlement Class for the purposes of this Settlement only. Preliminary certification of the Settlement Class will not be deemed a concession that certification of a litigation class or any subclass is appropriate, nor will Defendant be precluded from challenging class certification in further proceedings in the Actions or in any other actions if the Settlement Agreement is not finalized or finally approved. If the Settlement Agreement is not finally approved by the Court for

any reason whatsoever, and said failure to obtain final approval is conclusive after any and all appeals, Defendant's stipulation not to oppose certification only for purposes of effectuating this Settlement will be automatically rescinded, and no doctrine of waiver, estoppel, or preclusion will be asserted in any litigated certification proceedings in the Actions or any other judicial proceeding. No agreements made by or entered into by Defendant in connection with the Settlement Agreement may be used by Plaintiffs, any Settlement Class Member, or any other person to establish any of the elements of class certification in any litigated certification proceedings, whether in the Actions or any other judicial proceeding.

12. MISCELLANEOUS.

12.1 Change of Time Periods. The time periods and/or dates described in this Settlement Agreement are subject to Court approval and may be modified upon order of the Court or written stipulation of the Parties, without notice to Settlement Class Members. The Parties reserve the right, by agreement and subject to the Court's approval, to grant any reasonable extension of time that might be needed to carry out any of the provisions of this Settlement Agreement.

12.2 Time for Compliance. If the date for performance of any act required by or under this Settlement Agreement falls on a Saturday, Sunday, or court holiday, that act may be performed on the next business day with the same effect as it had been performed on the day or within the period of time specified by or under this Settlement Agreement.

12.3 Entire Agreement. This Agreement shall constitute the entire Agreement among the Parties with regard to the subject matter of this Agreement and shall supersede any previous agreements, representations, communications, and understandings among the Parties with respect to the subject matter of this Agreement. The Parties acknowledge, stipulate, and agree that no covenant, obligation, condition, representation, warranty, inducement, negotiation, or undertaking concerning any part or all of the subject matter of the Agreement has been made or relied upon except as expressly set forth herein.

12.4 Notices Under Agreement. All notices or mailings required by this Agreement to be provided to or approved by Class Counsel, Defense Counsel, or either Party, or otherwise made pursuant to this Agreement, shall be provided as follows:

If to Settlement Class Representatives or Class Counsel
Ryan Clarkson
rclarkson@clarksonlawfirm.com
Clarkson Law Firm, P.C.
25525 Pacific Coast Highway
Malibu, CA 90265

If to Defendant or Defense Counsel
Claudia Vetesi
CVetesi@mofo.com
Morrison & Foerster LLP
425 Market Street

San Francisco, CA 94105

And

Jason Kerr
JasonKerr@ppktrial.com
PRICE PARKINSON & KERR, PLLC
5742 West Harold Gatty Drive
Salt Lake City, Utah 84116

12.5 Good Faith. The Parties acknowledge that each intends to implement the Agreement. The Parties have at all times acted in good faith and shall continue to, in good faith, cooperate and assist with and undertake all reasonable actions and steps in order to accomplish all required events on the schedule set by the Court, and shall use reasonable efforts to implement all terms and conditions of this Agreement.

12.6 Parties Accept Risk of Changes in Fact and Law. Each Party, including Plaintiffs on behalf of themselves and the Settlement Class, expressly accepts and assumes the risk that, if facts or laws pertinent to matters covered by this Agreement are hereafter found to be other than as now believed or assumed by that Party to be true or applicable, this Agreement shall nevertheless remain effective.

12.7 Binding on Successors. Except as specifically provided herein, this Agreement is binding on, and shall inure to the benefit of, the Parties, the Released Parties, and their respective direct and indirect parent companies, predecessor entities, successor entities, related companies, direct and indirect subsidiaries, holding entities, past and present affiliates, franchisees, distributors, wholesalers, retailers, advertising and production agencies, licensors, and agents, including all current and former officers, directors, managers, members, partners, contractors, owners, employees, shareholders, consultants, attorneys, legal representatives, insurers, agents, assigns, or other equity interest holders of any of the foregoing, and their heirs, executors, administrators, and assigns. All Released Parties other than Defendant, which is a Party, are intended to be third-party beneficiaries of this Agreement.

12.8 Evidentiary Preclusion. The Parties agree that, to the fullest extent permitted by law, neither this Agreement nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of this Agreement or the Settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any claim or of any wrongdoing or liability of the Released Parties; or (b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any Released Party or the appropriateness of class certification in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. In addition, any failure of the Court to approve the Settlement and/or any objections or interventions may not be used as evidence in the Actions or any other proceeding for any purpose whatsoever. However, the Released Parties may file this Agreement and Final Approval Order in any action or proceeding that may be brought against them in any jurisdiction to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

12.9 No Reliance on Other Representations. No Party has relied on any statement, representation, omission, inducement, or promise of any other Party (or any officer, agent, employee, representative, or attorney for any other Party) in executing this Agreement, or entering the Settlement provided for herein, except as expressly stated in this Agreement.

12.10 Arms'-Length Negotiations. This Agreement compromises claims that are contested, and the Parties agree that the consideration provided to the Settlement Class and other terms of this Agreement were negotiated in good faith and at arms' length by the Parties, and reflect an Agreement that was reached voluntarily, after consultation with competent legal counsel, and guided in part by the Parties' private mediation with the Honorable Judge Peter Lichtman (Ret.) of Signature Resolution.

12.11 The Parties reached the Agreement after considering the risks and benefits of litigation. The determination of the terms of, and the drafting of, this Agreement, have been by mutual agreement after negotiation, with consideration by and participation of all Parties hereto and their counsel. Accordingly, the rule of construction that any ambiguities are to be construed against the drafter shall have no application.

12.12 Confidentiality. The Parties, Class Counsel, and Defendant's Counsel agree that until publication of this Agreement by submission to the Court, the terms of this Agreement and all associated documents and communications, including the negotiations leading to the execution of the Agreement and all submissions and arguments related to the mediation, shall not be disclosed by the Parties, Class Counsel, and Defendant's Counsel other than as necessary to finalize the Settlement and Notice Plan. Upon publication of the Agreement by submission to the Court, the nondisclosure obligations set forth here will no longer apply, but such obligations will continue to apply to the Parties' mediations, submissions in the mediations, and any settlement related negotiations leading to the execution of the Agreement.

12.13 Non-Disparagement. Class Counsel and the Settlement Class Representatives agree to refrain from disparaging Defendant or Main Post Partners, Shiseido Americas Corporation, Dr. Dennis Gross, Carrie Gross, the Class Products, Defendant's counsel, Defendant's parent companies, subsidiaries, affiliates, successors or assigns and Defendant's past, present, or future direct or indirect parents (collectively, "Related Entities"), in the media regarding the issues in the Actions. Defendant and Related Entities agree to refrain from disparaging Class Counsel and the Settlement Class Representatives in the media regarding the issues in the Actions. Provided, however, that nothing in this paragraph shall prohibit Class Counsel, Settlement Class Representatives, Defendant or Related Entities from discussing or commenting regarding any public facts about the Settlement, the Actions and Court orders in the Actions.

12.14 Independent Advice. Each Party has had the opportunity to receive, and has received, independent legal advice from his, her, or its attorneys regarding the advisability of making the Settlement, the advisability of executing this Agreement, and the legal and income tax consequences of this Agreement, and fully understands and accepts the terms of this Agreement.

12.15 Requisite Corporate Power. Defendant represents and warrants, severally and not jointly, that: (a) it has the requisite corporate power and authority to execute, deliver, and perform the Agreement and to consummate the transactions contemplated hereby; (b) the

execution, delivery, and performance of the Agreement and the consummation by it of the actions contemplated herein have been duly authorized by necessary corporate action on the part of the Defendant; and (c) the Agreement has been duly and validly executed and delivered by the Defendant and constitutes its legal, valid, and binding obligation.

12.16 Reasonable Best Efforts to Effectuate. The Parties acknowledge that it is their intent to consummate this Agreement, and agree to cooperate to the extent reasonably necessary to effectuate and implement the terms and conditions of this Agreement and to exercise their best efforts to accomplish the terms and conditions of this Agreement. The Parties further agree they will not engage in any conduct that will or may frustrate the purpose of this Agreement. The Parties further agree, subject to Court approval as needed, to reasonable extensions of time to carry out any of the provisions of the Agreement.

12.17 No Other Consideration. Each Settlement Class Representative represents and warrants, severally and not jointly, that he is entering into the Agreement on behalf of himself individually and as a proposed representative of the Settlement Class Members, of his own free will and without the receipt of any consideration other than what is provided in this Agreement or disclosed to, and authorized by, the Court. Each Settlement Class Representative represents and warrants, severally and not jointly, that he has reviewed the terms of the Agreement in consultation with Class Counsel and believes them to be fair and reasonable, and covenants that he will not file an Opt-Out request or object to this Agreement.

12.18 Non-assignment. Plaintiffs represent and warrant, severally and not jointly, that no portion of any Released Claim or claim, right, demand, action, or cause of action against any of the Released Parties that Plaintiffs have or may have arising out of the Actions or pertaining to their purchase and/or use of the Class Products and/or the design, manufacture, testing, marketing, Labeling, packaging, or sale of the Class Products otherwise referred to in this Agreement, and no portion of any recovery or settlement to which Plaintiffs may be entitled, has been assigned, transferred, or conveyed by or for Plaintiffs in any manner; and no Person other than Plaintiffs have any legal or equitable interest in the claims, demands, actions, or causes of action referred to in this Agreement as those of Plaintiffs themselves.

12.19 Stay Pending Court Approval. Plaintiffs' Counsel and Defendant's Counsel agree to stay all proceedings in the Actions, other than those proceedings necessary to carry out or enforce the terms and conditions of the Settlement, until the Effective Date of the Settlement has occurred. If, despite the Parties' best efforts, this Agreement should fail to become effective, the Parties will return to their prior positions in the Actions.

12.20 Exhibits and Recitals. All Exhibits and Recitals to this Agreement are material and integral parts hereof, and are incorporated by reference as if fully rewritten herein.

12.21 Variance; Dollars. In the event of any variance between the terms of this Agreement and any of the Exhibits hereto, the terms of this Agreement shall control and supersede the Exhibit(s). All references in this Agreement to "Dollars" or "$" shall refer to United States dollars.

12.22 Waiver. The waiver by one Party of any provision or breach of this Agreement shall not be deemed a waiver of any other provision or breach of this Agreement.

12.23 Modification in Writing Only. This Agreement and any and all parts of it may be amended, modified, changed, or waived only by Court order or a writing signed by duly authorized agents of Defendant and Plaintiffs.

12.24 Headings. The descriptive headings of any paragraph or sections of this Agreement are inserted for convenience of reference only and do not constitute a part of this Agreement.

12.25 Governing Law. This Agreement shall be interpreted, construed and enforced according to the laws of the State of New York, without regard to conflicts of law.

12.26 Continuing Jurisdiction. After entry of the Judgment, the Court shall have continuing jurisdiction over the *Kandel* Action solely for purposes of (i) enforcing this Agreement, (ii) addressing settlement administration matters, and (iii) addressing such post-Judgment matters as may be appropriate under court rules or applicable law.

12.27 Execution. This Agreement may be executed in one or more counterparts. All executed counterparts and each of them will be deemed to be one and the same instrument. Photocopies and electronic copies (e.g., PDF copies) shall be given the same force and effect as original signed documents.

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Dated: 6/18/2024

Mocha Gunaratna

Dated: 6/17/2024

Renee Camenforte

Dated: 6/18/2024

Jami Kandel

Dated: _____

Dr. Dennis Gross Skincare, LLC
By: _____
Its: _____

APPROVED AS TO FORM:

CLARKSON LAW FIRM, P.C.

DATED: June 18, 2024

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PRICE PARKINSON & KERR, PLLC

DATED: June ___ , 2024

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Jason M. Kerr
David Parkinson

Attorneys for Defendant

Dated: 6/18/2024

Mocha Gunaratna

Dated: 6/17/2024

Renee Camenforte

Dated: 6/18/2024

Jami Kandel

Dated: _____

Dr. Dennis Gross Skincare, LLC
By: _____
Its: _____

APPROVED AS TO FORM:

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Dated: 6/17/2024

Renee Camenforte

Dated: 6/18/2024

Jami Kandel

Dated: 6/23/2024

Dr. Dennis Gross Skincare, LLC
By: Dennis Gross
Its: principal

APPROVED AS TO FORM:

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DATED: June 18, 2024

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DATED: June 24, 2024

Claudia M. Vetesi
Adam Hunt

Attorneys for Defendant

696 F.Supp.3d 916
United States District Court, S.D. California.

Nicole KRAUSE-PETTAI, et al., individually and on behalf of all others similarly situated, Plaintiffs,
v.
UNILEVER UNITED STATES, INC., et al., Defendants.

Case No.: 20-cv-1672-AGS-BLM
|
Signed September 30, 2023

Synopsis

Background: Consumers brought action against manufacturer, alleging on claims under California Consumers Legal Remedies Act (CLRA), False Advertising Law (FAL), Unfair Competition Law (UCL), negligent misrepresentation, and fraud and deceit that they were duped into buying manufacturer's deodorant and antiperspirant. Manufacturer moved to exclude testimony from consumers' experts and for summary judgment.

Holdings: The District Court, Andrew G. Schopler, United States Magistrate Judge, held that:

on issue of first impression, packaging and labeling constraints under Federal Food, Drug, and Cosmetic Act (FDCA) expressly preempted per se rule under California Fair Packaging and Labeling Act (CFPLA) that nonfunctional slack-fill, or useless empty space, was misleading;

on issue of first impression, refusal by Food and Drug Administration (FDA) to set slack-fill, or useless empty space, limits in drug and cosmetic markets was not akin to blessing limitless slack fill, allowing for consumer claims;

opinion of consumer packaging expert that accused products had approximately 20%-25% less product than available capacity, which was purely nonfunctional, was not based upon sufficient facts or data, and therefore it was not reliable and it was not admissible;

opinion of consumer packaging expert was not based upon reliable methodology and those methods were not reliably applied, and therefore his testimony was not admissible;

knowledge of expert on consumer-purchasing behavior would not help trier of fact to understand evidence or to determine fact in issue in action against manufacturer alleging slack-fill claims;

consumers' own anecdotal accounts of deception were not sufficient to satisfy reasonable-consumer test; and

unlawful-prong for UCL cause of action was not satisfied.

Motions granted.

Procedural Posture(s): Motion to Exclude Expert Report or Testimony; Motion for Summary Judgment.

Attorneys and Law Firms

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Cody Robert Kennedy, Alan S. Lazar, Marlin & Saltzman LLP, Agoura Hills, CA, Joel Matthew Gordon, Haines Law Group, APC, El Segundo, CA, for Plaintiffs Kevin Bolden, Errol Carreon.

James Patrick Muehlberger, Shook, Hardy & Bacon, Kansas City, MO, Naoki S. Kaneko, Shook Hardy and Bacon L.L.P., Irvine, CA, Joan R. Camagong, Shook Hardy & Bacon LLP, San Francisco, CA, for Defendant Unilever United States, Inc.

ORDER GRANTING DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT (ECF 70) AND TO EXCLUDE EXPERT TESTIMONY (ECF 71 & 72), AND DENYING PLAINTIFFS' CLASS-CERTIFICATION MOTION (ECF 57)

Andrew G. Schopler, United States District Judge

This case is about "nonfunctional slack fill," or useless empty space, inside underarm-deodorant sticks. Among other defenses, defendant argues that federal law preempts slack-fill suits regarding drugs and cosmetics. That is a matter of first impression in our Circuit.

BACKGROUND

In this putative class action, four plaintiffs claim they were duped into buying defendant Unilever's deodorant and antiperspirant. They say the oversized containers create the illusion of holding more than competitors' same-weight items. (ECF 52, at 3, 10–12.) According to plaintiffs, much of Unilever's products' volume is nonfunctional slack fill. (*Id.* at 11–12.) They seek class certification, alleging various unfair and deceptive trade practices under state law. Unilever opposes certification and insists the case should be thrown out on summary-judgment and federal-preemption grounds.

DISCUSSION

A. Preemption

As a threshold matter, Unilever contends that federal regulations preempt plaintiffs' state-law claims. "[S]tate laws that conflict with federal law are without effect." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008) (cleaned up); *see also* U.S. Const., art. VI, cl. 2 (Supremacy Clause). "Federal preemption can be either express or implied." *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009). Unilever relies only on the express variety.

1. *Express Preemption: The FDCA*

To assure national uniformity, the Food, Drug, and Cosmetic Act expressly preempts any state "requirement" for labeling or packaging cosmetics and nonprescription drugs—including deodorants and antiperspirants—that is "different from or ***921** in addition to, or that is otherwise not identical with," federal rules. *See* 21 U.S.C. § 379r(a)(2) (nonprescription drugs); *id.* § 379s(a) (cosmetics). The question is: Do the challenged state laws mandate "requirements" that are (a) "identical with" federal standards or (b) "different from or in addition to" them?

As relevant here, both the FDCA and California's Sherman Food, Drug, and Cosmetic Law set the same baseline requirements for drugs and cosmetics. They deem such an item "misbranded" if "its labeling is false or misleading in any particular" or if its "container" is "filled as to be misleading." *See* 21 U.S.C. § 352(a)(1) (drugs; label); *id.* § 352(i)(1) (drugs; container); *id.* § 362(a) (cosmetics; label); *id.* § 362(d) (cosmetics; container); Cal. Health & Safety Code § 111330 (drugs; label); *id.* § 111390 (drugs; container); *id.* § 111730 (cosmetics; label); *id.* § 111750 (cosmetics; container). Neither law addresses slack-fill limits for drugs or cosmetics. Because the Sherman Law's standard "is *identical* to" the FDCA's, it is not preempted. *See* *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016).

But California did not stop at that baseline. It added to it. The California Fair Packaging and Labeling Act (CFPLA) condemns any opaque container as "misleading" if "it contains nonfunctional slack fill," with some exceptions. *See* Cal. Bus. & Prof. Code § 12606(b). The Ninth Circuit concluded that this exact regulatory scenario mandated preemption in *Del Real, LLC v. Harris*, 636 F. App'x 956 (9th Cir. 2016). In the context of "meat and poultry products," it held that the CFPLA's "nonfunctional slack fill provisions" were "in addition to, or different than" the relevant federal statutes' "general prohibitions against containers 'filled as to be misleading.' " *Id.* at 957.

Plaintiffs protest that slack-fill regulations may only be preempted by "an overt decision," not federal "silence" on the issue. (*See* ECF 77, at 15.) But Congress was not silent here; it spoke clearly about what is preempted. In the FDCA, Congress meant to preclude all state requirements that are "different from or in addition to," or "otherwise not identical with," the federal regulatory regime for labeling and packaging drugs and cosmetics. In *National Meat Association v. Harris*, 565 U.S. 452, 132 S.Ct. 965, 181 L.Ed.2d 950 (2012), the Supreme Court held that a nearly identical preemption provision "sweeps widely" and blocks states from imposing on the federal plan "any additional or different—even if non-conflicting—requirements." *Id.* at 459, 132 S.Ct. 965. Even assuming California's slack-fill regulation doesn't conflict with the federal design, it "plainly *adds* to the regulatory burden faced by a manufacturer" subject to the FDCA's packaging and labeling constraints. *See* *Del Real, LLC v. Harris*, 966 F. Supp. 2d 1047, 1064 (E.D. Cal. 2013), *aff'd*, 636 F. App'x 956 (9th Cir. 2016). Thus, the CFPLA's slack-fill ban for drugs and cosmetics is preempted.

2. *Preemptive Scope*

The foregoing robs plaintiffs of a powerful arrow in their quiver: a per se rule that nonfunctional slack fill is misleading. But it does not necessarily foreclose their claims entirely, as Unilever urges. The FDCA "does not preempt state laws

that allow consumers to sue ... manufacturers that label or package their products *in violation of federal standards*." *See* *Ebner*, 838 F.3d at 964 (discussing cosmetics). Plaintiffs argue that their state-law claims enforce federal prohibitions on "misleading" packaging. But Unilever insists that, according to the relevant federal agency, slack fill in drugs and cosmetics is never misleading.

For support, Unilever points to two cases that held the Food and Drug Administration's ***922** failure to set explicit restrictions on slack fill in drugs and cosmetics is "tantamount to a conscious decision by the agency to permit" it. *See* *O'Connor v. Henkel Corp.*, No. 14-CV-5547 (ARR) (MDG), 2015 WL 5922183, at *6 (E.D.N.Y. Sept. 22, 2015); *Bimont v. Unilever U.S., Inc.*, No. 14-CV-7749 (JPO), 2015 WL 5256988, at *6 (S.D.N.Y. Sept. 9, 2015). Both opinions quote *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753 (9th Cir. 2015). But *Astiana* made the opposite point. The defense there supposed that "the FDA's failure to issue specific regulations" about the word " 'natural' on cosmetics labels" was "tantamount to a conscious decision by the agency to permit any use of this term a manufacturer sees fit." *Id.* at 758. The Ninth Circuit disagreed. It noted that this "argument proves too much," as it would allow a manufacturer to "make any claim—wild, untruthful, or otherwise—about a product whose contents are not addressed by a specific regulation." *Id.* Even without precise federal guidelines, *Astiana* allowed plaintiffs' state-law suit alleging deceptive use of the word "natural" to proceed, as it promoted the general federal prohibition on "false or misleading" labeling. *Id.* at 758–59.

Like *Astiana*, the FDA's failure "to issue specific regulations" about nonfunctional slack fill does not mean manufacturers may make cosmetics with "any" amount of it, even refrigerator-sized deodorant sticks that are 99% empty. Federal statutes, after all, proscribe labeling and container-filling that is "misleading." *See* 21 U.S.C. § 352(a)(1), (i)(1); *id.* § 362(a), (d). So, litigants may bring state claims to vindicate that federal standard on the ground that the degree of slack fill for a drug or cosmetic product renders it misleading. They simply may not rely on California's slack-fill ban to do so.

At any rate, this Court is reluctant to divine broader federal preemption from an agency's choice to forego more detailed regulations. "[M]ere deliberate agency inaction—an agency decision *not* to regulate an issue—will not alone preempt state law." *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247 (3d Cir. 2008) (analyzing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002), and *Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988)).

Regardless, the FDA's refusal to set slack-fill limits in these markets is not akin to blessing limitless slack fill. Congress authorized the FDA to "promulgate regulations" to "prevent the nonfunctional-slack-fill of packages containing," among other things, food, drugs, and cosmetics. 15 U.S.C. § 1454(a) & (c)(4). Yet the FDA chose to set such standards only for food. *See* 21 C.F.R. § 100.100 (defining misbranded food containers). Does this mean it concluded that slack fill was always acceptable in drug and cosmetic products? No. The FDA later explained that "determining maximum allowable levels for functional slack-fill" in these items "would require considerable agency resources" and "would, in *many* cases ... serve no useful purpose." Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 2957, 2960 (Jan. 6, 1993) (emphasis added). In short, the FDA tacitly acknowledged at least some slack-fill problem in the drug and cosmetic marketplace, but it chose to focus its limited resources on food instead. That is a reasonable cost/benefit call, but no basis to preempt all slack-fill lawsuits. [1]

1 To the extent this Circuit still applies the "presumption against preemption" to express-preemption provisions, that principle offers additional support for confining this Court's preemption ruling to its current bounds. *See* *California Rest. Ass'n v. City of Berkeley*, 65 F.4th 1045, 1056–62 (9th Cir. 2023) (O'Scannlain, J., concurring) (discussing "the apparently conflicting line of cases" on this issue).

***923 B. Expert Testimony**

Before turning to summary judgment, the Court must see if plaintiffs' expert testimony is admissible in that analysis. Unilever moves to exclude the opinions of both experts—Dr. Sher Paul Singh and Dr. Forrest Morgeson III.

The "proponent of the expert" shoulders "the burden of proving admissibility." *United States v. Williams*, 850 F. App'x 566, 567 (9th Cir. 2021). A qualified expert's opinion is admissible when:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The trial court's task is to "ensure that all admitted expert testimony is both relevant and reliable." *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Rule 702's first condition—helpfulness to the factfinder—"goes primarily to relevance." *Daubert*, 509 U.S. at 591, 113 S.Ct. 2786. As for reliability, scientific evidence passes muster if the expert's "principles and methodology" are "grounded in the methods of science." *Wendell*, 858 F.3d at 1232. The court's inquiry is "flexible," with a "liberal thrust favoring admission." *Id.* (cleaned up). Among other things, courts may look at whether the expert's "theory or technique": (1) "is generally accepted in the scientific community," (2) has "been subjected to peer review and publication", (3) "can be and has been tested," and (4) produces an acceptable "known or potential rate of error." *Id.* Finally, courts consider whether experts' testimony concerns "matters growing naturally out of their own independent research," or if they "developed their opinions expressly for" trial. *Id.*

1. *Dr. Singh*

Dr. Singh's expert opinion is that "the accused products have approximately 20%-25% less product than the available capacity," which is "purely nonfunctional." (ECF 57-3, at 104.) He also concludes that plaintiffs' allegations against Unilever "are correct and the accused products are deceptive." (*Id.*) With decades of teaching, working, and researching in the packaging industry, Dr. Singh is eminently qualified to offer expert opinions in that field. (*See* ECF 57-3, at 80–84.) Because Unilever does not dispute his qualifications—nor that his knowledge is addressed to relevant topics that may be helpful to a factfinder—the Court will confine its analysis to the remaining contested Rule 702 prerequisites.

a. *Facts or Data*

There are several grave problems with the facts and data upon which Dr. Singh relies. First, his opinions about the "accused products" seem to be based on testing only two of the three designs. Plaintiffs concede that "only measurements from the Syzygy and Morpheus designs ended up in the tables" of Dr. Singh's report, but claim that the photographs show he "evaluated all three stick designs." (*See* ECF 79, at 5; ***924** ECF 57-3, at 103 fig.17; *id.* at 164.) They say data for the third design—Meteor—was omitted due to a "minor copying error," but have yet to come forward with those numbers. (ECF 79, at 5.)

Second, even among the designs he examined, Dr. Singh "looked at only two different samples" for each kind of deodorant or antiperspirant stick. (ECF 69-10, at 10.) Plaintiffs argue that no more was needed because "each product leaves the manufacturing line with precise weighted measurements." (ECF 79, at 6.) Even so, a sample size of two is a slim statistical reed to support such broad conclusions. *Cf. Pascal v. Nissan N. Am., Inc.*, No. 8:20-cv-00492-JLS-JDE, 2022 WL 19076763, at *10 (C.D. Cal. Dec. 21, 2022) (finding "testing on only four vehicles" was "problematic," but excluding expert on other grounds). Courts nonetheless often admit expert evidence despite "concerns that a survey's sample size is too small or unrepresentative," as this may merely "go to the weight to be accorded the survey results." *Araujo v. Coachella Valley Water Dist.*, No. 20-CV-01800-AJB-RBM, 2022 WL 4181004, at *9 (S.D. Cal. Sept. 12, 2022) (cleaned up). So this concern is not necessarily fatal. But the problems don't end there.

Perhaps the most worrisome blind spot is that the precise number and types of products Dr. Singh tested and examined remains a mystery. He variously testified that he sampled "ten sticks total" (ECF 69-11, at 8); "conducted the tests at two different times," with "ten sticks" one time and "eight sticks" another (*id.* at 15); or "analyzed" about "20, 25" sticks, although that data is "not captured anywhere" in his report (*id.* at 14). The tables in which he summarized his "weight"

and "volume" computations don't shed much light on the underlying data. (*See* ECF 57-3, at 103 fig.17; *id.* at 164.) The five brand names he lists could indicate many products of varying formulation, size, and scent. (*Id.* at 103 fig.17.) It is also unclear why there are nine total data rows in his two tables, whether his findings are based only on the five sticks identified in the first table, or if those two tables share overlapping data. (*Compare* ECF 57-3, at 103 fig.17 *with id.* at 164.)

His testimony about the number of product containers "examined" is similarly scattershot, ranging from 30 to 60. (*See* ECF 57-3, at 95 ("over approximately 30 stick deodorant containers"); ECF 69-11, at 12 ("probably ... 50 to 60 sticks"); *id.* at 13 ("approximately 50 sticks" or "somewhere around 35, 37. I don't know").) Granted, he allowed that his estimate of "50" included "sticks that are not at issue in this case." (ECF 69-11, at 13.)

The fundamental flaw is that there is no written record of Dr. Singh's entire procedure. Rather than writing down each result, he meant for his snapshots of unidentified products next to tape measures to constitute "visible data." (ECF 69-11, at 16; *see also id.* at 16 ("The data is the photograph."); *id.* at 5 ("I don't have the detail.").) But during his deposition he could not recreate the complete dataset, even with photographic aids.

In sum, plaintiffs have not carried their burden of showing that Dr. Singh's opinion is based upon sufficient facts or data.

b. *Methodology and Application*

Dr. Singh's methodology suffers from the same inscrutability and poor documentation as his data. Because he did not transcribe his results—and the photographic record is ambiguous—there is no way to retrace his steps exactly. His methods also fail all the standard reliability considerations. For example, plaintiffs have not shown that they are "generally accepted in the scientific community," have "been subjected to peer review and publication," "can be and [have] been tested," ***925** or yield an acceptable error rate. *See* *Wendell*, 858 F.3d at 1232. And Dr. Singh's opinions were expressly developed for this litigation, at plaintiffs' request. *See* *id.*; (ECF 57-3, at 80).

The details of Dr. Singh's testing system are somewhat ill-defined. His report describes how he measured the relative heights of each container and its enclosed product to come to a "percentage of slack fill." (ECF 57-3, at 103.) That document also explains that he used an "electronic balance" to weigh the deodorant he "extracted ... from the container." (ECF 57-3, at 99.) But only his deposition sheds light on how he extricated the product from the casings, with somewhat unpredictable results. Before extraction, he placed the deodorant "in the freezer for about ten minutes," followed by a "refrigerator" set to about "35 to 45 degree[s]" for an unspecified time. (ECF 69-10, at 5–6.) Some samples "did not come out right"; some "broke." (ECF 69-11, at 13.) Even worse, at times the product got "left in the bottom," and he "could not extract it." (*Id.* at 15.) It is unknown how many deodorant sticks succumbed to these ministrations. And Dr. Singh never clarified how he overcame these practical obstacles nor how he ensured a complete specimen for measurement.

Unilever particularly cries foul over the volume test. Before calculating a deodorant container's space, Unilever says, Dr. Singh inexplicably removed the twist-bottom dispensing "platform and internal components," thereby inflating his "maximum capacity measurements ... as they fail to account for the volume or space occupied by the components removed." (ECF 71-1, at 12.) Plaintiffs do not respond to this accusation. (*See generally* ECF 79.) Rather, they point out that both sides' "experts found roughly the same amount of total empty space in their analyses." (*Id.* at 6.) But this case is not about "empty space"; it's about *nonfunctional* empty space. And the calculations of nonfunctional space are wildly at odds: Unilever's expert concludes it's 0%; Dr. Singh says 100%. (*See id.* at 5; ECF 57-3, at 104 (Singh: "purely nonfunctional").)

In any event, it is unclear which brands and stick designs Dr. Singh subjected to this debatable measurement program. But it is plain that no one else could use "the same data and methods" to "replicate the results." *See* *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1047 (9th Cir. 2014) (cleaned up). Plaintiffs have therefore not carried their burden of showing that Dr. Singh's testimony is based on reliable methods or that those methods were reliably applied. Dr. Singh's testimony is excluded.

2. *Dr. Morgeson*

Plaintiffs offer Dr. Morgeson as an expert on consumer-purchasing behavior to opine that: (1) consumers "spend limited time examining package labeling information" and generally "assume that larger packages contain a larger quantity of a product"; (2) "[n]et weight labeling information

on product packages is rarely examined (or understood) by consumers"; and (3) due to these consumer tendencies and "general unfamiliarity with the concept of slack fill, the relevant Unilever product package features suggest" that Unilever consumers got "less product than they might have anticipated." (ECF 57-3, at 59.) Dr. Morgeson is a university professor who teaches "marketing research and marketing management courses." (ECF 57-3, at 57, 65.) He has researched and testified about "customer satisfaction and customer experience measurement and management," including "how they relate to slack-fill." (*Id.* at 58; ECF 80, at 4.) Unilever does not challenge his expert ***926** qualifications, but it contests every other step of the Rule 702 analysis.

a. *Helpfulness to Factfinder*

Although Unilever maintains that Dr. Morgeson's "opinions are not helpful to the trier of fact" (ECF 72-1, at 13), that is not the precise question the Court must answer. The issue is whether the expert's "*knowledge* will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Dr. Morgeson appears to have extensively studied consumer behavior, but his expertise in this field is only relevant if it sheds light on consumer expectations regarding deodorants and antiperspirants. That is, at best, unclear. Even assuming his knowledge is helpful, plaintiffs must prove that his wisdom can be channeled into reliable opinions about Unilever's consumers.

b. *Facts or Data*

Unilever criticizes Dr. Morgeson for failing to gather any relevant "facts or data," and doing "nothing to study the products at issue." (ECF 72-1, at 8.) Indeed, his discussion of the items here betrays a certain unfamiliarity. Plaintiffs' central allegation is that Unilever's sticks came in "larger packaging" than competitor products, although "the net weight [is] the same." (ECF 52, at 11.) Yet Dr. Morgeson rebuts these foundational points, claiming that Unilever's products "are roughly the *same size* (or larger) than those used by its competitors," but "contain *less* actual product." (ECF 57-3, at 63 (emphasis added).)

He has also apparently never examined the deodorant and antiperspirant market. According to his report, Dr. Morgeson based his opinions on his "review of relevant scientific and academic literature," his "academic research over the past 15 years," two decades of "experience working with large annual samples of cross-industry consumer survey data and research," and materials provided by plaintiffs' counsel. (ECF 57-3, at 59.) Yet he fails to specify how much of this background touched the pertinent market. He references three academic or industry articles and 13 papers describing original studies, but none concerning the market at hand.

In fact, only two papers extend slightly beyond food and beverages. A 1990 study of grocery-shopping habits considered four products: coffee, margarine, cereal, and toothpaste. *See* Peter R. Dickson & Alan G. Sawyer, *The Price Knowledge and Search of Supermarket Shoppers*, 54 J. Mktg., July 1990, at 42, 46. The results lumped all four items together, so it's impossible to tell if consumers behaved differently with toothpaste than with, say, cereal. *Id.* at 49–51. Similarly, a 2016 Australian grocery study of purchasing speed focused on twelve items, including milk, bananas, yogurt, chocolate bars, pasta sauce, rice, toothpaste, shampoo, and four pet foods. *See* Zachary Anesbury et al., *How Do Shoppers Behave Online? An Observational Study of Online Grocery Shopping*, 15 J. Consumer Behav. 261, 265 (2016). Interestingly, the two non-food items—shampoo and toothpaste—had the longest average selection times, with shoppers spending twice as long choosing shampoo as bananas. *Id.* If anything, these results suggest that food-buying habits don't apply equally to other commodities.

Unilever insists that Dr. Morgeson's opinion is not based on any "empirical study on the relevant [consumer] universe and products." (ECF 72-1, at 9.) Plaintiffs do not say otherwise. The adequacy of this dataset is concerning.

c. *Methodology and Application*

With no data points in the relevant market, plaintiffs must shoulder the burden of demonstrating why food consumers (or 1990-era toothpaste shoppers) are apt to ***927** behave like deodorant buyers. Or they must at least explain why food-shopping habits can be generalized across all consumables markets. "[W]hile studies involving similar but not identical situations may be helpful, an expert must set forth the steps used to reach the conclusion that the research is applicable." *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 606 (9th Cir. 2002). Without that minimum foundation, Dr. Morgeson could just as easily extrapolate opinions from car-buying research papers.

Plaintiffs respond that "there is no reason to believe that" the studies Dr. Morgeson relied upon "do not still apply to all consumers," including Unilever's customers. (*See* ECF 80, at

6.) But there is also "no reason to believe" that they apply here. The Court need not take Dr. Morgeson's word for it. Nor must it "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

The Court concludes that "there is simply too great an analytical gap between the data and the opinion proffered." *See id.*; *see also Highfields Cap. I, LP v. SeaWorld Entm't, Inc.*, No. 18-CV-1276-MMA (AGS), 2022 WL 1037210, at *16, 18 (S.D. Cal. Apr. 6, 2022) (excluding expert who "merely reviewed statements, documents, testimony, and outside articles," but applied "no scientific or methodological analysis of any data" to form his opinions). Dr. Morgeson's testimony, like Dr. Singh's, is excluded.

C. Summary Judgment

That leaves Unilever's summary-judgment motion. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute over a material fact is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court must view the facts and draw all reasonable inferences "in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (cleaned up).

Plaintiffs bring three claims based on California consumer-protection statutes: the Consumers Legal Remedies Act (claim 1), False Advertising Law (claim 2), and Unfair Competition Law (claim 3). They also allege common-law claims for negligent misrepresentation (claim 4) and fraud and deceit (claim 5). The statutory claims may generally be considered "together," with one caveat. *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 982 (C.D. Cal. 2015). Under the Unfair Competition Law, plaintiffs allege that Unilever engaged in "unfair, unlawful, [and] fraudulent business acts and practices." (ECF 52, at 23.) Each of these UCL prongs —"unfair," "unlawful," and "fraudulent"—is "a separate and distinct theory of liability." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). But when the factual bases for the unfair and fraudulent versions "overlap entirely," as here, their fates merge. *See Sue Shin v. Campbell Soup Co.*, No. CV 17-1082-DMG (JCx), 2017 WL 3534991, at *7–8 (C.D. Cal. Aug. 9, 2017). Because the UCL's unlawful prong raises distinct legal issues, however, the Court will address it separately from the other statutory claims.

1. *Claims Subject to the Reasonable-Consumer Test*

The first four causes of action—excepting the UCL's unlawful prong—rise and fall together, as they "are governed by the 'reasonable consumer' test." *See* ***928** *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (CLRA, FAL, and UCL's fraudulent prong); *see also Girard v. Toyota Motor Sales, U.S.A., Inc.*, 316 F. App'x 561, 562 (9th Cir. 2008) (negligent misrepresentation). Under this test, plaintiffs must prove that "members of the public are likely to be deceived." *Id.* Put another way, they must show "that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 129 Cal. Rptr. 2d 486, 495 (2003).

"Surveys and expert testimony" are "not required" to satisfy the reasonable-consumer test, but a "few isolated examples of actual deception are insufficient." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008) (cleaned up). In fact, as many as seven "Plaintiffs' deposition testimonies" have failed to meet this standard, when unaccompanied by other pertinent evidence of deception. *See In re 5-Hour Energy Mktg. & Sales Pracs. Litig.*, No. ML132438PSGPLAX, 2018 WL 11354864, at *7 (C.D. Cal. Jan. 24, 2018). By contrast, the testimony of even a single individual may suffice if paired with patently false marketing or relevant extrinsic evidence. *See, e.g.*, *Hawkins v. Kroger Co.*, 512 F. Supp. 3d 1079, 1088–89 (S.D. Cal. 2021) (holding that plaintiff's testimony, "the '0g Trans Fat' label," and defendant's "admission" that the product "contained some trans fat" were sufficient without other "extrinsic evidence"); *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 891 (N.D. Cal. 2016) (concluding that "three types of evidence"—plaintiff's testimony, "marketing research surveys," and the name "*Joint* Juice"—showed that reasonable consumers would likely "buy the product to relieve joint pain").

With all their expert testimony now excluded, the four plaintiffs must depend on their own anecdotal accounts of deception. All four testified that Unilever's packaging tricked "them into thinking they were getting more product than they were." (ECF 52, at 11; *see, e.g.*, ECF 57-4, at 2 (Nicole Krause-Pettai); ECF 77-7, at 7 (Christy Stevens Botto); ECF 77-8, at 10 (Kevin Bolden); ECF 57-6, at 3 (Errol Carreon).)

Yet plaintiffs have little else to work with. This case does not have patently false marketing like *Hawkins*, which involved a product with "some trans fat" bearing a " '0g Trans Fat' label." *See* *Hawkins*, 512 F. Supp. 3d at 1088–89. To the contrary, each plaintiff here is aware that every Unilever product is labeled with its actual net weight, which can be used for value comparisons. (ECF 69-5, at 13–15 (Krause-Pettai); ECF 77-7, at 11 (Botto); ECF 69-7, at 37–38 (Bolden); ECF 69-8, at 13 (Carreon).) Nor do plaintiffs have "marketing research surveys" or other evidence to corroborate their anecdotal claims. *See* *Mullins*, 178 F. Supp. 3d at 891.

With so little positive proof, plaintiffs cannot make their case. And that's before taking stock of the countervailing evidence that undercuts their theory of deception. First, plaintiffs offer no comparative evidence to corroborate their claims that Unilever is an outlier and that its competitors suffer lost sales due to their more aboveboard packaging. *See* *Bruton v. Gerber Products Co.*, 703 F. App'x 468, 471 (9th Cir. 2017) (finding that because competitors' labels "make many of the same illegal claims ... [a] reasonable jury comparing the labels side by side could not rationally conclude [defendant's] labels were likely to deceive"). By contrast, the defense introduced compelling comparative evidence that Unilever's "Dove and Degree sticks are generally in line with competing products." ***929** (ECF 69-3, at 20.) For women's antiperspirants, for instance, the Degree model is nearly the same *overall* height as the competing Secret brand, but it has *less* opaque height than the competitor. (*See id.*) This is because the Degree stick's bottom is translucent (revealing some slack fill), whereas the competitor's is not. (*See id.*) The same is true for women's deodorants. (*See id.* at 21.) And Unilever's Dove and Degree brands stand out even less in the men's categories. Indeed, they appear about the same height as—or shorter than—their competitors. (*See id.* at 22–23.)

Second, plaintiffs have not persuasively refuted Unilever's evidence that "from 2016 to 2022, there were *zero* complaints from California consumers concerning the empty space in the products at issue." (ECF 69-4, at 37.) After all, a "lack of complaints and returns" is "highly relevant" to rebutting a misrepresentation claim. *See* *Consumer Advocs. v. Echostar Satellite Corp.*, 113 Cal.App.4th 1351, 8 Cal. Rptr. 3d 22, 30 (2003). Plaintiffs rejoin that this is a "hidden practice" that is "essentially impossible to discover[ ]," let alone complain about. (ECF 77, at 5, 16.) Yet all four plaintiffs became suspicious because Unilever's sticks seemed top-heavy. (*See* ECF 69-5, at 10 (Krause-Pettai); ECF 69-6, at 28 (Botto); ECF 69-7, at 40 (Bolden); ECF 69-8, at 27 (Carreon)). Surely this observation wasn't unique to them. After millions of sales, a reasonable factfinder might expect more than "zero" complaints from a consuming public that truly felt deceived.

Finally, plaintiffs have little answer to Unilever's expert testimony that any "slack-fill in the sticks at issue is functional." (*See* ECF 69-2, at 46; *see also id.* at 42 ("purely functional").) That expert cogently explained this functionality. (*See id.* at 43–45; ECF 70-1, at 23–26.) Plaintiffs reply with some purported comparative evidence: Unilever's Axe brand products are filled on the same assembly lines, yet allegedly "contain a higher proportion of product to empty space" than the accused products. (ECF 79, at 5; *see also* ECF 77, at 18.) But Dr. Singh's testimony—including his questionable Axe measurements—is now excluded and cannot support this argument. Even if allowed, though, this evidence cuts both ways. If excessive slack fill offers some market advantage, as plaintiffs claim, they must explain why Unilever would deliberately handicap one of its own product lines by giving it less slack fill.

Even viewing the evidence in the light most favorable to plaintiffs, they cannot show that the general consuming public and targeted consumers would be misled. So there is no genuine dispute as to the material facts regarding negligent misrepresentation and the claims under the CLRA, FAL, and the UCL's fraudulent and unfair prongs. The Court grants summary judgment for Unilever accordingly.

2. *Other Claims*

The above reasonable-consumer analysis is the legal domino that largely topples the remaining causes of action. The fraud-and-deceit claim's elements are even more demanding than the reasonable-consumer test. Among other things, plaintiffs must prove that the labeling or packaging here was "actually false." *See* *Nacarino v. KSF Acquisition Corp.*, 642 F. Supp. 3d 1074, 1087 (N.D. Cal. 2022). As they have not shown it was even misleading, it isn't false. The UCL

unlawful-prong cause of action suffers a similar fate, as it requires the "violation of another law." *See* *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal.App.4th 1544, 62 Cal. Rptr. 3d 177, 186 (2007). Because the Court has rejected all plaintiffs' theories of predicate illegality—including those based on consumer expectations—the ***930** unlawful-prong claim cannot stand.

Thus, the Court grants summary judgment for Unilever on all claims.

CONCLUSION

Unilever's motions for summary judgment and to exclude expert testimony are **GRANTED**. Plaintiffs' class-certification motion is **DENIED AS MOOT**.

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United States District Court, N.D. California.

Michelle MORAN, Plaintiff,
v.
BONDI SANDS (USA) INC., et al., Defendants.

Case No. 21-cv-07961-JSW
|
Signed 04/29/2022

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ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO DISMISS AND SETTING INITIAL CASE MANAGEMENT CONFERENCE

Re: Dkt. No. 29

JEFFREY S. WHITE, United States District Judge

***1** This matter comes before the Court upon consideration of the motion to dismiss filed by Defendant Bondi Sands (USA), Inc. ("Bondi Sands").[1] The Court has considered the parties' papers, relevant legal authority, and the record in this case. The Court also has granted the parties' stipulation allowing Plaintiff, Michelle Moran ("Moran"), to file a second amended complaint. For the reasons that follow, the Court HEREBY GRANTS, IN PART, AND DENIES, IN PART, Bondi Sands' motion.

1 This case is one of seven cases Plaintiff's counsel has filed that challenge the terms "Reef Friendly" or "Reef Safe" on sunscreen products, including another case filed on Moran's behalf. *See, e.g., Moran v. Edgewell Personal Care, Inc.*, No. 21-cv-07669-RS.

BACKGROUND

In the summer of 2021, Moran purchased can of Bondi Sands' aerosol fragrance-free sunscreen ("Purchased Product" or the "Product"). (First Amended Class Action Complaint ("FACC"), ¶ 8, Ex. 1-5.) The front label of the Purchased Product includes the phrase "Reef Friendly." (*Id.*, Ex. 1-5.) Moran alleges that the term Reef Friendly "led her to believe that the [Purchased] Product's ingredients were all reef-safe and otherwise could not harm reefs, including the coral reefs and marine life that inhabits and depends on them." (*Id.* ¶ 8.)

According to Moran, the Purchased Product, and other similar products containing the Reef Friendly statement (collectively "Bondi Sands' Products"), actually contain chemical ingredients, such as avobenzone, homosalate, octisalate, and/or octocrylene, which "are not safe for reefs because they can harm and/or kill reefs, including the coral reefs and the marine life that inhabits or depends on them."[2] (*Id.* ¶ 3; *see also id.* ¶¶ 24-28.) Moran alleges she was not aware of that fact when she purchased the Product, and would not have purchased the Product, or would have paid substantially less for it, had she known the truth. (*Id.* ¶¶ 8, 72). Moran also alleges that she continues to see Bondi Sands' Products that use Reef Friendly on the labels. She would like to purchase them in the future, if that representation was true, but because she does not "possess any specialized knowledge, skill, experience, or education in sun care products," she has no way to determine the truth. (*Id.*; *see also id.* ¶ 9.)

2 Moran included Bondi Sands' Hydra UV Protect products in the FACC. Bondi Sands moved to dismiss on the basis that those products are sold only in Australia. Based on that representation, the parties have formally stipulated that Moran will withdraw her claims relating to those products and will amend the FACC accordingly.

Based on these and additional allegations that the Court will address in the analysis, Moran seeks relief on behalf of herself and putative classes for violations under each prong of California's Unfair Competition Law (the "UCL Claim"), for violations of California's False Advertising Law (the "FAL Claim"), for violations California's Consumer Legal Remedies Act (the "CLRA Claim"), for breach of warranty, and for unjust enrichment.

ANALYSIS

A. The Court Denies Bondi Sands' Motion to Invoke the Primary Jurisdiction Doctrine.

***2** Bondi Sands moves to dismiss or stay pursuant to the primary jurisdiction doctrine. "The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). It is a "prudential" doctrine "under which a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Id.* It is "not designed to secure expert advice from agencies every time a court is presented with an issue conceivably within the agency's ambit." *Id.*

The determination of whether an action should be stayed pursuant to the primary jurisdiction doctrine is a matter for the Court's discretion. *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002). In considering this issue, courts have "traditionally employed such factors as (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Id.* (citing *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)).

The Food and Drug Administration ("FDA") has promulgated regulations and labelling requirements for over the counter ("OTC") sunscreens. Bondi Sands also notes Congress is considering legislation that would require the FDA, in consultation with other agencies, to develop labelling requirements for the term "Reef Safe." The legislation was introduced in July 2021 and, to date, has not been passed. Each version of the proposed bill also provides the FDA with at least two-years from the date the law is enacted to develop those requirements. [3] Moran does not seriously dispute that this is an area that would fall within the FDA's expertise and that it has not yet been addressed. However, "primary jurisdiction is not required when a referral to the agency would significantly postpone a ruling that a court is otherwise competent to make." *Astiana v. Hain Celestial Gp., Inc.*, 783 F.3d 753, 760-61 (9th Cir. 2015) (internal citations and quotations omitted). "[E]fficiency is the deciding factor in whether to invoke primary jurisdiction."

3 *See* https://www.congress.gov/bill/117th-congress/house-bill/4800/text (last visited April 29, 2022); https://www.congress.gov/bill/117th-congress/senate-bill/2546/text (last visited April 29, 2022).

In one of the other cases that Moran's counsel has filed in this District, the court considered this issue and determined that, at this juncture, action by the FDA appeared too remote to warrant invocation of the doctrine. *White v. The Kroger Co.*, No. 21-cv-08004-RS, 2022 WL 888657, at *2-3 (N.D. Cal. Mar. 25, 2022). The Court concurs and, in light of that uncertainty, concludes invoking the doctrine would not be efficient.

Accordingly, the Court DENIES, IN PART, Bondi Sands' motion on that basis.

B. The Court Denies Bondi Sands' Motion to Dismiss Based on FDCA Preemption.

Bondi Sands also argues Moran's claims are preempted by the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. sections 301, *et seq.* The FDCA contains a preemption provision, which provides that "no State ... may establish or continue in effect any requirement ... that is different from or in addition to, or that is otherwise not identical with a requirement under the [FDCA]." 21 U.S.C. § 379r(a)(2). The FDA's regulations governing OTC sunscreen do not currently address environmental claims.

***3** Moran argues she asks only that the Reef Friendly phrase be removed from the label. She alleges, however, that the Court should require "prominent qualifications and/or disclaimers on the [Bondi Sands' Products'] front label concerning [their] true nature[.]" (FACC ¶ 38.c.) Even if the FDA neither prohibits nor permits the phrase Reef Friendly, Moran fails to meaningfully engage with Bondi Sands' argument that she asks the Court to ask Bondi Sands to add information not currently required by the FDA to the Products' labels. For that reason, the Court finds *Prescott v. Bayer Health Care, LLC*, on which she relies, distinguishable. No. 20-cv-00102-NC, 2020 WL 4430958, at *2-3 (N.D.

Cal. July 31, 2020). However, it also is evident that Moran's claim is based on the theory that the phrase Reef Friendly is misleading, and FDCA regulations prohibit "claims that would be false and/or misleading on sunscreen products." 21 C.F.R. § 201.327(g).

Accordingly, the Court concludes Moran's claims are not preempted in their entirety and DENIES, IN PART, Bondi Sands' motion on that basis as well.

C. The Court Concludes Moran Has Stated Claims for Relief.

Bondi Sands also moves to dismiss for failure to state a claim. A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. A court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleading standard of Rule 8(a)(2), "a plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Pursuant to *Twombly*, a plaintiff cannot merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

As a general rule, "a district court may not consider any material beyond the pleadings in ruling on Rule 12(b)(6) motion." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds by* *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citation omitted). However, a court may consider documents that subject to judicial notice on a motion to dismiss without converting the motion to one for summary judgment. *See* *Mack S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by* *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). If the allegations are insufficient to state a claim, a court should grant leave to amend unless amendment would be futile. *See, e.g.*, *Reddy v. Litton Indus. Inc.*, 912 F.3d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

Bondi Sands argues Moran is proceeding on a lack of substantiation theory because she alleges it was "statutorily required to ensure it has adequate substantiation for" the "Reef Friendly" representation. (FACC ¶ 35.) There is no private right of action for a "lack of substantiation" claim. *See* *Kwan v. SanMedica Int'l, LLC*, 854 F.3d 1088, 1096 (9th Cir. 2017) (citing *Nat'l Council Against Health Fraud v. King Bio Pharms., Ltd.*, 107 Cal. App. 4th 1336, 1344 (2003) ("*King Bio*")). Moran asserts she is not premising her claims on that theory and, instead, asserts the statement is false. [4] The Court "must therefore parse" the FACC to ensure Moran alleges actual falsity. *Locklin v. Strivectin Op. Co.*, No. 21-cv-7967-VC, 2022 WL 867248, at *4 (N.D. Cal. Mar. 23, 2022).

4 The Court will hold Moran to that representation.

***4** A plaintiff may establish an advertising claim is false through "testing, scientific literature, or anecdotal evidence." *King Bio*, 107 Cal. App. 4th at 1348. For example, in *Kwan*, plaintiff alleged the defendant falsely implied that the product's health benefits "were clinically proven by credible scientific proof." *Kwan*, 854 F.3d at 1096. The court determined that allegation was conclusory and was "simply an allegation that defendant's marketing claims lack scientific substantiation." *Id.* The defendant in *Locklin* also argued the plaintiff was pursuing a lack of substantiation claim, but the court rejected that argument. 2022 WL 867248, at *4. The court reasoned the plaintiff "does not allege that [defendant] 'reef safe' assertion lacks substantiation – that, say, no scientific evidence exists to bolster the company's advertising." *Id.*; *see also Cooper v. Curallux, LLC*, No. 20-cv-2455-PJH, 2020 WL 4732193, at *4 (N.D. Cal. Aug. 14, 2020) ("A substantiation claim involves an advertising claim that has no evidentiary support one way or the other. ... In contrast, a false advertising claim is on in which the claim has actually been disproved ... such that the plaintiff can point to evidence that directly conflicts with the claim.") (internal citations and quotations omitted).

The *Locklin* court also distinguished *Aloudi v. Intramedic Research Group* [5], on which Bondi Sands relies, reasoning that the plaintiff's allegations were "far more developed and coherent" in contrast to the "plainly irrelevant studies" and reliance "on anecdotal evidence" supporting the plaintiff's allegations in *Aloudi*. 2022 WL 867248, at *4 n.3. It held, therefore, "[b]y alleging that the sunscreen contains chemicals that directly threaten coral reefs, the complaint identifies 'specific facts pointing to actual falsehood' " and denied the motion to dismiss. *Id.* (quoting *Kwan*, 854 F.3d at 1097).

5 729 Fed. Appx. 514 (9th Cir. 2017).

In *Bitton v. Gencor Nutrientes, Inc.*, the defendant made a nutritional supplement and represented it had conducted a study showing " 'statistically significant results' showing increases in 'free testosterone' in study participants who took" the supplement. 654 Fed. Appx. 358, 360. The plaintiffs alleged that statement was false and included an expert report that concluded the trial results were not statistically significant. *Id.* at 362. The Ninth Circuit concluded the allegations were sufficient to state a claim and rejected the defendants' argument that the plaintiffs were proceeding on a lack of substantiation theory. *Id.*

Here, Moran does not rely on vague or conclusory allegations and instead cites to materials, which she claims are sufficient to allege the chemicals contained in the Bondi Sands' Products are harmful to reefs. (FACC ¶¶ 24-28 & nn. 27-32.) She also cites to reports from various organizations, petitions submitted to the FDA, and legislation, which she argues provides further evidence that the phrase Reef Friendly is false or misleading. [6] (*Id.* ¶¶ 13-19 & nn. 8-24.) As in *Locklin*, Moran does not allege that there is *no* evidence to support Bondi Sands' claim; she alleges that there is evidence that directly conflicts with the representation that the Product is Reef Friendly.

6 Moran's FACC included allegations that were identical to allegations in *Locklin* regarding legislation in Hawaii, which suggested that the Hawaii Senate had banned octocrylene. *Compare Locklin*, 2022 WL 867248, at *2 (quoting complaint) *with* FACC ¶ 17. The parties have stipulated that Moran shall amend those allegations. Counsel for Moran shall take care to avoid these drafting issues going forward.

Bondi Sands argues these materials are not sufficient because, for example, they neither evaluated the Bondi Sands' Products nor the chemicals at issue in the same formulation as the Bondi Sands Products. Each of the challenged Bondi Sands Products contains octocrylene. (FACC ¶ 24.a-24.f.) According to some materials cited by Moran, octocrylene "can harm marine life" including corals by accumulating in coral tissues, inducing bleaching, damaging coral DNA, and can "even kill." [7]

7 *See, e.g.*, https://oceanservice.noaa.gov/news/sunscreen-corals.html (last visited April 27, 2022) (cited at FACC ¶ 14 n.9); *see also* https://haereticus-lab.org/protect-land-sea-certification-3 (last visited April 27, 2022) (listing octocrylene as "known pollutant" that poses threat to, *inter alia*, corals and ocean systems) (cited in FACC ¶ 13 n.8).

***5** The *Locklin* court considered and rejected similar arguments.

> The complaint cites scientific studies purporting to document the harmful effects of four chemicals present in the sunscreen and actions by governmental bodies to ban them. It alleges a connection between those chemicals and coral reefs: When sunscreen washes off, it flows into the oceans, where its constituent chemical compounds threaten aquatic life. The complaint further explains that some consumers are misled by the "reef safe" label. Thinking that their use of StriVectin's product will not pose a threat to coral reefs, these consumers pay an inflated price for a product that falls short of its promises. Taken together and as true, those allegations suggest that StriVectin's product label misleads reasonable consumers, thereby

> violating California's consumer protection laws.

2022 WL 867248, at *2.

Moran's allegations about the alleged harm caused by chemicals in the Bondi Sands' Products' are not materially different from the plaintiff's allegations in *Locklin*, and the Court finds that reasoning persuasive. The Court also finds the *Locklin* court's conclusion that "even if the chemicals pose only a serious – but ultimately uncertain – threat to coral reefs, that may well be enough to prove that" Bondi Sands' Reef Friendly claim "is false or misleading to a reasonable consumer who cares about avoiding using products that endanger the reefs." *Id.* at *4. As in *Locklin*, the materials cited by Moran do not directly contradict her theory and, thus, do not plead her out of a claim. *Id.* Bondi Sands' argument that Moran fails to show the chemicals at issue are actually dangerous goes to whether Moran ultimately will be able to prove her claims that the statement is false or misleading, rather than whether she has *alleged* that is the case. Accordingly, the Court DENIES, IN PART, Bondi Sands' motion to dismiss on this basis.

Bondi Sands moved to dismiss the breach of warranty and unjust enrichment claims solely on the basis that they were derivative of Moran's consumer protection claims. Because the Court concludes the consumer protection claims can proceed, it also denies Bondi Sands' motion to dismiss these derivative claims.

D. The Court Grants, in Part, Bondi Sands' Motion to Dismiss the Equitable Claims.

Bondi Sands moves to dismiss Moran's claims for equitable relief on the basis that she has an adequate remedy at law. It is well-established that claims for relief under the FAL and the UCL are limited to restitution and injunctive relief. *See, e.g.*, *Korea Supply Co. v. Lockheed Martin*, 29 Cal. 4th 1134, 1146-49 (2003). [8] In contrast, the CLRA provides for equitable relief and for damages. In *Sonner v. Premier Nutrition, Inc.*, the Ninth Circuit held "that the traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution under the UCL and CLRA in a diversity action." 971 F.3d 834, 843-44 (9th Cir. 2020). There, the plaintiff dropped her claims for damages shortly before trial. Because the plaintiff failed to allege an adequate legal remedy in her complaint and conceded her claim for restitution was the same amount of money she had been seeking in damages, the court determined she failed to state a claim for relief. "Sonner fails to explain how the same amount of money for the exact same harm is inadequate or incomplete[.]" *Id.* at 844.

8 The claim for unjust enrichment also seeks equitable relief.

***6** In addition to seeking restitution, Moran seeks prospective injunctive relief. In *Ziegler v. WellPet LLC*, the court reasoned that damages for past harm were not an adequate remedy for prospective harm caused by alleged false advertising because damages "would [not] ensure that [the plaintiff] (and other consumers) can rely on WellPet's representations in the future." 526 F. Supp. 3d 652, 687 (N.D. Cal. 2021); *see also* *Adams v. Cole Haan, LLC*, No. SACV 20-913 JVS (DFMx), 2021 WL 4907248, at *2-*4 (C.D. Cal. Mar. 1, 2021) (finding monetary damages "would not necessarily be sufficient to remedy" harm from alleged false advertising); *Brooks v. Thomson Reuters Corp.*, No. 21-CV-01418-EMC, 2021 WL 3621837, at *11 (N.D. Cal. Aug. 16, 2021) (declining to apply *Sonner* to bar UCL claims for prospective injunctive relief because "the prospect of paying damages is sometimes insufficient to deter a defendant from engaging in an alleged unlawful, unfair, or fraudulent business practice"). Assuming Moran sufficiently alleges she has standing, which the Court addresses in the following section, as in *Ziegler*, her claims for monetary equitable relief would not necessarily redress prospective harm.

In paragraph 38 of the FACC, Moran sets forth allegations about why legal monetary remedies would not be adequate, including the procedural posture of the case. (FACC ¶ 38.f.) The Court continues to find that argument unpersuasive. *See, e.g.*, *Gardiner v. WalMart, Inc.*, No. 20-cv-4618-JSW, 2021 WL 4992539, at *7 (N.D. Cal. July 28, 2021). In addition, the Court has previously concluded that "nothing in *Sonner* suggests that the Court should ignore the allegations in the FACC in favor of Rule 8's general principles." *Hanscom v. Reynolds Consumer Prods.*, No. 21-cv-3434-JSW, 2022 WL 591466, at *3 (N.D. Cal. Jan. 21, 2022) (citing cases).

The Court also concludes the allegation that no expert discovery has commenced (FACC ¶ 38.f) is insufficient to allege Moran lacks an adequate remedy at law. This

allegation does no more than speculate that "restitution and damages could be different[.]" *Phan v. Sargento Foods, Inc.*, No. 20-cv-9251-EMC, 2021 WL 2224260, at *5 (N.D. Cal. June 2, 2021) (noting that "speculation is questionable" given that Section 17200 does not permit nonrestitutionary disgorgement) (quoting *Julian v. TTE Tech., Inc.*, No. 20-cv-22857-EMC, 2020 WL 6743912, at *4-5 (N.D. Cal. Nov. 17, 2020)). Moran also argues that because the UCL encompasses conduct that is broader than some of her other claims, she and putative class members "may be entitled to restitution" but not damages.[9] Moran does not suggest that she seeks a different amount in damages than she does in restitution. Moran also argues that the statute of limitations on her UCL claim is one year longer than the statute of limitations on her other claims, which would preclude putative class members from obtaining damages on those claims.

9 Moran seeks relief on behalf of a nationwide class, yet seems to suggest that there are material differences between California law and the laws of other states, at least as to the breach of warranty claim. The Court shall expect Moran to address why those differences will not preclude class certification if she files such a motion.

The Court concludes "these allegations do not establish that the damages she seeks are necessarily inadequate or incomplete. That is, [Moran's] 'inability to obtain damages here [would result] from her CLRA [and common law] claims' failure on the merits" not that there "there is an inherent limitation of the legal remedy that renders it inadequate." *Hanscom*, 2022 WL 591466, at *3 (quoting *Nacarino v. Chobani, LLC*, No. 20-cv-7437-EMC, 2021 WL 3487117, at *12 (N.D. Cal. Aug. 9, 2021)); *see also Alvarado v. Wal-mart Assocs., Inc.*, No. 20-cv-1926-DSF (JCx), 2020 WL 6526372, at *4 (C.D. Cal. Aug. 7, 2020) (concluding shorter statute of limitations on some claims did not render legal remedies inadequate). In addition as in *Alvarado*, Moran alleges that she bought her sunscreen in July 2021, "so her damages or restitution would not be affected by whether the statute of limitations is three or four years." *Id.*

***7** Accordingly, the Court concludes Moran fails to allege she lacks an adequate monetary remedy at law, and the Court GRANTS, IN PART, Bondi Sands' motion to dismiss on this basis. Because the Court cannot conclude it would be futile, it GRANTS Moran leave to amend.

E. The Court Concludes Moran Alleges She Has Standing.

Bondi Sands' final argument is that Moran fails to allege facts to show she has standing. A lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A "facial" attack accepts the truth of the plaintiff's allegations but asserts that they "are insufficient on their face to invoke federal jurisdiction." *Id.* The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6). *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013).

Moran alleges she purchased the Product based on the Reef Friendly representation and would not have done so, or would have paid substantially less for it, had she known the truth. Therefore, to the extent Bondi Sands argues that Moran fails to allege injury-in-fact to pursue damages, the Court denies the motion.

Bondi Sands also challenges Moran's standing to seek injunctive relief, which requires her to allege she "has suffered or is threatened with a 'concrete and particularized' legal harm, coupled with a 'sufficient likelihood that [she] will again be wronged in a similar way.' " *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) and *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). The latter inquiry turns on whether the plaintiff has a "real and immediate threat of repeated injury." *Id.* The threat of future injury cannot be "conjectural or hypothetical" but must be "certainly impending" to constitute an injury in fact for injunctive relief purposes. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018).

Moran alleges that she "is not personally familiar with the ingredients in the Products and does not possess any specialized knowledge, skill, experience, or education in sun care products, ... and their ingredients or formulations." (FACC ¶ 8.) Therefore, she claims she has no way to determine if the Reef Friendly representation is true and is unable to rely on the representation in the future. (*Id.*) Bondi Sands argues Moran can simply review the ingredients list to determine if the allegedly harmful chemicals are

present. [10] "Several courts have rejected similar arguments since *Davidson*." *Moore v. GlaxoSmithKline Consumer Healthcare Holdings (US) LLC*, No. 20-cv-9077-JSW, 2021 WL 3524047, at *5 (N.D. Cal. Aug. 6, 2021) (citing cases); *but see* *Cimoli v. Alacer Corp.*, 546 F. Supp. 3d 897, 906 (N.D. Cal. 2021) (noting "several district courts relying on *Davidson* have found a plaintiff lacks standing where the plaintiff could 'easily discover whether a previous misrepresentation had been cured without first buying the product at issue' ") (quoting *Cordes v. Boulder Brands USA, Inc.*, No. CV 18-6534 PSG, 2018 WL 6714323, at *4 C.D. Cal. Oct. 17, 2018).

10 Bondi Sands argues this is "underscored" by Moran's lawsuit against Edgewell and "raises the question of whether [she] was ever 'injured' at all." (Reply at 13 n.5.) At this stage of the proceedings, the Court will not assess the impact, if any, of Moran's other lawsuit on her claims here.

***8** In *Moore*, the plaintiff alleged that she was " 'an average consumer who is not sophisticated in the chemistry, manufacturing, and formulation of cosmetic products,' [and] would not be able to differentiate between cosmetic ingredients that are natural and those that are synthetic." *Id.* This Court followed the reasoning of a line of cases that rejected the argument that a plaintiff could avoid future deception by reviewing an ingredients list. *Id.* This Court also distinguished *Joslin v. Clif Bar & Co.*, a case in which it determined the plaintiff could discover whether the representation had been cured. No. 18-cv-4941-JSW, 2019 WL 5690632 (N.D. Cal. Aug. 26, 2019). In *Joslin*, the plaintiffs alleged the defendant's use of the term "white chocolate" on a product label was misleading because the product did not contain white chocolate. Although there were other reasons to conclude the plaintiffs in *Joslin* lacked standing, in *Moore*, this Court distinguished *Joslin* because "[w]hite chocolate is a single ingredient, the presence or absence of which would be easily identifiable on the list." *Moore*, 2021 WL 3524047, at *6 (citing *Joslin*, 2019 WL 5690632, at *3).

The Court concludes the facts in this case present a closer question than the factual situations presented in *Moore* or in *Joslin*. Here, Moran claims that the ingredients at issue actually cause harm, rather than alleging claims about their formulation as in *Moore, e.g.*, whether they are natural or synthetic. As was the case in *Joslin*, the "presence or absence" of those ingredients is identifiable from the list. However, Moran also alleges that she does not possess any specialized knowledge, skill, experience, or education in sun care products, ... and their ingredients or formulations." (FACC ¶ 8.) From those facts the Court concludes it is reasonable - and plausible - to infer she may not be able to determine whether the Bondi Sands Products are reef friendly when confronted with them in the future.

The Ninth Circuit has stated "[w]e do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging." *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 939-40 (9th Cir. 2008). The Court concludes that, based on the facts in this case, the Court concludes Moran's allegations are sufficient to plausibly *allege* she has standing to seek injunctive relief. *Cf.* *Prescott*, 2020 WL 4430958, at *7 ("[A]bsent an encyclopedic knowledge of sunscreen active ingredients, Plaintiffs may not be able to truly know whether a sunscreen is truly 'mineral-based.' ").

Accordingly, the Court DENIES Bondi Sands' motion to dismiss on this basis as well.

CONCLUSION

For the foregoing reasons, the Court GRANTS, IN PART, AND DENIES, IN PART Bondi Sands' motion to dismiss. As noted, the parties stipulated that Moran may file a Second Amended Complaint, and the Court has approved that stipulation. The Court shall not require Moran to file the proposed Second Amended Complaint until she determines whether she intends to amend her allegations regarding the claims for monetary injunctive relief. Accordingly, the Court GRANTS Moran until May 20, 2022, to file a second amended complaint, that shall include the amendments addressed in the stipulation and which may amend the allegations regarding equitable relief. Bondi Sands shall answer or otherwise respond by June 3, 2022, although the parties may stipulate to extend that deadline.

It is FURTHER ORDERED that the parties shall appear for a case management conference on June 24, 2022, and they

shall file a joint case management conference statement by June 17, 2022.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 1288984

Case #6131 (10/27/2017)
TOO FACED COSMETICS, LLC
Better Than Sex Mascara
Challenger: Benefit Cosmetics, LLC
Product Type: Cosmetics/Beauty Products/Toiletries
Issues: Performance Claims; Product Demonstration/Testing
Disposition: Modified/Discontinued

- **In a NAD proceeding, the advertiser has the initial burden of presenting a reasonable basis for its claims.**

- **"Before" and "after" photographs are product performance claims and, therefore, they must be supported by reliable evidence, and be accurate and representative of the level of product efficacy that a reasonable consumer can expect to achieve when using the product as directed.**

Basis of Inquiry: Claims made by Too Faced Cosmetics, LLC ("the advertiser" or "Too Faced") on product packaging and online advertising for its Better Than Sex ("BTS") original and waterproof mascara (together, "BTS Mascaras") were challenged by Benefit Cosmetics, LLC ("the challenger" or "Benefit"), maker of they're Real! mascara. The following are representative of the claims that served as the basis for NAD's inquiry:

Express Claims:

"1944% more volume!*"
"*results observed in a clinical study"

"Don't miss out on the mind-blowing mascara that gives your lashes 1,944% more volume."

"Too Faced Better Than Sex Waterproof Mascara is a sweat-proof, waterproof, play-proof mascara that gives you 1,944% more volume**."
"**Clinical study results"

"In a recent study of 40 lashes after 3 coats of Better Than Sex Mascara there was a 1,944% improvement in the appearance."

"1,944% increase in the appearance of lash volume*"
"*as observed in a study after applying three coats."

"This has got a claim on it that I have never in my life in my career heard any other mascara say…. This is a study of 40 women after 3 coats of Better Than Sex, that is the percentage, 1944% improvement in the appearance."

"1944% improvement in the appearance of your lashes, that's crazy, I've never seen that number, that statistic."

"[T]hat is the truth, it is 1944% it's crazy but it's true."

Challenger's Position:

I. Advertiser Exaggerates BTS Mascaras' Ability to Voluminize Eyelashes

Benefit challenged advertising by Too Faced, contending that the advertiser falsely claims on its product packaging, website, YouTube channel, and in an online Home Shopping Network (HSN) video, that using BTS Mascaras will result in "1,944% more volume." In addition, Benefit asserted that the advertiser's disclosures – "results observed in a clinical study" and "[c]linical study results" – are false.

The challenger also argued that the advertiser's laboratory test procedures and results, submitted in support of its 1,944% increase in volume claim, were overly redacted and prevented Benefit from assessing whether the tests were competent and reliable.[1] According to the challenger, the redacted submissions raised important methodological concerns regarding sample size, product application, and the reliability of the micrometer measurements in calculating lash volume. As a result, Benefit maintained that the "1,944% more volume" and "clinical study" claims were unsupported.

II. "Before" and "After" Comparative Demonstrations Misrepresent the Mascaras' Efficacy

The challenger asserted that Too-Faced's "before" and "after" demonstrations – which appear on the product packaging, YouTube and HSN videos and depict sparse and thin eyelashes being transformed into longer, defined and voluminous lashes – misrepresent BTS Mascaras' performance abilities. The challenger contended that visual product demonstrations in advertisements must be truthful and accurate and cannot be enhanced. The challenger further argued that "before" and "after" photographs constitute performance claims that create the consumer expectation that users can anticipate similar dramatic results.

Benefit also maintained that the advertiser's "before" and "after" demonstrations reasonably convey the message that BTS Mascaras provide a 1,944% increase in volume when only one coat is applied under real-world conditions. This is misleading because the "after" results cannot be achieved unless the consumer has used three coats of the product and the product is professionally applied. For these reasons, the challenger argued that the "after" photographs are "artificially enhanced" and do not fairly and accurately reflect the results consumers will typically experience when they use the product in their usual way. The challenger also noted that the absence of a clear and conspicuous disclosure regarding use of the professional make-up artist and three coats of mascara further rendered the advertising false and misleading.[2]

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[1] The advertiser's testing was submitted confidentially pursuant to Section 2.4(D) of *NAD/NARB Procedures*.

[2] Specifically, the challenger argued that the BTS "before" and "after" photographs used to illustrate the 1944% increase in volume claim do not clearly and conspicuously disclose that three coats of mascara were applied by a professional make-up artist. While the back of the BTS product packaging and website state that consumers should use three coats to achieve the most impressive results (e.g., "three coats and achieve the most intense black, oversized, multidimensional lashes possible!"; "three coats and you'll believe in magic!"), the challenger asserted that there is no indication this description relates to the advertiser's "1944% more volume" claim. Even if the language of the "disclosure" was somehow appropriate, the challenger argued that placing it on the back of the package does not meet the legal standard for a clear and prominent disclosure. Further, the challenger stated, nowhere on the package or website does it disclose that the appearance of the lashes in the "after" photograph is the result of the mascara being applied by a professional make-up artist.

For these reasons, the challenger maintained that the advertiser's "before" and "after" demonstrations should be permanently discontinued.

Advertiser's Position:

I. Permanently Discontinued Claims

Too Faced agreed to permanently discontinue the challenged HSN video as well as all references to the increase in volume claim being based on a "clinical study."

II. "1,944% More Volume" Claim is Properly Supported With Objective, Quantitative Test Results

Too Faced argued that independent laboratory testing supported its claim that using BTS Mascaras results in "1,944% more volume." In support of this claim, the advertiser submitted confidential testing to NAD.[3] According to the advertiser, an experienced, independent testing facility conducted volume testing on one tube of BTS original mascara and one tube of BTS waterproof mascara during 2013 and 2015, respectively. In both studies, human lashes were coated with three coats of BTS mascara and objective measurements using a digital caliper/micrometer were taken at baseline and after each successive coat. According to the test results, following each coating, the mean volume showed a statistically significant increase over the prior mean. After three coats of mascara, the mean lash volume increased 1,944%, as compared to the mean volume at baseline.

In response to Benefit's concerns that the laboratory testing was difficult to assess because it was overly redacted, Too Faced provided assurances that the product testing was reliable. For example, the advertiser explained that the BTS Mascaras were applied to the tested lashes by a trained evaluator with the wand provided with the product. While the total number of lashes tested was confidential, Too Faced maintained that there were more than enough lashes to ensure that the tests had sufficient power. The advertiser also cited to a chemistry textbook to demonstrate that digital micrometer measurements are reliable and appropriate for evaluating eyelashes because they measure objects with a high degree of accuracy and precision.[4] In addition, the advertiser noted that the FDA has identified calipers (another term for micrometers) as a "compass-like device intended for use in measuring the thickness or diameter of a part of the body or the distance between two body surfaces."[5] Thus, the advertiser argued, its laboratory testing was methodologically sound and more than adequately supported its "1,944% more volume" claim.

III. "Before" and "After" Demonstrations Properly Represent the Mascaras' Efficacy

[3] These tests were submitted confidentially pursuant to *NAD/NARB Procedures,* Section 2.4(D).
[4] Citing Daniel L. Reger et al., Chemistry: Principles and Practice, Section 1.3 at 11 (Cengage Learning 2010).
[5] Citing 21 CFR § 888.4150 - Calipers for clinical use.

Too Faced asserted that BTS Mascaras' "before" and "after" advertising images are properly supported. Specifically, the advertiser contended that the laboratory testing demonstrated that using three coats of BTS mascara generated a 1,944% average volume increase. Further, the advertiser noted that its 2013 consumer use study – in which respondents self-applied three coats of BTS original mascara once a day for one week at home and self-reported the results – also demonstrated that the majority of the subjects responded favorably to the mascaras' product performance.[6] Based on these studies, Too Faced argued its "before" and "after" images are clearly representative of the products' benefits.

Additionally, in support of the "before" and "after" images, the advertiser submitted an affidavit from Eric Hohl, President of Too Faced. The affidavit explained that the woman featured in the "before" and "after" photographs on the BTS waterproof product packaging was a Too Faced employee, that the waterproof mascara was applied by a professional makeup artist using the wand included with the product, and that the photographs were not artificially enhanced in any way (either digitally or through the use of lash inserts). Based on Mr. Hohl's understanding, the "before" and "after" photographs featured on the original BTS mascara packaging were also taken under similar circumstances.

The advertiser rejected Benefit's argument that the "before" and "after" images are not representative of typical consumer results because they were achieved with the help of a professional make-up artist. Too Faced argued that as long as there were no photographic enhancements or the use of artificial devices like lash inserts, using professional models and a stylist to create its mascara "before" and "after" beauty shots was not objectionable. Further, Too Faced asserted, consumers generally understand that advertisers normally use makeup artists in these types of photographs.

The advertiser also rejected Benefit's arguments that the BTS product packaging and website do not clearly and conspicuously disclose that the "after" images used to illustrate the "1944% more volume" claim are based on the application of three coats of mascara. Given the small size of its mascara packaging, the advertiser argued that its full description on the back of the product (i.e., "three coats and you've achieved the most intense, oversized, multidimensional lashes possible") is more likely to be read by consumers rather than a small footnote on the front panel. The website similarly states up front and above the 1,944% claim that three coats are recommended for optimal results (i.e., "Three coats and you'll be in magic."). Finally, the advertiser maintained that the typical application of mascara involves multiple coats on lashes, as opposed to a single swipe of mascara. Thus, consumers would not have been misled even if there had been no statement on the BTS package as to the recommended number of coats.

Decision:

The parties are manufacturers of competing brands of high-end mascaras that are sold at specialty retail markets, such as Sephora and Ulta Beauty. At issue here is the truthfulness of Too Faced's claim that consumers will achieve "1,944% more volume" when they use Better Than

[6] The advertiser's consumer use study was also submitted to NAD confidentially pursuant to *NAD/NARB Procedures*, Section 2.4(D).

Sex ("BTS") original and waterproof mascara products (together, "BTS Mascaras"). Also in dispute is whether the advertiser's "before" and "after" depictions are truthful and accurate representations of the products' performance.

I. Permanently Discontinued Claims

As an initial matter, the advertiser represented in writing that it elected to permanently discontinue the online HSN videos, which made the following challenged claims:

> "In a recent study of 40 lashes after 3 coats of Better Than Sex Mascara there was a 1,944% improvement in the appearance."; "1,944% increase in the appearance of lash volume" "*as observed in a study after applying three coats."; "This has got a claim on it that I have never in my life in my career heard any other mascara say… This is a study of 40 women after 3 coats of Better Than Sex, that is the percentage, 1944% improvement in the appearance."; "1944% improvement in the appearance of your lashes, that's crazy, I've never seen that number, that statistic."; and, "that is the truth, it is 1944% it's crazy but it's true."

The advertiser also advised NAD in writing that it agreed to permanently discontinue all references to the increased volume claim being based on a "clinical study" (i.e., "results observed in a clinical study" and "Clinical study results"). In reliance on the advertiser's representation that the claims above have been permanently discontinued, NAD did not review the claims on their merits. The voluntarily discontinued claims will be treated, for compliance purposes, as though NAD recommended their discontinuance and the advertiser agreed to comply.

II. The Advertiser's "1,944% More Volume" Claim

In a NAD proceeding, the advertiser has the initial burden of presenting a reasonable basis for its claims.[7] If NAD finds that an advertiser has provided a reasonable basis for its claims, the burden shifts to the challenger to show either that the advertiser's evidence is fatally flawed or that the challenger possesses stronger, more persuasive evidence reaching a different result.[8] Employing these standards, NAD first reviewed the evidence submitted by the advertiser.

In support of its "1,944% more volume" claim, the advertiser submitted *in vitro* testing of both the original and waterproof mascara products. In these studies, a trained evaluator used a digital micrometer to measure the mean length and width of human eye lashes at baseline and after each successive application of the BTS Mascaras. Based on these measurements, a volume score was calculated. The results revealed statistically significant lash volume increases following each application of BTS mascara, with a mean lash volume increase of 1,944% after the third coat of mascara.

[7] See e.g., Walker & Company Brands, Inc. (Bevel Shaving System), Report #5964, *NAD/CARU Case Reports* (June 2016).
[8] Id.

Notably, the advertiser's *in vitro* testing was designated "confidential" pursuant to Section 2.4(D) of *NAD/NARB's Procedures*. Though the *Procedures* require advertisers to provide a "*comprehensive* summary of the proprietary information and data (including as much non-confidential information as possible about the methodology employed and the results obtained)" (emphasis added), the advertiser here provided the challenger with minimal information concerning the test methodology and results. While NAD understands that advertisers can be disadvantaged if competitors have access to proprietary or highly sensitive material, NAD is at a distinct disadvantage when the challenger is unable to review and critique the methodology and results of the tests at issue.[9] Although NAD routinely analyzes technical and scientific materials submitted in confidence, the analysis of evidence by experts on both sides remains an important aspect of the fairness and integrity of the self-regulatory process. Absent that opportunity, NAD was limited in its ability to rely, with confidence, on the evidence submitted.[10]

In addition to confidentiality concerns, NAD was troubled by the advertiser's test methodology. For example, there was limited evidence in the record concerning whether a micrometer, defined by Oxford Dictionaries as a "gauge that measures small distances or thickness between its two faces, one of which can be moved away from or towards the other by turning a screw with a fine thread,"[11] is an accepted and recognized tool to measure eye lash volume. While the advertiser argued that digital micrometers are appropriate for taking such measurements, it cited to several pieces of evidence that NAD found to be unpersuasive. First, the advertiser referred to a chemistry text book, which depicted a digital micrometer measuring a rigid, metal elbow pipe that appeared to be at least an inch wide. The caption next to the photograph reads: "A digital micrometer can measure dimensions of items several centimeters long with high accuracy and precision."[12] While a tool that accurately measures objects that are "several centimeters long" is certainly valuable, this evidence does not clearly establish that micrometers are a reliable tool for assessing the length and width of eyelashes, which are measured in millimeters. The advertiser also cited to a FDA regulation in support of its claims that calipers (another term for micrometers) are appropriate to measure lash volume. The regulation states:

> A caliper for clinical use is a compass-like device intended for use in measuring the thickness or diameter of a part of the body or the distance between two body surfaces, such as for measuring an excised skeletal specimen to determine the proper replacement size of a prosthesis.[13]

Like the elbow pipe depicted in the textbook, this particular definition provides an example of a caliper/micrometer taking a measurement of a skeletal specimen, which seems to have little in common with the thinness and flexibility of a single eyelash. In further support of its decision to

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[9] See Meridian Animal Health (NurtureCalm24/7 Pet Collars), Report #5239, *NAD/CARU Case Reports* (October 2010). See also The Procter & Gamble Company (Swiffer Dust & Shine Furniture Spray), Report #4960 *NAD/CARU Case Reports* (January 2009); Reckitt Benckiser, Inc. (Electrasol 2-in-1 Powerball Tabs, Electrasol 2-in-1 Gelpacs , Electrasol Advanced Powder, Electrasol Advanced Gel, Electrasol Dual Action Tabs); Report #4765, *NAD/CARU Case Reports* (December 2007).

[10] Id.

[11] See https://en.oxforddictionaries.com/definition/micrometer (last visited 10/17/2017).

[12] Daniel L. Reger et al., Chemistry: Principles and Practice, supra n. 4.

[13] 21 CFR 888.4150, supra n. 5.

use a micrometer, the advertiser explained that the laboratory's standard practice is to use a micrometer when measuring eyelashes. While a single testing facility might very well use a micrometer to measure lash volume, NAD noted that such evidence is inadequate to establish that the tool is generally accepted in the cosmetic industry and an appropriate device for this particular purpose.[14]

NAD was also concerned about the consumer relevance of the test methodology and results. NAD observed that the advertiser relied on *in vitro* laboratory tests rather than evaluating the BTS Mascaras on the human eye and its attendant lashes. Though NAD cannot discuss the confidential methodology in detail, NAD found the manner in which the tested lashes were arranged, prior to trained evaluator's application of the mascaras, lacked consumer relevance. Moreover, NAD questioned the sufficiency of the number of lashes tested. The advertiser stated that it had assessed "more than enough lashes to ensure that the tests had sufficient power" and that the statistical significance of its results demonstrated that a sufficient number of lashes were tested. On this point NAD noted that an insufficient sample size can, in fact, lead to statistically significant results that are unreliable and difficult to generalize to a broader population. Further, NAD noted that when it attempted to confirm the advertiser's "1,944% more volume" calculation using the confidential formula provided in the study, NAD could not duplicate the results. The advertiser informed NAD that a different type of analysis was required to compute the claimed volume increase. This analysis, however, was not mentioned in the submissions or otherwise provided to NAD, making it even more difficult to assess whether the advertiser's laboratory testing was sufficiently reliable to support the challenged volume claim. Regardless, even if the advertiser's sample size was appropriate and the volume calculations could be independently verified, NAD noted that a statistically significant but consumer irrelevant test is inadequate to substantiate the advertiser's volume claims.

Ultimately, NAD's concerns with the advertiser's laboratory test methodology, combined with the challenger's limited ability to review and critique the advertiser's confidential testing, led NAD to conclude that the testing was insufficiently reliable to support the challenged claim. Consequently, NAD found there was no reasonable basis to support the "1,944% more volume" claim and recommended the claim be discontinued.

III. The Advertiser's "Before" and "After" Depictions

NAD next considered whether the advertiser's product depictions were properly supported. The challenged product packaging displays two photographs, labeled "Before" and "After," which are located directly beneath the "1,944% more volume" claim. The "Before" photograph depicts a woman's short, sparse eyelashes devoid of any mascara; the "After" photograph shows dramatically transformed lashes that appear lengthier, well-defined, and much more voluminous.

[14] Notably, two prior NAD mascara cases in which the volume claims were found to be substantiated, the advertisers used laboratory imaging, not digital micrometers, to measure lash volume. See The Procter & Gamble Company (COVERGIRL Clump Crusher Mascara), Case #5635, *NAD/CARU Case Reports* (September 2013) and L'Oréal U.S.A., Inc. (Maybelline Volum' Express The Rocket Mascara and L'Oréal Paris Telescopic Shocking Extensions Mascara), Case #5628, *NAD/CARU Case Reports* (September 2013).

Likewise, during the YouTube advertisements, spokespeople are depicted with BTS mascara applied to one set of eyelashes while their other lashes are conspicuously sparse and bare.

It is well-established that "before" and" after" images are performance claims that must be supported, accurate and representative of the level of product efficacy that a reasonable consumer can expect to achieve.[15] As discussed more fully above, NAD was concerned with the reliability of the advertiser's product performance testing, specifically that its *in vitro* testing did not demonstrate the performance consumers could typically expect to achieve when applying BTS Mascaras to their own lashes. NAD was also concerned that the advertiser's consumer use study – which relied on women to subjectively rate various aspects of BTS original mascara's product performance at home during a one week period – did not reliably establish that the "before" and "after" images are depictions of typical consumer results.[16] Moreover, with respect to the affidavit from the company's president attesting to the truthfulness and accuracy of the "before" and "after" photographs, NAD determined that an affidavit is generally not considered to be "proof" of product performance.[17] NAD further noted that the advertiser's "before" and "after" images reasonably convey a message that consumers using the product will achieve similar eyelash volume when they apply the product according to its use instructions.[18] Without reliable evidence in the record demonstrating the volume consumers can expect to achieve when applying BTS Mascaras, NAD concluded that the performance message conveyed by the advertiser's "before" and "after" images was not supported.

NAD observed that the parties also disputed whether the advertiser's "before" and "after" depictions were false because the use of a professional stylist and three coats of mascara are not reflective of typical consumer results. These issues are essentially moot given NAD's concerns about reliability of the advertiser's support for its "before" and "after" performance claims. However, for guidance purposes, NAD has recognized that consumers reasonably expect products to be styled in a manner to optimize their appeal.[19] Neither the use of a professional make-up artist to style lashes nor the application of three coats of mascara are precluded – provided that the depicted images are representative of the results consumers can typically achieve (as supported by reliable performance testing) and the product is applied consistent with its use instructions.

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[15] Ontel Products Corp. (Pink Armor Nail Gel), Report #5701, *NAD/CARU Case Reports* (March 2014); Lifestyle Lift Holdings, Inc. (Lifestyle Lift), Report #4654, *NAD/CARU Case Reports* (April 2007).

[16] NAD also had methodological concerns about the advertiser's confidential consumer use study, including, the sample size tested and the mascara application instructions. Additionally, the subjects' responses were aggregated in manner that made it difficult to assess the reliability of the reported results.

[17] See Ontel Products Corp. (Pink Armor Nail Gel), Report # 5701, supra n. 15 (finding "affidavit is not proof of what consumers can typically expect to achieve when using the product according to its use instructions").

[18] See L'Oréal U.S.A., Inc. (Maybelline Volum' Express The Rocket Mascara and L'Oréal Paris Telescopic Shocking Extensions Mascara), supra n. 14, NARB Panel #189 (January 2014) (finding that advertising using a mascara photograph conveys a message about the degree to which the advertised mascara increases eyelash volume and "reasonably conveys the message that consumers using the advertised mascara will achieve similar eyelash volume/thickness.")

[19] See e.g., Kimberly-Clark Worldwide, Inc. (Depend Incontinence Underwear), Report #6100, *NAD/CARU Case Reports* (July 2017); L'Oréal U.S.A., Inc. (Maybelline Volum' Express The Rocket Mascara and L'Oréal Paris Telescopic Shocking Extensions Mascara), Report #5628, supra n.14.

For all of the foregoing reasons, NAD recommended that the advertiser discontinue its "before" and "after" images.

Conclusion:

NAD recommended that the advertiser discontinue its "1,944% more volume" claim and also recommended that the advertiser discontinue its "before" and "after" images.

Advertiser's Statement:

Too Faced Cosmetics believes that NAD reached the wrong results in concluding that Too Faced should discontinue its 1,944 percent more-volume claim and its Before-and-After photographs, and designates both of these issues for NARB review on appeal. First, NAD misapplied the long-standing principle that advertising claims need only be supported with a reasonable basis. As the tests at issue were conducted using a sound methodology by a well-known, highly-regarded independent laboratory, and the results were documented in comprehensive reports, NAD should have found that Too Faced had a reasonable basis for the 1,944 percent more-volume claim, and further that the same test results provided proper support for the Before-and-After photographs at issue. On the latter issue, NAD also incorrectly rejected the results of sensory testing establishing that the Before-and-After photos depicted typical consumer results. Finally, Too Faced is concerned with NAD's conclusions based on Too Faced's reliance on its right under Section 2.4(D) of NAD/NARB's Procedures to designate proprietary information as confidential. Such protections for the advertiser are particularly important when, as here, the challenger is a principal competitor who did not submit or rely on any of its own testing or third-party testing on the products at issue. **(#6131 RL, closed 10/27/2017)**

Case #7132 (03/01/2024)
Amyris Clean Beauty, Inc.
Advertising for Biossance
Challenger: *National Advertising Division*
Product Type: *Cosmetics / Beauty Products / Toiletries*
Issues: *Express Claims; Ingredient / Content/Nutrition; Product Performance*
Disposition: *Substantiated In Part/Modified-Discontinued In Part*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

NATIONAL ADVERTISING DIVISION,
Challenger,

AMYRIS CLEAN BEAUTY, INC.,
Advertiser.

Case No. 7132
Closed 03/01/2024

FINAL DECISION

- **"Clean" claims are ubiquitous in the beauty industry. As with "natural" claims, "clean" is undefined. In the absence of a definition, NAD considers the context in which the product is marketed to determine consumer takeaway.**

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger National Advertising Division ("NAD" or "Challenger") challenged express and implied claims made by Advertiser Amyris Clean Beauty, Inc. ("Amyris" or "Advertiser") for its Advertising for Bioscience. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims[1]

[1] During the inquiry, the Advertiser advised NAD it has discontinued the sale of its Squalane + Elderberry Jelly Cleanser product and all claims in connection with the product. NAD identified the claim "….it erases makeup, daily impurities while nourishing your microbiome" as part of its inquiry. In reliance on the advertiser's representation that these claims had been permanently discontinued and that the product is no longer being sold, NAD did not review these claims on their merits. The voluntarily discontinued claims will be treated, for compliance purposes, as though NAD recommended their discontinuance and the advertiser agreed to comply.

- "Clean ingredients and clean formulas – we ban over 2000 ingredients that are known to be toxic to you and the environment. All of our ingredients are also ethically and sustainably sourced."

- "Our 100% sugarcane derived squalane is ethically and sustainably sourced, keeping 2 million sharks every year safe from liver harvesting."

- "Did you know our squalane is sugar-cane derived and it's a hero ingredient in *every* Biossance formula? This miracle multitasker locks in weightless moisture, calms and protects, and improves elasticity."

II. Evidence Presented

The Advertiser provided the following evidence in support of its claims:

- A certification from Bonsucro, the leading global sustainability platform for sugarcane, verifying that the sugarcane it uses is sustainably harvested and processed.
- A third-party report from the Bloom Association, a non-profit organization advocating for marine environment and species preservation.
- Its Environmental, Social and Governance ("ESG") Report for 2021 explaining its practices to, among other things, engage in sustainable business through the choice of ingredients that are not allowed in its products as well as its sourcing of squalane not derived from shark livers.
- Its Supplier Code of Conduct outlining its requirements for its contract manufacturers and suppliers to operate in accordance with all applicable human rights laws and regulations and practice environmental sustainability.
- Statements by regulatory bodies, laws, trade associations and non-profit organizations concerning substances deemed toxic to human health and/or the environment– specifically, (1) the European Union (EU)'s Cosmetics Regulation 1223/2009 which regulates the manufacture and sale of cosmetics products in the EU (and Annex II which lists 1611 ingredients prohibited in the manufacture of cosmetics products)[2]; (2) the European Chemicals Agency ("ECHA"), which implements EU chemicals legislation (including Registration, Evaluation, Authorisation and Restriction of Chemicals [REACH] which establishes procedures for collecting and assessing information on the properties and hazards of substances and requires companies to register substances[3]); (c) the U.S. Food and Drug Administration ("FDA")'s ban of ten or more ingredients in cosmetics products; (d) the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the International Union for Conservation of Nature's Red List; (e) the Environmental Working Group ("EWG")'s Advertiser's "Unacceptable List" of ingredients (which includes prohibited ingredients referenced by the EU's Cosmetics Regulation, FDA as well other countries [e.g., Canada] and associations [e.g., Association of Southeast Asian Nations' Cosmetics Association])[4]; (f) the Advertiser's curated blacklist of ingredients which includes ingredients

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02009R1223-20190813

[3] https://echa.europa.eu/regulations/reach/understanding-reach.

[4] Additionally, the Advertiser relied on its products being "verified" by the Environmental Working Group ("EWG"), a non-partisan, non-profit organization that specializing in research and advocacy in the areas of, among other things, toxic chemicals, drinking water pollutants, and corporate accountability. According to the

referenced in the aforementioned regulations, convention, regulatory agencies, and EWG as well as other regulations (e.g., EU's Food Allergen's Directive, regulatory agencies [e.g., Health Canada], and state laws [e.g., California's Prop 65 which requires businesses to provide warnings to Californians about significant exposures to chemicals that cause cancer, birth defects or other reproductive harm], (g) its 2021 ESG Report in which it defines "clean chemistry."

- Three clinical studies[5] assessing the moisturization and skin protection capabilities of squalane in the amount found in Biossance products standing alone or in a cream containing squalane oil by preventing transepidermal water loss ("TEWL").[6]
- An article discussing that washout periods are not needed in clinical trials of topical agents.

III. Decision

A. Background

Amyris is a synthetic biotechnology company that researches, develops and manufactures consumer products and ingredients. Amyris's parent company and Nikkol Group formed a joint venture company that markets and sells sugarcane-derived squalene branded as Neossance. Under the Biossance brand, Amyris creates and markets cosmetic products that feature Neossance squalane. Squalane derives from shark livers, olives or sugarcane.

B. Standard of Review

Advertisers must possess a "reasonable basis" for claims disseminated in advertising.[7] What constitutes a "reasonable basis" depends on several factors, including the type of product, the type of claim, the consumer benefit from a truthful claim, the ease of developing substantiation for the claim, the consequences of a false claim, and the amount of substantiation experts in the field believe is reasonable.[8]

While advertisers can tout the inclusion of certain ingredients in their products, they should avoid tying the ingredients to specific performance benefits in the absence of reliable evidence demonstrating that the ingredient provides the stated benefit.[9]

Advertiser, the "EWG-verified" mark can be used only if a product does not contain ingredients that are on the EWG's "Unacceptable List" of ingredients that may pose human health and environmental risks.

[5] Dermscan Poland Study; AMA Laboratories Study; and EvaluLab Study.

[6] The Advertiser referred to studies in connection with claims to a product that was discontinued during the course of the inquiry. Accordingly, NAD did not review the claims in connection with the product or the substantiation submitted in support of the claims.

[7] *Guardian Technologies, LLC (GermGuardian and PureGuardian Air Purifiers and Replacement Filters)*, Report #6319, NAD/CARU Case Reports (November 2019).

[8] *Pfizer Inc.*, 81 F.T.C. 23 (1972). *See also* FTC, *Policy Statement Regarding Advertising Substantiation* (Nov. 23, 1984), https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation.

[9] *Vogue International, Inc. (OGX Shampoos and Conditioners)*, Report #5844, NAD/CARU Case Reports (May 2015).

C. Analysis

1. Clean and sourcing claims

A. "Clean ingredients and clean formulas – we ban over 2000 ingredients that are known to be toxic to you and the environment.

It is well-established that an advertiser is responsible for all reasonable interpretations of its claims, not simply the messages it intended to convey.[10] In the absence of reliable consumer perception evidence, NAD steps into the shoes of the consumer and uses its expertise to evaluate the messages reasonably conveyed.

"Clean" is an undefined term widely used in many different product categories. The context in which "clean" claims are made dictates their meaning. Consequently, "clean" claims should be qualified to make clear the intended takeaway.[11] This is especially important in light of numerous class action lawsuits filed against beauty companies for touting their "clean" products while marketing products which contain, for example, per- and polyfluoroalkyl substances – known as PFAs.

The challenged claim appeared on the Biossance Sustainability webpage which describes its initiatives including its use of sugarcane-derived squalane. The basis of the qualified clean claim—which refers to the ingredients and formula—is the absence of "over 2000 ingredients that are known to be toxic to you and the environment."

In support of its qualified clean claim the Advertiser referred to statements by regulatory bodies, countries and trade associations concerning substances deemed toxic to human health and/or the

[10] *Implus, LLC (Airplus Shoe Insoles),* Report #6161, NAD/CARU Case Reports (Feb. 2018).

[11] NAD was informed by its review of natural claims where it has recommended that express or implied "natural" and related claims be qualified, e.g., to specify that the product contains natural ingredients and the percentage contained therein. *See The Procter & Gamble Company (Tide purclean Laundry Detergent)*, Report #6392, NAD/CARU Case Reports (July 2020) (recommending that the advertiser (1) use clear and conspicuous qualifying language that conveys the limitations of its plant-based claim, namely, that the product is "75% plant-based" instead of "plant-based"; (2) modify the claim that the "powerful plant-based clean you can feel good about" to avoid the implication that the product is 100% plant-based or that the "powerful cleaning power" is derived solely from plant-based ingredients); *See also, Church & Dwight Co., Inc. (Arm & Hammer® Essentials Liquid Laundry Detergent)*, Report #4848, NAD/CARU Case Reports (May 2008) (determining, in relevant part, that although the advertiser provided a reasonable basis for its claim "Harnessing the Power of Nature" claim because the surfactants are made from plants and the surfactants in the final product are nearly 35 percent plant-based. Standing alone, the phrase "harnessing the power of nature" was unlikely to give rise to the impression that the product as a whole (or all of its surfactants) is 100 percent natural. However, in using this claim, NAD cautioned the advertiser to avoid juxtaposing the claim with elements (claims and/or visuals) that may give rise to an unsupported message that the product is natural, in whole or in substantial part).

NAD has previously considered cases involving "natural" claims where a product's ingredients were derived from nature but were chemically processed to make the final product. *See Dr. Squatch, LLC (Jukebox Soap)*, Report #7195, NAD/CARU Case Reports (Aug. 2023); *The Colgate Palmolive Company Tom's of Maine "Naturally Dry" Antiperspirant*, Report #6001, NAD/CARU Case Reports (Sept. 2016), *citing Procter & Gamble (Olean Fat Substitute)*, Report #3499, NAD Case Reports (October 1998) (determining that a natural claim was unsupported because although Olean may start off with soybean oil and sugar, the oil molecules and the sugar molecules are chemically broken apart and then recombined to form a new molecule not found in nature).

environment as mentioned above, including, in relevant part, the EU (Annex II of the EU's Cosmetics Regulation 1223/2009 which lists 1611 ingredients prohibited in the manufacture of cosmetics products; the ECHA which implements EU chemicals legislation), the FDA's ban of ten or more ingredients in cosmetics products; and the EWG's "Unacceptable List" of ingredients.

The Advertiser avoids using ingredients in its products that it and other third-parties consider harmful to human health and/or the environment. The claim that a product is "clean" can be qualified to define the reason that the product is "clean." Here, the claim explains what makes the product "clean" – "we ban over 2000 ingredients that are known to be toxic to you and the environment."

Although the Advertiser provided many sources for its banned ingredients, the prohibited ingredient lists on which it relies overlap – for example, the Advertiser's own blacklist of ingredients and the EWG's Unacceptable List of ingredients include the same ingredients in, for example, Annex II of the EU's Cosmetics Regulation.

The Advertiser also cited to other sources and specific numbers of ingredients banned by each – for example, over 600 prohibited ingredients by the ECHA and 40 ingredients banned by the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the International Union for Conservation of Nature's Red List. However, the ECHA does not refer to a separate list of over 600 prohibited ingredients but, rather, implements existing legislation such as the Cosmetics Regulation. The Convention on International Trade in Endangered Species of Wild Fauna and Flora and the International Union for Conservation of Nature's Red List concern the end uses of some of the species which may be used in commercial products, including cosmetics, but they do not directly relate to prohibited *ingredients*.[12] Consequently, these sources do not support the challenged claim.

There is also no information in the record as to which of these ingredients that are on the banned lists are typically used as cosmetic ingredients. According to the Personal Care Products Council, the leading trade association for the personal care product industry, over 80 percent of the ingredients listed in Annex II of the EU's Cosmetics Regulation have not been used and never would be used as a cosmetics ingredient.[13] The FTC's Green Guides advise that a truthful claim that a product, package, or service is free of, or does not contain or use, a substance may nevertheless be deceptive if the substance has not been associated with the product category.[14] Similarly here, it is not clear whether the over 2000 ingredients the Advertiser does not use in its products are associated with cosmetics products.

For all the foregoing reasons, NAD recommended that the claim "Clean ingredients and clean formulas – we ban over 2000 ingredients that are known to be toxic to you and the environment" be modified to reflect the ingredients banned that are typically used in cosmetics products.

B. "Our 100% sugarcane derived squalane is ethically and sustainably sourced, keeping 2 million sharks every year safe from liver harvesting"; "All of our ingredients are also ethically and sustainably sourced."

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[12] E.g., The Convention on International Trade in Endangered Species of Wild Fauna and Flora and the International Union for Conservation of Nature's Red List focus on lists of threatened flora and fauna species.

[13] https://www.personalcarecouncil.org/u-s-and-eu-cosmetics-regulation/.

[14] 16 C.F.R. 260.9(b)(2).

1. Keeping 2 million sharks safe each year from liver harvesting

The Advertiser uses sugarcane-derived squalane, the key ingredient in its products. Squalane has historically been derived from shark liver.

In support of its claim that its sugarcane derived squalene saves 2 million sharks, the Advertiser relied on a third-party report from the Bloom Association. The Bloom Report explains that much is unknown about the shark liver oil market because there is no standard code specifically designating the product and countries do not share this information with the Food and Agriculture Organization of the United Nations. The Bloom Report further explains that the same problem applies for international squalene and squalane trade where the market volumes are also unknown.

Despite the unknowns noted above, the Bloom Report noted that over 3 million sharks were estimated to be killed in 2012 to harvest the estimated global demand of 2,000-2,200 tons of shark liver oil in 2012 with approximately 90 percent of it used to make squalane for the cosmetics industry. Publicly available data confirms the figure in the challenged claim and that only estimates are possible.[15] Based on these estimates, approximately 1,363 sharks were killed per ton of squalane created. The Advertiser based its claim of 2 million sharks saved on the amount of sharks needed to produce a ton of squalane as cited in the Bloom Report and the 1900 tons of squalane it used in its products in 2021.

The calculation of the number of sharks saved is based on an estimated number of sharks killed in 2012 and an estimate as to the global demand for shark liver oil at one point in time - 2012.[16] Absent more certainty as to the number of sharks killed and the amount of shark liver oil used by the cosmetics industry, there is no reliable figure as to the amount of sharks saved to support the claim at issue. Consequently, NAD determined that the estimates provided in the Bloom Report do not support the Advertiser's claim that it is "keeping 2 million sharks every year safe from liver harvesting." NAD recommended that the claim be discontinued or modified to avoid referring to a numerical figure. Nothing in the decision prevents the Advertiser from making a more general claim that sharks are not harvested for squalane found in Biossance products.

2. Ingredient sourcing

NAD next examined the claim "Our 100% sugarcane derived squalane is ethically and sustainably sourced." To support this claim, the Advertiser relied on the Bonsucro certification for 2022. Bonsucro, a non-profit member-based organization whose members include major multinational corporations, requires adherence to various criteria and indicators relating to sustainable farming and milling and

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[15] *See* Catherine Macdonald, Joshua Soll, *Shark conservation risks associated with the use of shark liver oil in SARS-CoV-2 vaccine development,* at https://www.biorxiv.org/content/10.1101/2020.10.14.338053v1.full#ref-55 ("Moderate assumptions about oil yield suggest the range of individual animals in the reported global liver oil trade in 2018 falls between 694,848 (large sharks) and 16.35 million (small sharks), with *1.8 million (based on a 20.8 kg median unidentified shark weight; Worm et al. 2013) as the best supported rough estimate.*") (emphasis added)

[16] *Cf. Everlane, Inc. (Everlane ReNew Clothing)*, Report #7019, NAD/CARU Case Reports (Oct. 2021) (determining that the claim "To date, we have recycled over nine million plastic bottles" was supported based on Everlane's calculation of the total number of recycled bottles since 2018 is tied to how it calculates the number of recycled bottles in a garment and the number of garments Everlane has produced since 2018).

is a leading global sustainability platform setting standards for sugarcane. This Bonsucro certification is based on the Bonsucro Product Standard 5.1 which complies with the Standard Setting Code of the ISEAL Alliance, an international nonprofit organization that codifies best practices for the design and implementation of social and environmental standards systems based on various well-recognized international standards such as the International Organization of Standardization Standard. The Bonsucro Production Standard incorporates standards including assessment of environmental, social and human rights risks, labor rights and occupational risks and production and processes focused on enhancing sustainability. Bonsucro principles also align with international industry standards, including, for example, the UN's International Bill of Human Rights and the International Labor Organization's Declaration of Fundamental Principles and Rights at Work.

The Bonsucro Production Standard applies worldwide to any sugarcane mill and their supplying area wishing to sell sugarcane derived products as Bonsucro certified and make related claims. The Bonsucro Production Standard evaluates the outcome of practices implemented at mill and farm (also referred to as agriculture) levels. The certification is awarded based on an assessment of each step in the sugarcane's chain of custody in the production process (acquisition of certified products, receiving, storage, handling, operational processes, and final product).

NAD determined that the Bonsucro certifications provides a reasonable basis for the claim "Our 100% sugarcane derived squalane is ethically and sustainably sourced."

Next, NAD examined the support for the claim "All of our ingredients are also ethically and sustainably sourced."[17] The Advertiser relied on its Supplier Code of Conduct which requires all of its suppliers to assure that, among other things, they engage in ethical practices (including labor practices) and that they source their ingredients in a way that minimizes deleterious impacts to the environment.[18]

NAD has found that supplier codes of conduct can support aspirational claims. In the *Chipotle* case, Chipotle referred to its Supplier Code of Conduct as evidence that reducing its carbon emissions is a focus of its sustainability efforts and that those efforts are growing and evolving, an aspirational claim.[19] In other cases, NAD has found that adherence to an international standard, which had stringent rules for, among other things, third-party certification of chain of custody (or traceability) of recycled materials, content claims, social and environmental production practices, and chemical restrictions across manufacturing processes was sufficient to support a qualified environmental benefit claim.[20]

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[17] These claims appear as part of other claims: "Clean ingredients and clean formulas – we ban over 2000 ingredients that are known to be toxic to you and the environment. All of our ingredients are also ethically and sustainably sourced"; "Our 100% sugarcane derived squalane is ethically and sustainably sourced, keeping 2 million sharks every year safe from liver harvesting."

[18] The Advertiser also notes that it reserves the right to conduct audits to ensure that its suppliers adhere to its code of conduct, noting its 2021 audit eliciting no reported violations and that it will conduct an audit of its suppliers in 2023.

[19] *Chipotle Mexican Grill, Inc. (Advertising by Chipotle Mexican Grill)*, Report #7020, NAD/CARU Case Reports (Feb. 2022).

[20] *Everlane, Inc. (Everlane ReNew Clothing)*, Report #7019, NAD/CARU Case Reports (Oct. 2021) ("No New Plastic: There are already over 8 billion tons of plastic on our Planet—and they're not going away. So in 2018 we set out to remove virgin plastic from our entire supply chain by 2021").

Here, the Supplier Code of Conduct is referenced as support for a broad, unqualified claim that *all* of the ingredients in the product *are* ethically and sustainably sourced. While the Supplier Code of Conduct might demonstrate the Advertiser's commitment to ensuring that ingredients are ethically and sustainably sourced, it does not, standing alone, demonstrate that all ingredients are, in fact, ethically and sustainable sourced. Consequently, NAD recommended that the claim "All of our ingredients are also ethically and sustainably sourced" be discontinued or modified to better fit the evidence in the record.

2. Efficacy Claim

NAD next examined Advertiser's support for the claim "Did you know our squalane is sugar-cane derived and it's a hero ingredient in *every* Biossance formula? This miracle multitasker locks in weightless moisture, calms and protects, and improves elasticity." The Advertiser relied upon three studies – Dermscan, AMA, EvaluLab – which assessed the impact of squalane, in the form and range of the amount found in the Biossance products, on these objectively measurable attributes.[21]

While advertisers can tout the inclusion of certain ingredients in their products, they should avoid tying the ingredients to specific performance benefits in the absence of reliable evidence demonstrating that the ingredient provides the stated benefit.[22]

a. Locks in moisture, protects

All three studies conducted a TEWL assessment, a well-established method to assess a product or ingredient's moisturization capabilities, on skin.[23] According to the Advertiser, the reference to "protects" also speaks to skin hydration. A decrease in TEWL indicates increased skin hydration.

Dermscan Study

Conducted in Poland in 2017, The Dermscan Study was blinded and assessed Biossance 100% Squalane Oil on forearms of 30 females with fair-medium tone skin ages 18-65 most of whom had normal skin. The subjects underwent a one-day washout period. One day prior to the study the subjects' arms were divided into four zones—one zone was UV irradiated to determine a Minimal Erythema Dose (i.e., the minimum dose or shortest time when erythema becomes visible after irradiation). The three other zones on the forearm were divided into two "test" sites, one irradiated and one not and one site which was not treated or irradiated. At the start of the study, the squalane was applied to the two test sites and participants were instructed to not apply any product to their forearms with the exception of their normal morning wash. The subjects returned to the test facility for TEWL readings using a Tewameter at 24, 32 and 48 hours after subjects were acclimated in a humidity-controlled room prior to testing.

Compared to the non-treated non- irradiated zones, the treated irradiated zone had an average of 11% less TEWL at 32 hours and 8% at 48 hours, both of which are statistically significant results.

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[21] All Biossance creams contain between 5% and 10% squalane.

[22] *Vogue International, Inc. (OGX Shampoos and Conditioners)*, Report #5844, NAD/CARU Case Reports (May 2015).

[23] *The Procter and Gamble Company (Olay Body Wash)*, Report #7013, NAD/CARU Case Reports (March 2022).

AMA Study

The AMA Study was a four-week, randomized, double-blind study of 30 women ages 35-60 that tested the effectiveness of a cream formulated with 5% squalane against a placebo cream identical in all respects except it did not contain squalane.[24] The study also had a 72-hour washout period. Researchers instructed participants to apply the product two times per day to the whole face and neck area. Once a week the subjects went to the study site underwent TEWL measurements using an evaporimeter after acclimatization. The results showed statistically significant improvements in moisturization at weeks 3 and 4 for the test product versus placebo.[25]

EvaluLab Study

This two-week blinded study of 21 male and female participants ages 19-72 with normal, dry or acne-prone skin consisted of a one-week washout period.[26] The subjects were asked to apply the squalane oil every morning and night to their faces and did not use any other moisturizers or skincare (besides facial cleanser as needed). The subjects were acclimated in a humidity-controlled room prior to testing. Researchers measured TEWL via a Tewameter at baseline, one hour after the first application of the product, and at one and two weeks. There was a statistically significant decrease in TEWL at all time points.

Based on the totality of the evidence, NAD determined that portion of the claim that refers to squalane "lock[ing] in weightless moisture…and protects" was supported. All of the studies used an industry-accepted measurement to assess skin hydration. The Dermscan and AMA studies had 24- and 72-hour washout periods, respectively, Washout periods reduce the potential for confounding factors so that the benefits of the tested product can be attributed to the product. While the washout periods in these studies are shorter compared to the one-week or longer periods in other cosmetics and personal case cases,[27] NAD noted that the results from the EvaluLab Study (which, standing alone, is not sufficiently representative given its small sample size) with its more typical one-week washout period corroborated the statistically significant improvements in skin moisturization seen in the Dermscan and AMA Studies.

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[24] The study consisted mostly of Caucasian women as well as Hispanic and Asian women. The subjects agreed to refrain from using any anti-aging products during the study.

[25] The study showed widely varying baseline scores. While the Advertiser noted that the study assumed that the variance between the subjects were equal, there was no mention of an adjustment for the baseline such as an analysis of covariance or an adjustment for the premeasurement such as subtracting the premeasurement and analyzing the difference between the treatments which would ensure that the reported measurements accounted for the variability in the pre-measurements and accurately reflect the ingredient's efficacy. NAD ultimately determined this was not a fatal flaw but cautioned the Advertiser to be mindful of these statistical concerns in future testing.

[26] The average age of the subjects was 41. There were 17 women and 4 men. Most of the subjects had dry or acne prone skin. The study did not include information about the race or ethnicity of the subjects.

[27] *Guthy-Renker, LLC* (*Crepe Erase® Anti-Aging Body Care Treatment System*), Report #6298, NAD/CARU Case Reports (July 2019), NARB #259 (12.9.19) (one week); *See Advantice Health, LLC (Kerasal Fungal Nail Renewal),* Report #6421RO, NAD/CARU Case Reports (July 2021) (one week); *Philosophy, Inc. (Time in a Bottle Age-Defying Serum),* Report #5765, NAD/CARU Case Reports (Sept. 2014) (one week); *DERMAdoctor, Inc. Photodynamic Therapy Laser Lotion*, Report #5549, NAD/CARU Case Reports (Jan. 2013) (one week); *Origins Natural Resources, Inc. (Plantscription Anti-Aging Serum and Plantscription Anti-Aging Eye Treatment)*, Report #5502, NAD/CARU Case Reports (Aug. 2012); NARB #181 (01.29.13).

b. Calms and improves elasticity

According to the Advertiser, "calms" refers to squalane's impact on skin inflammation. The Advertiser relied on the Dermscan study which evaluated the impact of squalane in calming the subjects' skin after the induced erythema by measuring their skin color using a Spectrocolorimeter. Specifically, a decrease in the "a* parameter" corresponds to a decrease in the red component of the skin and hence a calming effect. In comparison to the non-treated irradiated zone, there were statistically significant decreases in the *a parameter of 5 percent on average on at 24 hours, 8 percent at 32 hours and 5 percent at 48 hours.

The Advertiser also relied on the AMA Study which assessed the subjects' skin elasticity using a cutometer, a well-recognized instrumental assessment for elasticity. The results showed statistically significant increases in skin elasticity of 7.93 at week 14, 11.31 at day 21 and 12.96 at day 28.

Both studies use accepted instrumental measurements to squalane's calming effects and impact on elasticity over the short- and longer-term. Taken together, the studies provide a reasonable basis for the "calms" and "improves elasticity" portion of the claim.

For all the foregoing reasons, NAD determined that the claim "[i]t's a hero ingredient in *every* Biossance formula? This miracle multitasker locks in weightless moisture, calms and protects, and improves elasticity" in the claim "Did you know our squalane is sugar-cane derived and it's a hero ingredient in *every* Biossance formula? This miracle multitasker locks in weightless moisture, calms and protects, and improves elasticity" is supported by a reasonable basis.

IV. Conclusion

NAD recommended that the claim "Clean ingredients and clean formulas – we ban over 2000 ingredients that are known to be toxic to you and the environment" be modified to reflect the ingredients banned that are typically used in cosmetics products.

NAD recommended that the claim "keeping 2 million sharks every year safe from liver harvesting" be discontinued or modified to avoid referring to a numerical figure. Nothing in the decision prevents the Advertiser from making a more general claim that sharks are not harvested for squalane found in Biossance products.

NAD determined that Amyris provided a reasonable basis for its claim "Our 100% sugarcane derived squalane is ethically and sustainably sourced."

NAD recommended that the claim "All of our ingredients are also ethically and sustainably sourced" be discontinued.

NAD determined that the claim "[i]t's a hero ingredient in *every* Biossance formula? This miracle multitasker locks in weightless moisture, calms and protects, and improves elasticity" in the claim "Did you know our squalane is sugar-cane derived and it's a hero ingredient in *every* Biossance formula? This miracle multitasker locks in weightless moisture, calms and protects, and improves elasticity" is supported by a reasonable basis.

V. Advertiser's Statement

Biossance will comply with NAD's recommendations. While we disagree with certain aspects of the decision, we thank the NAD for their diligent review. (**#7132 AMU, closed 03/01/2024**)

Case #7296 (03/19/2024)
NourishMax
NourishMax Diamond Infused Eye Cream
Challenger: *National Advertising Division*
Product Type: *Cosmetics / Beauty Products / Toiletries*
Issues: *Blurring; Disclosure; Express Claims; Implied Claims / Consumer Perception*
Disposition: *Modified / Discontinued*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

NATIONAL ADVERTISING DIVISION,
Challenger,

NOURISHMAX,
Advertiser.

Case No. 7296
Closed 03/19/2024

FINAL DECISION

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger National Advertising Division ("NAD" or "Challenger") challenged express and implied claims made by Advertiser NourishMax ("NourishMax" or "Advertiser") for its NourishMax Diamond Infused Eye Cream. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims

- "After researching and testing hundreds of eye cream products, we kept coming back to NourishMax Diamond Infused Eye Cream. This top pick features a comprehensive list of hard-hitting ingredients that target every eye concern, from dark circles, fine lines, wrinkles, and puffiness to telltale signs of aging like crow's feet."
    - Overall Rating (4.9)
    - Quality Rating: 10/10
    - Expert Rating: 9.9/10
    - Users Rating: 9.8/10

B. Implied Claim

- The Skincarebrandsreviews page featuring these claims reflects independent, honest opinions of the reviewers.

II. Decision

During the pendency of NAD's inquiry, the Advertiser agreed to permanently discontinue all of the challenged claims and that the webpage would also be taken down. The voluntarily discontinued claims will be treated, for compliance purposes, as though NAD recommended their discontinuance and the advertiser agreed to comply. NAD appreciated the Advertiser's action given its concerns about review websites which appear to be independent but are, in fact, controlled by advertisers and thereby constitute advertising.[1]

III. Conclusion

The Advertiser agreed to permanently discontinue all of the challenged claims. The voluntarily discontinued claims will be treated, for compliance purposes, as though NAD recommended their discontinuance and the advertiser agreed to comply.

IV. Advertiser's Statement

The advertiser declined to provide an advertiser's statement given the case disposition. **(#7296 AMU, closed 03/19/2024)**

[1] *Smarter Reviews (Advertising by Smarter Reviews)*, Report #7205R, *NAD/CARU Case Reports* (Feb. 2024)

2023 WL 2663877
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Daian ONAKA, Torshia Woods, Shelizeller, Margo Ferguson, and Eva Bailey, individually and on behalf of all others similarly situated, Plaintiffs,
v.
SHISEIDO AMERICAS CORPORATION, Defendant.

21-cv-10665-PAC
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Signed March 27, 2023
|
Filed March 28, 2023

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Lori Blake Leskin, Arnold & Porter, LLP, New York, NY, Willis Wagner, Arnold & Porter Kaye Scholer LLP, San Francisco, CA, for Defendant.

OPINION & ORDER

PAUL A. CROTTY, United States District Judge

***1** Plaintiffs Daian Onaka, Torshia Woods, Sheli Zeller, Margo Ferguson, and Eva Bailey (collectively, "Plaintiffs") bring claims on behalf of themselves and a putative nationwide class and various putative state class actions against Defendant Shiseido Americas Corporation, ("Defendant"), alleging that Defendant misrepresented its beauty products, ("the Products") as "clean" and "natural" when they actually contain per- and polyfluoroalkyl substances ("PFAS"). Plaintiffs allege (1) breach of implied warranty; (2) breach of express warranty; (3) negligent misrepresentation; (4) fraud; and violations of the (5) California Consumer Legal Remedies Act ("CLRA"), California Civil Code §§ 1750, *et seq.*; (6) the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (7) the California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (8) the Ohio Deceptive Trade Practices Act, ("ODTPA"), Ohio Rev. Code §§ 4165.01, *et seq.*; (9) the New Jersey Consumer Fraud Act, ("NJCFA"), N.J. Stat. Ann. §§ 56:8-1, *et seq.*, and (10) the North Carolina Unfair Trade Practices Act, ("NCUTPA"), N.C. Gen. Stat. Ann. §§ 75-1.1, *et seq.* Defendant moves to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons stated below, Defendant's motion is **GRANTED**.

BACKGROUND

I. Advertising Campaign

Defendant is "one of the largest cosmetic companies in the world, with a portfolio including dozens of high-end brands," including the brand "bareMinerals." Compl. ¶¶ 3, 33, ECF No. 1. bareMinerals "differentiates itself in the highly competitive beauty market by uniformly advertising its products as being 'free of harsh chemicals and unnecessary additives, and full of ... natural minerals,' 'rigorously safety tested,' 'pure,' and 'clean, conscious beauty that's good to your skin, good for the community and good for the planet.' " *Id.* ¶ 2 (internal citations omitted).

bareMinerals produces various cosmetic products, "including foundation, lipstick, mascara, and other makeup for the face, eyes, and lips" and sells its Products at mass market beauty retailers and department stores in the United States, at bareMinerals' own retail stores, and online through online retailers and bareMinerals' own website. *Id.* ¶¶ 29, 31. "However, contrary to bareMinerals name, business model and purpose, representations and consumer expectation of clean products" its Products contain PFAS chemicals "that are known to be potentially harmful to humans and the environment." *Id.* ¶ 76.

There are "thousands of varieties of PFAS chemicals in existence," but all contain carbon-fluorine bonds, making them "highly persistent in the environment and human bodies" and earning them the nickname "forever chemicals." *Id.* ¶¶ 37, 38. According to the Food and Drug Administration ("FDA"), PFAS may be "intentionally added" to certain

cosmetic products to "condition, smooth or make skin appear shiny" and "to increase [a cosmetic's] durability and water resistance." *Id.* ¶ 40. Various studies indicate that PFAS—particularly when used in cosmetics near the eyes, mouth, and skin—may have adverse effects on a consumer's health, including "increased cholesterol, liver inflammation, increased blood pressure in pregnancy, decreased birth rate of children, decreased vaccine response in children, and increased risk of kidney or testicular cancer," among other negative health effects. *Id.* ¶¶ 51–66.

***2** Despite marketing its products as "clean" and "natural," *id.* ¶ 74, Defendant does not disclose that its products contain PFAS. *Id.* ¶ 15. Plaintiffs, however, "tested each type of the Products they purchased, and each contained PFAS." *Id.* Defendant's "uniform, pervasive marketing messaging that [bareMinerals'] product line is 'clean' and 'natural' " leads consumers to purchase the Products with the expectation that the Products will be "free from potentially harmful chemicals" when they, in fact, contain PFAS. *Id.* ¶¶ 74, 76. "Reasonable consumers would consider PFAS a harmful chemical and would not expect it would be in the Products." *Id.* ¶ 77. Had Plaintiffs known that the Products contained PFAS, they would not have purchased them or would have paid less for them. *Id.* ¶ 17.

II. Individual Plaintiffs

Daian Onaka is a resident and citizen of San Jose, California. *Id.* ¶ 23. She purchased the Products, including BAREPRO® Performance Wear Liquid Foundation SPF 20, BAREPRO® 16-Hr Full Coverage Concealer, Original Liquid Mineral Foundation, GEN NUDE® Matte Liquid Lipstick, most recently in September 2021, [1] at bare+Beauty, a bareMinerals outlet store located in Livermore, California. *Id.* ¶ 101. She brings claims individually and on behalf of all persons residing in the United States and California who purchased the Products "[d]uring the fullest period allowed by law." *Id.* ¶¶ 138, 139.

1 Other than a single "most recently" purchased-on date, the Complaint does not allege any other specific times any Plaintiff purchased any Product. The Complaint also generally alleges that Plaintiffs purchased and used the Products "within the relevant time period" without defining the relevant time period. *See, e.g.*, Compl. ¶ 23, ECF No. 1.

Torshia Woods is a resident and citizen of Horn Lake, Mississippi. *Id.* ¶ 24. She purchased the Products, including BAREPRO® Performance Wear Liquid Foundation SPF 20 and Original Liquid Mineral Foundation, most recently on October 15, 2021, directly from the bareMinerals website. *Id.* ¶ 110. She brings claims individually and on behalf of all persons residing in the United States and Mississippi who purchased PFAS Makeup "[d]uring the fullest period allowed by law." *Id.* ¶¶ 138, 140.

Sheli Zeller is a resident and citizen of Franklin, Ohio. *Id.* ¶ 25. She purchased the Products, including BAREPRO® Performance Wear Liquid Foundation SPF 20 and GEN NUDE® Matte Liquid Lipstick, most recently on October 11, 2021, from Amazon. *Id.* ¶ 117. She brings claims individually and on behalf of all persons residing in the United States and Ohio who purchased the Products "[d]uring the fullest period allowed by law." Compl. ¶¶ 138, 141.

Margo Ferguson is a resident and citizen of Clifton, New Jersey. *Id.* ¶ 26. She purchased the Products, including BAREPRO® Performance Wear Liquid Foundation SPF 20, most recently on January 15, 2021, from the Ulta website. *Id.* ¶ 124. She brings claims individually and on behalf of all persons residing in the United States and New Jersey who purchased the Products "[d]uring the fullest period allowed by law." *Id.* ¶¶ 138, 142.

Eva Bailey is a resident and citizen of Marion, North Carolina. *Id.* ¶ 27. She purchased the Products, including BAREPRO® Performance Wear Liquid Foundation SPF 20, most recently on March 4, 2021, from the bareMinerals website, *Id.* ¶ 131. She brings claims individually and on behalf of all persons residing in the United States and North Carolina who purchased PFAS Makeup "[d]uring the fullest period allowed by law." Compl. ¶¶ 138, 143.

Each Plaintiff alleges that she purchased the Products believing they were "clean, natural, and free from harmful chemicals ... like PFAS." *Id.* ¶¶ 103–04; 112–13; 119–20; 126–27; 133–34. Plaintiffs "looked at the product's packaging prior to her purchase, but nowhere on the packaging did Defendant disclose the presence of PFAS chemical in the [the Products]." *Id.* ¶ 105, 114, 121, 128, 135. Had they been aware of "the presence of potentially harmful chemicals, like PFAS, in the PFAS Makeup, [they] would not have purchased the PFAS makeup or would have paid significantly less." *Id.* ¶ 106, 115, 122, 129, 136.

DISCUSSION

I. Legal Standard Under Rule 12(b)(1)

***3** "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "When the Rule 12(b)(1) motion is facial, *i.e.*, based solely on the allegations of the complaint or the complaint and exhibits attached to it (collectively the 'Pleading'), the plaintiff has no evidentiary burden. The task of the district court is to determine whether the Pleading 'allege[s] facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue.' " *Carter v. HealthPort Tech., LLC*, 822 F.3d 47, 56 (2d Cir. 2016) (internal citation omitted). When deciding a motion to dismiss under Rule 12(b)(1) at the pleadings stage, the court "must accept as true all material factual allegations of the complaint and draw all reasonable inferences in favor of the plaintiff." *Id.* at 56–57 (cleaned up). "However, the burden remains on the plaintiff, as the party invoking federal jurisdiction, to establish its standing as the proper party to bring an action." *Akridge v. Whole Foods Mkt. Grp., Inc.*, 20 Civ. 10900 (ER), 2022 WL 955945, at *3 (S.D.N.Y. Mar. 30, 2022); *see also FW/PBS, Inc. v. City Of Dallas*, 493 U.S. 215, 231 (1990) ("It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record," and if the plaintiff fails to "clearly [ ] allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute," he does not have standing under Article III. (internal quotation marks and citation omitted)). "Where, as here, the defendant moves for dismissal under Rule 12(b)(1), as well as on other grounds, the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990) (internal citations and quotations omitted).

II. Article III Standing

The crux of Defendant's 12(b)(1) challenge is that Plaintiffs lack Article III standing. To satisfy the " 'irreducible constitutional minimum' of standing," a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff must have a "personal stake" in the case. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). For an injury to be "concrete," it "must actually exist." *Spokeo*, 578 U.S. at 340. Concrete injuries include "physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC*, 141 S. Ct. at 2206.

"That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' " *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)). Thus, "[f]or each claim asserted in a class action, there must be at least one class representative (a named plaintiff or a lead plaintiff) with standing to assert that claim." *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 862 F. Supp. 2d 322, 331-32 (S.D.N.Y. 2012) (citing *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 241 (2d Cir. 2007)).

Defendant argues that Plaintiffs lack Article III standing because the Complaint does not adequately allege that Plaintiffs suffered an injury-in-fact.[2] As a threshold matter, Defendant is incorrect that that an economic injury-in-fact based on "buyer's remorse" does not confer Article III standing. In arguing that Plaintiffs' theory of injury is unavailable, Defendant relies on out-of-Circuit precedent. Def. Mem. of Law at 9–10, ECF No. 29. But in the Second Circuit, "an allegation that a plaintiff would not have purchased a product or would not have paid the same amount comfortably satisfies the injury-in-fact prong of Article III standing." *Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 575 (S.D.N.Y. 2021); *see also Lin v. Canada Goose US, Inc.*, —— F. Supp. 3d. ——, ——, 2022 WL 16926312, at *3 (S.D.N.Y. Nov. 14, 2022) (collecting cases).[3] Each Plaintiff alleges that had she been aware of "the presence

of PFAS chemicals in the [Products], she would not have purchased the [the Products] or would have paid significantly less," *see* Compl. ¶¶ 106, 115, 122, 129, 136, and therefore likewise alleges an acceptable category of Article III injury.

2 The Court's "standing analysis must proceed on a claim-by-claim basis." *Edwards v. N. Am. Power & Gas, LLC*, 120 F. Supp. 3d 132, 138 (D. Conn. 2015) (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). As the parties appear to agree that Plaintiffs' Article III economic injury is the same for each claim, the Court likewise does the same.

3 Courts in this District that have analyzed the logic of some of the cases cited by Defendant have likewise rejected them as inapplicable in this Circuit. *See, e.g.*, *Duchimaza v. Niagara Bottling, LLC*, —— F. Supp. 3d. ——, ——, 2022 WL 3139898, at *5–6 (S.D.N.Y. Aug. 5, 2022); *Borkenoff v. Buffalo Wild Wings, Inc.*, 16-cv-8532 (KBF), 2018 WL 502680, at *3–4 (S.D.N.Y. Jan. 19, 2018).

***4** Defendant next claims the Plaintiffs lack standing because the Complaint does not specify which PFAS were present in the tested Products; that no reasonable consumer would consider all PFAS in any quantity harmful; and that Defendant made no deceptive misrepresentations or omissions in its marketing of the Products. Despite framing its arguments as addressing standing, Defendant's argument is little more than a dispute over how best to read the Complaint in a light most favorable to the Plaintiffs. If the Plaintiffs' allegations are accepted as true, consumers may have paid too much for the Products based on Defendant's misleading representation and omission. Any challenges to the merits of Plaintiffs' claims regarding Defendant's allegedly misleading representations and omissions are not properly considered under Article III.

However, while an Article III injury premised on a price premium theory is available to Plaintiffs, they still "must plead enough facts to make it plausible that they did indeed suffer the sort of injury that would entitle them to relief." *Maddox v. Bank of New York Mellon Tr. Co., N.A.*, 19 F.4th 58, 65–66 (2d Cir. 2021). "While the standard for reviewing standing at the pleading stage is lenient, a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing." *Baur v. Veneman*, 352 F.3d 625, 636–37 (2d Cir. 2003). Here, the Court agrees with Defendant that Plaintiffs have failed to meet their burden.

In consumer fraud and related claims cases, a Complaint that alleges facts demonstrating it is at least plausible that a plaintiff purchased a misbranded product sufficiently confers Article III standing. *See* *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732 (2d Cir. 2017). For example, a plaintiff can allege that her purchased products actually were misbranded, *see* *Harris v. Pfizer Inc.*, 586 F. Supp. 3d 231, 239 (S.D.N.Y. 2022); "that a third-party investigation has revealed defects in the same line of such products" as those she purchased, *Clinger v. Edgewell Personal Care Brands, LLC*, No. 3:21-cv-1040 (JAM), 2023 WL 2477499, at *3 (D. Conn. Mar. 13, 2023) (citing *John*, 858 F.3d at 732), or by alleging a "broad systematic fraud in a market in which [plaintiffs] regularly transact[ ]". *Wilson v. Mastercard*, 21-CV-5930, 2022 WL 3159305, at *5 (S.D.N.Y. Aug. 8, 2022).

Plaintiffs maintain that at the motion to dismiss stage, they are not required to demonstrate that they actually purchased adulterated products because they are asserting an economic injury, not one based on physical harm. Plaintiffs' argument misses the mark. Under Plaintiffs' theory of economic injury, they were injured because they overpaid for misbranded and/or inadequately labeled Products and the Products were misbranded because they contained PFAS contrary to Defendant's pervasive "clean" and "natural" marketing. *See, e.g.*, Compl. ¶¶ 78–81, 95; Pl.'s Opp'n at 6. Plaintiffs must therefore allege facts making it at least plausible that one of them purchased a Product that was misbranded, *i.e.*, that contained PFAS. They have failed to do so.

Plaintiffs' single allegation of independent testing is inadequate. For one, the Complaint does not allege that Plaintiffs tested any of their own purchases for PFAS. The Complaint merely states "Plaintiff tested each *type* of Products they purchased, and each contained PFAS." Compl. ¶ 15 (emphasis added). As Defendant highlights—without objection from Plaintiff—this merely expresses that Plaintiffs tested the same kind of Products from the same line of Products that they themselves had purchased, not that they tested their own purchases. This need not be fatal, if the independent testing is "reasonably near in time" to Plaintiffs'

own purchases. *See* *Clinger*, 2023 WL 2477499, at *4. The Complaint, however, fails to state when Plaintiffs' independent testing was conducted and therefore makes it nothing more than a "sheer possibility", *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009), that Plaintiffs' purchases likewise contained PFAS.

***5** Nor have Plaintiffs plausibly alleged that the presence of PFAS in the Products is so widespread as to render it plausible that any Plaintiff purchased a mislabeled Product at least once. Plaintiffs provide no facts from which the Court could extrapolate that their isolated testing should apply broadly to Defendant's Products, regardless of when they were purchased. The Complaint does identify several studies, articles, and blog posts that indicate a generalized presence of PFAS in cosmetics. *See, e.g.*, Compl. ¶ 58 (citing Danish study analyzing presence of PFAS in twenty-two unidentified cosmetics); ¶ 36 n.16 (citing article that notes PFAS "are found in many different consumer, commercial, and industrial products"). However, courts repeatedly emphasize that the third-party testing or investigation must address misbranding at least by the same manufacturer at issue in plaintiffs' case. *See*, *e.g.*, *Clinger*, 2023 WL 2477499, at *3 ("[A] product defect may be plausibly inferred from the fact that a third-party investigation has revealed defects in the *same line of such products.*" (emphasis added)); *John*, 858 F.3d at 736–37 (relying on state regulatory investigation that found the defendant specifically mislabeled products likely purchased by plaintiff).

Notably, the Complaint does not allege that any of its sources show that Defendant's cosmetics contain PFAS. Based on the Court's own examination,[4] only one study cited in the Complaint found PFAS in some of Defendant's cosmetics. *See* Compl. ¶ 40 n. 20 (citing Heather Whitehead et al., *Fluorinated Compounds in North American Cosmetics*, ENVIRON. SCI. TECHNOL. LETT. (June 15, 2021) https://pubs.acs.org/doi/10.1021/acs.estlett.lc00240) (last accessed Mar. 21, 2023). That study, however, does not list which of line of Products were tested (therefore leaving to speculation that they were from the same line as those purchased by Plaintiffs) and only tested cosmetics purchased from 2016 through 2020. *Id.* The Complaint does not allege that any Plaintiff purchased Products before 2021, further rendering the study too remote to raise Plaintiffs' claims to plausible. *See, e.g.*, *Wilson*, 2022 WL 3159305, at *5 ("Further illustrating the disconnect between her allegations of a systematically fraudulent market and her own potential injury, she alleges that she began using her Mastercard credit card in November 2018, outside the period she allegedly analyzed.").

4 In deciding a motion to dismiss, the court may consider documents, such as this, "that are attached to the complaint or incorporated in it by reference." *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007).

Even if the Court assumed that the Complaint adequately alleges that the Defendant regularly sold products containing PFAS, it is still not plausible that Plaintiffs overpaid because the Complaint does not provide any nonconclusory allegations that the Plaintiffs purchased the Products with any regular frequency. *See, e.g.*, Compl. ¶ 23, 102; *see also Akridge*, 2022 WL 955945, at *7 (holding that plaintiff did not have standing to bring a mislabeling claim where he alleged only that he purchased "numerous" items that the FDA found were part of a "pattern" of mislabeling by defendant); *cf.* *John*, 858 F.3d at 734, 736 (finding the "critical" portion of standing claim was that plaintiff pled not only that he was a frequent shopper, but that he purchased Defendant's products approximately once or twice a month, and that the systematic overcharging occurred nearly 90% of the time). The only nonconclusory statements regarding Plaintiffs' purchases are that each Plaintiff "purchased the [the Products]," that she "previously purchased" the Products, and a single "most recently" purchased-on date in 2021. Compl. ¶¶ 101–02, 110–11, 117–18, 124–25, 131–32. This is a far cry from the repeated purchases within a specified period alleged by other plaintiffs that have allowed courts to infer a plausible likelihood of a past injury. While it may have been plausible that the Plaintiffs were injured had they shown either timely third-party findings related to PFAS in the same line of Products as those purchased by Plaintiffs or that the Plaintiffs' purchased the Products with any regular frequency, the absence of both renders their claims too speculative to confer standing.

***6** The Court also notes that Plaintiffs recently submitted as supplemental authority an opinion from within this Circuit addressing a similar issue. *See* Pl.'s Not. of Supp. Auth., ECF No. 38 (attaching *Clinger*, 2022 WL 2477499). While this decision was issued after the briefing period for the instant motion in this case closed, the underlying cases it relied on were not. Thus, despite having the full opportunity to address this issue in their opposition—and failing to do so—Plaintiffs'

now seem poised to request that the Court graft the *Clinger* court's reasoning onto their briefing.

In any event, *Clinger* is readily distinguishable from Plaintiffs' case. In *Clinger*, the plaintiffs relied on a third-party study by a consumer protection organization that found products in the same line as those purchased by plaintiffs were misbranded. *Clinger*, 2022 WL 2477499, at *1. As discussed above, Plaintiffs' have failed to include any third-party testing of Defendant's cosmetics that Plaintiffs purchased. Further, while the *Clinger* plaintiffs also conducted their own independent testing of the same line of products as those they purchased like Plaintiffs did here, such testing, unlike here, made the plaintiffs' claims plausible if the testing was "reasonably near in time" to their purchases. *Id.* at *1, *4. Nor did the *Clinger* court rely solely on plaintiffs' independent testing; rather, plaintiffs also attached the third-party study. Finally, the plaintiffs in *Clinger* purchased their products over a three-year period spanning from 2019 through 2021. *Id.* at *2. Again, other than the single purchase associated with each Plaintiff in 2021, the Complaint fails to allege when and how frequently the Plaintiffs' purchased the Products. While Article III standing merely requires that a plaintiff plead facts making it plausible she purchased a misbranded product, Plaintiffs' generalized allegations fail to clear even this low mark.

Because the Court finds that Plaintiffs fail to adequately allege Article III standing, it does not reach the remainder of Defendant's arguments, including its request for judicial notice, the applicability of Rule 9(b), and failure to state a claim under Rule 12(b)(6). *See, e.g.*, *Carlone v. Lamont*, No. 21-871, 2021 WL 5049455, at *4 n.4 (2d Cir. Nov. 1, 2021) (summary order).

CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendant's motion to dismiss the Complaint. Defendant's request for oral argument is denied. Although Defendant requests that the Complaint be dismissed with prejudice, "where a complaint is dismissed for lack of Article III standing, the dismissal must be without prejudice rather than with prejudice" because such "a dismissal is one for lack of subject matter jurisdiction." *Carter*, 822 F.3d at 54–55. Plaintiffs have 21 days to file an Amended Complaint, should they so desire. The Clerk of Court is respectfully directed to close the motion at ECF No. 27.

All Citations

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United States District Court, S.D. California.

Yeraldinne SOLIS, Plaintiff,
v.
COTY, INC.; Noxell Corporation, Defendants.

Case No. 22-cv-0400-BAS-NLS
|
Signed March 7, 2023

Attorneys and Law Firms

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ORDER:

(1) GRANTING MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) (ECF No. 19); and

(2) GRANTING PLAINTIFF LEAVE TO FILE SECOND AMENDED COMPLAINT

Cynthia Bashant, United States District Judge

***1** Plaintiff Yeraldinne Solis ("Solis") brings this consumer-protection class action against Defendants Coty, Inc. ("Coty") and Noxell Corporation ("Noxell," together with Coty, "Defendants"). She alleges she purchased Defendants' beauty product marketed as "safe" and "sustainable," when it contains harmful and carcinogenic chemicals called PFAS. (*See generally* Am. Compl., ECF No. 13.) Now before the Court is Defendants' motion to dismiss ("Motion"). (Mot., ECF No. 19.) Solis opposes (Opp'n, ECF No. 20) and Defendants reply (Reply, ECF No. 22.) Having considered the record of this case, the parties' briefing, and the relevant case law, the Court **GRANTS** Defendants' Motion and **DISMISSES WITHOUT PREJUDICE** the Amended Complaint for lack of subject-matter jurisdiction. [1]

[1] Both parties have filed requests peripheral to the Motion. Defendants submitted alongside their Motion a Request for Judicial Notice (Request for Judicial Notice ("RJN"), Ex. 2 to Mot., ECF No. 19-2) and, shortly after Defendants filed their Reply, Solis moved *ex parte* for leave to file a Notice of Supplemental Authority (Notice, ECF No. 25). The Court **GRANTS** Defendants' request for judicial notice as to Exhibit K, color photographs of the packaging and labeling of the cosmetic product at issue. (Photographs, Ex. K to RJN, ECF No. 19-13); *see* *Kanfer v. Pharmacare US, Inc.*, 142 F. Supp. 3d 1091, 1098–99 (S.D. Cal. 2015) ("Courts addressing motions to dismiss product-labeling claims routinely take judicial notice of images of the product packaging."); *Chaudry v. Cnty. of San Diego*, No. 21cv1847-GPC (AHG), 2022 WL 17652794, at *3 (S.D. Cal. Dec. 13, 2022) (opining that "[c]onsidering documents subject to judicial notice is not inconsistent with a facial challenge on subject matter jurisdiction" and collecting authorities). The Court **DENIES AS MOOT** the remainder of Defendants' request for judicial notice because the Court did not rely on any of the exhibits therein to resolve the pending Motion.
The Court **GRANTS** Solis' request for leave to file her Notice of Supplemental Authority—a decision by a district court within the Ninth Circuit authored and published after Defendants' Reply, which Solis claims buttresses her position. (Notice at 1 (citing *Galgetta v. Walmart, Inc.*, No. 3:22-cv-3757-WHO, 2022 WL 17812924, at *1 (N.D. Cal. Dec. 19, 2022)).)

I. BACKGROUND

A. Factual Background [2]

[2] These facts are all taken from the Amended Complaint. (*See* ECF No. 13.) The Court accepts as true all non-conclusory factual allegations set forth therein. *See* *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Coty is a foreign corporation with its principal place of business located in New York, New York. (Am.

Compl. ¶ 14.) Coty owns CoverGirl Cosmetics brand ("CoverGirl"). (*Id.*) Noxell is a subsidiary of Coty. (*Id.* ¶ 15.) Together, Defendants formulate, design, manufacture, advertise, distribute, and sell CoverGirl's line of beauty products. (*Id.* ¶ 1.)

In December 2021, Solis purchased a unit of CoverGirl's TruBlend Pressed Powder (the "Product") from a retail store in Escondido, California. (Am. Compl. ¶ 13.) Prior to purchase, Solis reviewed the Product's "packaging" and "labeling," images of which are provided both in the Amended Complaint at Paragraph 28 and at Exhibit K to Defendants' Request for Judicial Notice. (*See id.* ¶ 28; Ex. K to RJN, ECF No. 19-13.) In particular, she read the statements on the Product's label, located on the backside of the Product's packaging, which states the Product is "dermatologically tested" and "suitable for sensitive skin." (*Id.* ¶ 7.)

She also alleges she poured over statements in CoverGirl's and Coty's websites, as well as a Coty investor report, prior to purchasing the Product. (Am. Compl. ¶¶ 21–29.) Specifically, Solis avers she reviewed:

- A statement on CoverGirl's website that, "[A]t COVERGIRL we hold ourselves to the highest quality standards when it comes to the safety and efficacy of our products." (*Id.* ¶ 21.)
- A statement on CoverGirl's website that the brand is "championing open, inclusive and sustainable beauty." (*Id.* ¶ 22.)
- A statement on CoverGirl's website explaining it "uses a wide array of testing methods to assess and ensure [their] products remain safe" and will "continue to invest in the latest alternative testing technology and innovation to ensure [it is] delivering safe, high-quality products." (*Id.* ¶ 23.)
- A statement on Coty's website that it is "changing the way [it] design[s], formulate[s], and manufacture[s], in order to minimize [its] environmental impact and create more innovative, cleaner products." (*Id.* ¶ 24.)
- A statement on Coty's website, which provides, "By working hand-in-hand with [its] ingredients suppliers, [Coty] use[s] the latest innovation and technology, applying green science to minimize the pressure of [its] products on natural resources." (*Id.*)
- A statement on Coty's website that its "products have an important role to play in building a sustainable future" and that "sustainability is at the heart of [its] product creation, from design and development through the procurement of materials." (*Id.* ¶ 25.)
- A statement on Coty's website that it "constantly strive[s] to develop products that reflect [its] consumers' evolving needs. Increasingly this means clean products that meet consumer demand for ingredient transparency and minimalist safe formulas, that don't compromise on product quality." (*Id.* ¶ 26.)
- A Coty investor report, which states, "In the U.S., Covergirl continues to show that the brand is on a sustainable path of improvement and growth as it has grown and maintained share in 6 of the last 9 months since the new brand equity was launched." (*Id.* ¶ 29.)

Solis alleges that she believed the Product to be "safe for use and[ ] otherwise sustainable" based upon the above-mentioned representations and, thus, purchased the Product in reliance upon the truthfulness of those representations. (Am. Compl. ¶¶ 12, 62 ("Defendants' conduct deceived Plaintiff ... into believing that the Product is safe and sustainable[.]").) However, Solis claims Defendants' marketing is misleading, for the Product is neither "safe" nor "sustainable," but rather it is "unfit for use" and "pose[s] a significant safety risk" because an organization called Toxin Free USA detected in samples of the Product heightened levels of organic fluorine, which are indicative of purportedly harmful per- and polyfluoroalkyl substances (referred to above as "PFAS"). [3] (*Id.* ¶¶ 1, 6, 133.)

[3] Solis alleges it is not yet scientifically feasible to test for PFAS directly, and that organic-fluorine screening is "the best current test method" available for detecting PFAS. (Am. Compl. ¶ 4.)

***3** PFAS are a group of highly persistent, synthetic chemicals. (Am. Compl. ¶¶ 2, 5.) According to the Food & Drug Administration ("FDA"), PFAS "are often intentionally added to certain products such as foundation, lipstick, eyeliner, eyeshadow, and mascara." (*Id.* ¶ 33 (citation and quotation marks omitted); *see id.* ¶ 32 ("PFAS are used in cosmetics due to their properties such as hydrophobicity and film-forming ability, which are thought to increase product wear, durability, and spreadability.").) Although Solis does not contend there exists a federal or state regulation prohibiting the use of PFAS as an additive in cosmetic products, she avers that "PFAS are not necessary for the intended outcomes" and that several of Defendants' peers do not use PFAS in their products. (*Id.* ¶ 34.)

Solis alleges it is beyond dispute PFAS are toxic and carcinogenic. (Am. Compl. ¶ 40.) Solis claims exposure to PFAS in humans increases the risk of cancer, liver damage, fertility issues, asthma, and thyroid disease, and cites a number of studies linking PFAS to those diseases and health complications. (*Id.* ¶¶ 3 n.3, 30, 40–42 nn. 35–37.) She avers cosmetics that contain PFAS raise a particularly disconcerting health risk because users apply beauty products directly to the face—in particularly absorptive areas such as near the eyes and mouth—and habitually. (*See id.* ¶¶ 2, 7–8, 38–39.) And "[b]ecause PFAS persist and accumulate over time, they are harmful even at very low levels." (*Id.* ¶ 2.)

Crucially, Solis concedes, as she must, the Product's label discloses PTFE as one of its ingredients. (*See* Am. Compl. ¶¶ 46–48; *see also id.* ¶ 28 (providing black-and-white picture of backside of Product's packaging, which contains a list of ingredients that includes "PTFE").)

Solis alleges PTFE—known more commonly as Teflon—is "a type of PFAS chemical." (*Id.* ¶ 46.) Nevertheless, Solis alleges that because it is not yet scientifically feasible to isolate particular PFAS in a test sample, "the exact source of organofluorine" in the Product "cannot be determined to solely come from [PTFE]." (*Id.* ¶ 48.)

B. Procedural History

On March 25, 2022, Solis filed an initial complaint. (ECF No. 1.) On April 27, 2022, Defendants filed a motion to dismiss. (ECF No. 10.) In lieu of filing an opposition, Solis filed her Amended Complaint. (ECF No. 13.) The Amended Complaint asserts 15 separately enumerated claims: (1) unlawful, unfair, and fraudulent business practices in violation of California's Unfair Competition Law ("UCL") (*id.* ¶¶ 88–105); (2) violation of California's Consumer Legal Remedies Act (*id.* ¶¶ 106–20); (3) breach of the implied warranty under the Song-Beverly Act (*id.* ¶¶ 121–34); (4) violation of California's False Advertising Law ("FAL") (*id.* ¶¶ 135–47); (5) fraud (*id.* ¶¶ 148–56); (6) constructive fraud (*id.* ¶¶ 157–67); (7) fraudulent inducement (*id.* ¶¶ 168–77); (8) money had and received (*id.* ¶¶ 178–83); (9) fraudulent concealment (*id.* ¶¶ 184–96); (10) fraudulent misrepresentation (*id.* ¶¶ 197–204); (11) negligent misrepresentation (*id.* ¶¶ 205–11); (12) unjust enrichment (*id.* ¶¶ 212–20); (13) breach of express warranty (*id.* ¶¶ 221–30); (14) violation of the Magnuson-Moss Warranty ("MMW") Act (*id.* ¶¶ 231–39); and (15) negligent failure to warn (*id.* ¶¶ 240–49). She brings these claims on behalf of herself, a nationwide class, and a California subclass. (*Id.* ¶¶ 79–87.)

Defendants now move to dismiss the Amended Complaint pursuant to both Federal Rule of Civil Procedure ("Rule") 12(b)(1) for lack of subject-matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (*See* Mem. in Supp. of Mot., Ex. 1 to Mot. ("Mem."), ECF No. 19-1.)

In particular, Defendants assert the Amended Complaint fails to plead an injury-in-fact as a prerequisite of Article III standing. (*See* Mem. at 9–12.) They further aver Solis fails to state a single claim upon which relief can be granted because, *inter alia*: (1) Solis' claims under California's consumer-protection statutes do not plausibly allege violations of the "reasonable consumer standard"; (2) Solis' claims for which fraud is an elemental lynchpin fail under Rule 9(b)'s heightened standard; (3) Solis' claims for breach of warranty fail—and, thus, so does her MMW Act claim—because she neither identifies an inaccurate statement in Defendants' marketing materials nor alleges the Product is unfit for its intended use; (4) Solis' claims for unjust enrichment and money-had-and-received as currently formulated are precluded by California law; and (5) Solis has not alleged a non-economic injury as a prerequisite for her negligent failure to warn claim. (*See id.* at 12–25.)

II. LEGAL STANDARD

***4** "Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Id.* (internal citations omitted). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (internal citations omitted); *see also* *Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006).

Under Rule 12(b)(1), a party may move to dismiss a claim based on lack of subject-matter jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1123 (9th Cir. 2010). A Rule 12(b)(1) challenge to jurisdiction may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1036, 1039 (9th Cir. 2004), *cert denied*, 544 U.S. 1018 (2005). In a facial challenge to subject-matter jurisdiction, the defendant contests the allegations in the complaint itself are insufficient to invoke subject-matter jurisdiction. *Id.* A district court assesses a facial challenge to subject-matter jurisdiction as it would a motion to dismiss under Rule 12(b)(6). *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). That is, "all factual allegations in [the] complaint are taken as true and all reasonable inferences are drawn in [the plaintiff's favor]." *Id.* (citing, *inter alia,* *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)).

Unlike on a facial challenge, where the district court generally is limited to the four corners of the pleading in determining whether it has subject-matter jurisdiction over a case, *see* *Thornhill Publ'g Co. v. Gen. Tel. Elec.*, 594 F.2d 730, 733 (9th Cir. 1979), on a factual challenge the defendant provides evidence that an alleged fact in the complaint is false, thereby resulting in a lack of subject-matter jurisdiction, *Meyer*, 373 F.3d at 1039. Therefore, on a factual challenge, the allegations in a complaint are not presumed to be true and "the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert denied*, 489 U.S. 1052 (1989). "Once the moving party has converted the motion to dismiss into a facial motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003), *cert denied*, 541 U.S. 1009 (2004). However, "[a] court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.' " *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *Augustine v. United States*, 704 F.2d 1074, 1078 (9th Cir. 1983)).

Where, as here, a Rule 12(b)(1) motion is brought alongside a Rule 12(b)(6) motion, it is appropriate for the court to first consider and address the disputed jurisdictional issues under the former before analyzing the merits of a claim under the latter. *See* *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) ("[T]he jurisdictional question of standing precedes, and does not require, analysis of the merits." (quoting *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008))). If, upon analysis of the Rule 12(b)(1) motion, the court finds it lacks subject-matter jurisdiction over the action, it need not address the merits issues raised in the collateral Rule 12(b)(6) motion. *Toyota Landscaping Co., Inc. v. S. Cal. Dist. Council of Laborers*, 11 F.3d 114, 117 (9th Cir. 1993); *Prather v. AT&T Inc.*, 996 F. Supp. 2d 861, 871 n.8 (N.D. Cal. 2013) ("Having concluded that it lacks subject matter jurisdiction over [plaintiff's] claim, the Court need not—and indeed cannot—address [d]efendants' alternate grounds for dismissal under Federal Rules of Civil Procedure 12(b)(6) and 9(b).").

III. ANALYSIS

***5** Article III, Section 2 of the Constitution limits federal courts to hearing "actual cases or controversies." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). This limitation means the plaintiff must have standing to sue. *Id.* at 338. To establish standing, a plaintiff must demonstrate the irreducible constitutional minimum of: (1) an injury-in-fact via "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) causation—that the injury is "fairly traceable to the challenged action of the defendant"; and (3) redressability—that it is "likely, as opposed to merely

speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations and quotations omitted). "Each element of standing 'must be supported ... with the manner and degree of evidence required at the successive stage of litigation.' " *Maya*, 658 F.3d at (quoting *Lujan*, 504 U.S. at 561).

To survive a facial attack directed at standing brought pursuant to Rule 12(b)(1), a plaintiff "must 'clearly ... allege facts demonstrating' each element." *Spokeo*, 578 U.S. at 338 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)); *see also* At this stage, the Court presumes to be true the factual allegations in the pleadings, and construes in favor of plaintiff all reasonable inferences therefrom. *See* *Lujan*, 504 U.S. at 555 (instructing district courts to "presum[e] that general allegations embrace those specific facts that are necessary to support a claim" on a Rule 12(b)(1) facial challenge); *see also Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274, 279 (7th Cir. 2020) ("A facial attack tests whether the allegations, taken as true, support an inference that the elements of standing exist." (citation omitted)); *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 737 (2d Cir. 2017) ("When the defendant asserts a 'facial' challenge to standing ... it remains the case that courts should continue to draw from the pleadings all reasonable inferences in the plaintiff's favor[.]").

Here, the Rule 12(b)(1) component of Defendants' Motion is a facial challenge to subject-matter jurisdiction directed at the first element of standing: injury-in-fact. (*See* Mem. at 9–13.) "To establish an injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, 578 at 339 (quoting *Lujan*, 504 U.S. at 560); *see also* *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 597 (9th Cir. 2020).

Defendants contend Solis has alleged neither economic nor physical harm. Thus, Solis fails to establish she suffered an injury-in-fact and, therefore, lacks standing to pursue any one of her 15 claims. (Mem. at 12–13.) In response, Solis contends the allegations in her Amended Complaint give rise to an economic injury sustained as a result of her purchase of a unit of the Product in December 2021. (Opp'n at 6–14.) Thus, whether Solis has standing to pursue the instant lawsuit rises and falls with whether the Amended Complaint alleges, or contains facts that permit a reasonable inference, that Solis suffered a concrete and particularized economic injury arising from her purchase of the Product. *See* *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) ("A plaintiff must demonstrate standing for each claim he or she seeks to press and for each form of relief sought." (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006))).

A. Concrete Injury-in-Fact

"A 'concrete' injury is one that 'actually exist[s],' meaning that it is 'real, and not abstract.' " *Arizona v. Yellen*, 34 F.4th 841, 848 (9th Cir. 2022) (quoting *Spokeo*, 578 U.S. at 340). "A 'quintessential injury-in-fact' occurs when plaintiffs allege that they 'spent money that, absent defendants' actions, they would not have spent." *Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 845 (N.D. Cal. 2018) (quoting *Maya*, 658 F.3d at 1069); *Moreno v. Vi-Jon, LLC*, No. 21-cv-21-56370, 2022 WL 17668457, at *1 (9th Cir. Dec. 14, 2022) (Mem.) ("[Plaintiff] alleged that he wouldn't have purchased or paid as much for [defendant's] products if he had known the truth about their effectiveness. That is sufficient for an Article III injury.").

***6** Solis argues the economic injury she allegedly suffered as a result of her December 2021 purchase of the Product qualifies as a "concrete" one. Specifically, she avers she paid a premium for a unit of the Product on the basis it was "safe" and "sustainable," as Defendants' purportedly advertised, but that the Product was neither of those things because it contained heightened levels of organic fluorine indicative of allegedly harmful PFAS. Thus, Solis claims the Product was worth far less than the amount she paid, and that, had she known of the health risks attendant to the Product, she either would not have spent her money on the Product or would have purchased it on different terms. (Opp'n at 8 (citing Am. Compl. ¶¶ 7–9, 12).)

The parties agree that Solis seeks to invoke two theories of standing based upon economic injury: (1) the "benefit-of-the-bargain" theory and (2) the "overpayment" theory. (*See* Opp'n at 6–11; Mem. at 9–13.) The Court addresses both theories in turn, below.

1. Benefit of the Bargain Theory

A plaintiff adequately alleges a concrete economic injury when she adequately pleads "she bargained for a product worth a given value but received a product worth less than the value." *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 705–06 (9th Cir. 2020) (quoting *In re Johnson & Johnson Talcum Powder Prod. Mkt., Sales Prac. & Liab. Litig.* ("*In re Johnson & Johnson*"), 903 F.3d 278, 283 (3d Cir. 2018)). This is known as the "benefit-of-the-bargain" theory of Article III standing. *Id.* To invoke such a theory, a plaintiff "must do more than allege that she 'did not receive the benefit she *thought* she was obtaining' "; she "must show that she did not receive a benefit for which she actually *bargained*." *Id.* (emphasis in original) (quoting *In re Johnson & Johnson*, 903 F.3d at 283). Hence, the plaintiff must identify a specific misrepresentation about the elusive benefit, which allegedly was baked into the purchase price of the consumer item at issue. *See, e.g.*, *id.* at 705–06 ("Absent some allegation that [defendant] made false representations about [the product's] safety, [plaintiff's] benefit of the bargain theory falls short."); *Birdsong v. Apple, Inc.*, 590 F.3d 955, 961–62 (9th Cir. 2009) ("The plaintiffs' benefit of the bargain theory fares no better. They have not alleged that they were deprived of an agreed-upon benefit in purchasing their [product]. The plaintiffs have not alleged that [defendant] made any misrepresentations ...."); *see also Estrada v. Johnson & Johnson*, No. 2:14-cv-1051-TLN-EFB, 2015 WL 1440466, at *4–5 (E.D. Cal. Mar. 27, 2015) ("Plaintiff received the benefit-of-the-bargain because she received the exact product she intended to purchase, unlike the cases she cites where the consumers received products that were mislabeled or defective." (footnote omitted)).

Solis claims the Amended Complaint contains ample facts to support her benefit-of-the-bargain theory of standing. (*See* Opp'n at 8.) She alleges that "she reviewed the labeling, packaging, and marketing materials of her Product"—prior to purchase—including representations on the Product's packaging it is "suitable for sensitive skin" and "dermatologically tested" and representations on Defendants' websites touting their products as "safe." (*Id.* (citing Am. Compl. ¶¶ 9–12).) But Solis alleges that Defendants' representations about the Product's "safety" benefit are hollow and, more importantly, deceptively misleading, because the Product is, in fact, unsafe due to the presence of purportedly harmful PFAS therein. (*Id.* (citing Am. Compl. ¶ 6).) Thus, Solis avers she was denied the benefit of the bargain when she purchased the Product in December 2021.

Defendants contend Solis' benefit-of-the-bargain theory fails because the Amended Complaint does not actually identify any affirmative representation—either on the Product's label or packaging or in Defendants' online marketing materials—that touts the Product as "safe" or PFAS-free. (Mem. at 12–13.) Moreover, Defendants argue the Product label's express disclosure that PTFE—which Solis concedes is a common type of PFAS—is an ingredient forecloses Solis' benefit-of-the-bargain theory. (*Id.*) In support, Defendants direct the Court to the Ninth Circuit precedents of *Birdsong* and *McGee*, with which, they assert, the instant case rests on all fours. [4] (*Id.*) This Court agrees.

[4] Although Defendants do not cite directly to *Birdsong*, they rely heavily upon *McGee*, which itself relies upon *Birdsong* as its foundational precedent. (Mem. at 9, 11 (citing *McGee*, 982 F.3d at 700).)

***7** *Birdsong* involved a class-action in which plaintiffs sued Apple alleging the iPods they purchased were "defective because [they] pose[d] an unreasonable risk of noise-induced hearing loss to users." 590 F.3d at 956. The *Birdsong* plaintiffs' theory of standing was premised upon the theory they were deprived of the benefit of safely listening to music, which they alleged was baked into the iPod's purchase price. *Id.* at 961. The Ninth Circuit held the *Birdsong* plaintiffs lacked standing for failure to allege an injury-in-fact. *Id.* It found significant that: (1) the *Birdsong* plaintiffs did not allege Apple made any representation that one of the iPod's benefits is that it enables users to "safely listen to music at high volumes for extended periods of time"; and (2) "Apple provided a warning against listening to music at loud volumes." *Id.* Thus, the Ninth Circuit concluded the *Birdsong* "plaintiffs' alleged injury in fact [was] premised on the loss of a 'safety' benefit that was not part of the benefit of the bargain to begin with[ ]" and, thus, did not satisfy Article III standing requirements. *Id.*

In *McGee*, the plaintiff alleged that she had purchased defendant's popcorn believing it contained only safe and healthy ingredients, but later discovered it contained partially hydrogenated oil, a source of carcinogenic trans fat. 982 F.3d at 700. Like the plaintiffs in *Birdsong*, the *McGee*

plaintiff alleged standing under, *inter alia*, a benefit of the bargain theory. Relying on *Birdsong*, the Ninth Circuit found the *McGee* plaintiff also lacked standing. It held:

> McGee does not contend that [defendant] made any representation about [the popcorn's] safety. Although she may have assumed that [the popcorn] contained only safe and healthy ingredients, her assumptions were not included in the bargain, particularly given the labeling disclosure that the product contained artificial trans fat. Thus, even if those expectations were not met, she has not alleged that she was denied the benefit of the bargain.

Id. at 706.

Together, *Birdsong* and *McGee* stand for a simple legal premise: where a plaintiff seeks to allege an injury-in-fact arising from the purchase of a purportedly unsafe consumer item, he or she is precluded from doing so based upon a "benefit of the bargain" theory where (1) there is no identifiable misrepresentation concerning the purported benefit of which the plaintiff was allegedly deprived and (2) the product's labeling or packaging discloses the alleged benefit is not part of the bargain.

This Court finds *Birdsong* and *McGee* doom Solis' benefit-of-the-bargain theory. Just as in *Birdsong* and *McGee*, Solis alleges the Product she received lacked a "safety" benefit for which she never bargained in the first instance. While Solis claims the Product's label represents the cosmetic is "dermatologically tested" and "suitable for sensitive skin," Solis simply fails to draw a cogent nexus between those statements and her belief the Product she purchased was PFAS-free. There is an even weaker link between the statements Solis identified in Defendants' online marketing materials and the purported safety benefit Solis believed she had bargained for but did not receive. Those statements are far too generalized to reasonably be construed as representations about the Product's PFAS content. *Cf.* *Estrada*, 2015 WL 1440466, at *4 (concluding "general safety statements on both of [d]efendants' websites" lacked "sufficient specificity to substantiate an injury"). And the statement in Coty's investor report that, "In the U.S., Covergirl continues to show that the brand is on a sustainable path of improvement and growth as it has grown and maintained share in 6 of the last 9 months since the new brand equity was launched" (*see* Am. Compl. ¶ 29), clearly concerns Defendants' business performance, not the safety and sustainability of Defendants' products.

Moreover, as *Birdsong* and *McGee* instruct, Solis is not free to ignore the ingredient list on the Product's label. *See also* *Cheslow v. Ghirardelli Chocolate Co.*, 445 F. Supp. 3d 8, 20 (N.D. Cal. 2020) ("[W]here the actual ingredients are disclosed, a plaintiff may not ignore the ingredient list.") (collecting authorities). Indeed, Solis *expressly* alleges (1) the Product's label expressly discloses it contains PFAS because it lists PTFE—a type of PFAS—as one of its main ingredients and (2) she reviewed the Product's label prior to purchase. (Am. Compl. ¶¶ 13 (alleging Solis reviewed the Product's label), 28 (excerpting images of Product's label), 46–48 (alleging PFTE is a PFAS)).

***8** Simply put, Solis avers she purchased the Product based on her *belief* it was PFAS-free and, thus, "safe" and "sustainable." (*See, e.g.*, Am. Compl. ¶ 62 ("Defendants conduct deceived Plaintiff ... into believing the Product is safe and sustainable, when it is not.").) But it is clear from the Product's label that a PFAS-free cosmetic powder was not part of the benefit of the bargain and, thus, Solis' belief was mistaken. Because Solis cannot identify a misrepresentation in Defendants' marketing materials or allege the Product was mislabeled, this case is easily distinguishable from those she cites, in which this Court's sister tribunals found valid benefit-of-the-bargain theories. *See* *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (holding plaintiff who purchased from defendant department store items for prices advertised as "discounted" but that were actually the "original" prices suffered a concrete economic injury under the benefit-of-the-bargain theory of standing); *Berke v. Whole Foods Mkt., Inc.* No. CV 19-7471 PSG (KSx), 2020 WL 5802370, at *7 (C.D. Cal. Sept. 18, 2020) (distinguishing facts in case at hand from *Birdsong* on basis that plaintiff adequately alleged defendant had engaged in "false or misleading advertising").

Accordingly, this Court finds *Birdsong* and *McGee* preclude Solis from invoking the benefit-of-the-bargain theory to

demonstrate a concrete economic injury for Article III standing purposes.

2. Overpayment Theory

In addition to the benefit-of-the-bargain theory, the parties also appear to agree Solis invokes an overpayment theory of Article III standing. The Ninth Circuit has consistently recognized a concrete economic injury lies where the plaintiff alleges he or she "paid more for a product than [he or she] otherwise would have paid, or bought it when [he or she] otherwise would not have done so." *Hinojos*, 718 F.3d at 1104; *see* *McGee*, 982 F.3d at 707 (confirming the "overpayment" theory of Article III standing is a viable one in the Ninth Circuit).

It is well-established a plaintiff can demonstrate a concrete economic injury by showing he or she was induced into overpaying or purchasing a product he or she otherwise would not have, based upon either a defendant's (1) false representation and/or (2) actionable non-disclosure. *See* *Mazzo v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012) ("Plaintiffs contend that class members paid more for the [braking system] than they otherwise would have paid, or bought it when they otherwise would not have done so, because Honda made deceptive claims and failed to disclose the system's limitations. To the extent that class members were relieved of their money by Honda's deceptive conduct —as Plaintiffs alleged—they have suffered an 'injury in fact.' "); *Maya*, 658 F.3d at 1069 ("Plaintiffs claim that, as a result of defendants' actions, they paid more for their homes than the homes were worth at the time of sale. Relatedly, they claim that they would not have purchased their homes had defendants made the disclosures allegedly required by law. We agree with plaintiffs that these are actual and concrete economic injuries.").

However, in *McGee*, the Ninth Circuit alluded to a possible third subcategory of the overpayment theory. *See* 982 F.3d at 707. There, the Ninth Circuit left open the possibility that, by merely showing the item "contain[s] a hidden defect," a plaintiff may adequately allege economic injury under the overpayment theory in lieu of an identifiable misrepresentation or actionable omission. *Id.* (observing that *Birdsong* did not explicitly reject the premise a plaintiff can demonstrate a concrete economic injury by simply alleging he or she purchased a product with a hidden defect); *see also* *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1117 (C.D. Cal. 2008) ("Plaintiffs also properly allege damages for the purchase price of the toys that allegedly were defective and not fit for their represented use. Plaintiff's claim is straightforward—they alleged that they purchased toys that were unsafe and unusable and should get their money back.").

***9** Reading the Amended Complaint in a light most favorable to Solis, it appears she seeks to invoke all three sub-theories.

Misrepresentation: Because Solis' benefit-of-the-bargain theory is deficient, so is this variant of her overpayment theory. An identifiable, affirmative misrepresentation is the lynchpin of both theories. *See* *McGee*, 982 F.3d at 707 (rejecting plaintiff's overpayment theory based upon misrepresentation and alluding to its benefit-of-the-bargain analysis). As this Court already concluded, Solis fails to identify a single false representation about the Product's safety or grapple with the Product's PTFE disclosure. Thus, the cases to which Solis cites are inapposite. *See* *Zeiger*, 304 F. Supp. 3d at 842, 846 (finding valid overpayment theory where product label contained statements such as "Unrivaled Quality Standards" and "Optimal Health" but nowhere disclosed the presence of harmful lead, arsenic, and BPA); *Coffelt v. Kroger Co.*, No. EDCV 16-1471 JGB (KKx), 2017 WL 10543343, at *5 (C.D. Cal. Jan. 27, 2017) (finding valid overpayment theory where defendant's produce was labeled "Packed at Peak of Freshness" but were contaminated with a dangerous bacterial called "Listeria"). Accordingly, Solis fails to demonstrate the facts alleged in her Amended Complaint give rise to an overpayment theory of standing predicated upon a misrepresentation of Defendants.

Omission: Solis avers "Defendants' Article III standing argument fails to address [her] claims premised on Defendants' omission and concealment." (Opp'n at 10.) But, unlike the cases Solis cites, the Product's label, here, discloses the very hazard Solis alleges Defendants had a continuing duty to disclose. *See* *Galgetta v. Walmart, Inc.*, No. 3:22-cv-3757-WHO, 2022 WL 17812924, at *1 (N.D. Cal. Dec. 19, 2022) (alleging Walmart brand spices failed to disclose the possibility they contained "heavy metals" that are dangerous to humans). Indeed, the Court need not look beyond the allegations in the Amended Complaint to conclude Solis fails to identify an actionable nondisclosure. She alleges that all

PFAS are harmful, that PTFE is a type of PFAS, and that the Product's label lists PTFE as one of the Product's ingredients. (Am. Compl. ¶¶ 28, 46–48.)

In an apparent effort to harmonize her Amended Complaint with her claim Defendants omitted and concealed the Product's PFAS content, Solis argues Defendants' PTFE disclosure is both incomplete and insufficient. Alluding to the scientific limitations of PFAS screening, Solis avers "the exact source of organofluorine cannot be determined to solely come from [PTFE]." (Am. Compl. ¶ 48.) From this fact, Solis asks the Court to infer there are other sources and types of PFAS in the Product. While this Court is mindful of Solis' claim that it is not yet scientifically feasible to screen for discrete PFAS chemicals (*see id.* ¶¶ 4, 48), this is not a viable method of demonstrating Article III standing. Even the lenient standard that controls this Motion prohibits this Court from making unwarranted inferences based on conclusory allegations unsupported by fact.[5] *See* *Baur v. Veneman*, 352 F.3d 625, 636–37 (2d Cir. 2003) (explaining that "[w]hile the standard for reviewing standing at the pleading stage is lenient," a plaintiff may not "rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing"); *cf.* *Meaunrit v. Pinnacle Foods Grp., LLC*, No. C 09-04555 CW, 2010 WL 1838715, at *3 (N.D. Cal. May 5, 2010) (holding the mere allegation a product "*might contain* harmful pathogens" was a "speculative, hypothetical injury"); *accord* *Blackburn v. Champions Petfoods USA, Inc.*, No. 1:18-cv0038, 2021 WL 9682169, at *2 (S.D. Iowa Aug. 12, 2021) (similar).

5 Even if this Court were to find the Amended Complaint permits a reasonable inference the Product contains PFAS from another source (it does not), Solis still fails to allege what use a second disclosure would serve beyond the message conspicuously provided in the Product's ingredient list. Solis alleges she was deceived into believing she had purchased a PFAS-free cosmetic item. But the Product's ingredient list—as seen in Paragraph 28 in the Amended Complaint—should have dispossessed a reasonable consumer of that belief. Hence, standing alone, the disclosure Solis appears to claim Defendants should have made is a superfluous one.

***10** Solis also argues in her Opposition that, by merely listing PTFE as an ingredient, Defendants fail to adequately disclose to consumers the Product contains PFAS. (Opp'n at 19 ("Defendants assume that because the acronym 'PTFE' is disclosed on the ingredient list, that consumers like Plaintiff would automatically understand that PTFE is a type of PFAS.").) But nowhere in the Amended Complaint does Solis make this straightforward allegation. Instead, the Amended Complaint largely grapples with Defendants' PTFE disclosure by glossing over its existence. (*See, e.g.*, Am. Compl. ¶ 62 (alleging Defendants "omitted and concealed that the Product contains substances—organic fluorine which is indicative of PFAS—that are widely known to have significant health repercussions").)

Simply put, even construing the Amended Complaint in the light most favorable to Solis, her allegations do not support finding Defendants made an actionable omission about the Product's safety or PFAS contents. Rather, the Amended Complaint bears the indicia of a pleading that attempts to artfully plead around an express disclosure of the very contaminant the plaintiff alleges defendants had a duty to divulge.

Hidden Defect: Finally, reading Solis' papers charitably, she appears to seek to invoke an overpayment theory on the basis of a hidden defect, as conceptualized by the Ninth Circuit in *McGee*. There, the Ninth Circuit held that the *McGee* plaintiff failed to plead a "hidden defect"—that defendant's popcorn contained trans fats—because the product's label disclosed trans fats and because the risk of health complications associated with trans fats were well-established at the time of the complaint. 982 F.3d at 709–10. The same is true here: the Product's label discloses that a PFAS chemical is one of the item's ingredients (*see* Am. Compl. ¶¶ 28, 46–48) and, as Solis herself alleges, PFAS' carcinogenic and toxic qualities are "widely known" (*id.* ¶ 62). Accordingly, this third strand of Solis' overpayment theory fails, too.

Therefore, Solis' Amended Complaint must be dismissed under Rule 12(b)(1) for lack of standing.

B. Particularized Injury-in-Fact

Failure to allege a concrete *and* particularized injury in fact precludes a plaintiff from demonstrating Article III standing. *See* *Spokeo*, 578 U.S. at 340 (observing the Supreme Court has "made it clear time and time again that an injury in fact must be both concrete *and* particularized") (collecting authorities). Thus, this Court need not delve into Defendants' argument that Solis fails to allege a *particularized* economic injury. Yet it does so in the interests of completeness and

streamlining the issues, should Solis attempt to cure the deficiencies identified above and should Defendants again seek to dismiss Solis' prospective second amended pleading under Rule 12(b)(1).

"Art[icle] III requires the party who invokes the court's authority to 'show that [s]he personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant[.]' " *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Unless an injury affects the "plaintiff in a personal and individual way," it is not "particularized" and, thus, cannot form the basis for Article III standing. *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560 n.1).

"The 'gist of the question of standing' is whether the party seeking relief has 'alleged a personal stake in the outcome of the controversy as to assure that concrete adverseness ... upon which the court so largely depends for illumination of difficult [legal] questions.' " *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 205 (1962)). Indeed, Article III standing doctrine "derives from the interests in ensuring that parties have the proper incentives to litigate cases." *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1005 (9th Cir. 2001). With this doctrinal basis in mind, to demonstrate a particularized economic injury, here, Solis must proffer allegations that enable this Court to infer she purchased a unit of Product contaminated with PFAS. *Cf. Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1030 (8th Cir. 2014) ("In the context of defective products, ' it is not enough for a plaintiff to allege that a product line contains a defect or that a product is at risk for manifesting this defect; rather, the plaintiffs must allege that *their* product *actually exhibited* the alleged defect.' " (quoting *In re Zurn Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 616 (8th Cir. 2011)) (emphasis in original)); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("[N]amed plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' " (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976))).

***11** In the Amended Complaint, Solis alleges Toxin Free USA screened a sample of the Product at some unspecified time prior to July 2021, several months before Solis purchased her own unit of Product. (Am. Compl. ¶¶ 6, 31.) Toxin Free USA detected 6,242 parts per million of organic fluorine in the tested sample. (*Id.* ¶ 6.) However, Solis does not allege she tested—or knows the precise chemical composition of —the unit of Product she purchased in December 2021. [6] Defendants contend the absence of such allegations is fatal. (Mem. at 12–13 ("Plaintiff has evidently not undertaken even a basic investigation of the chemical composition of any Product unit she purchased. She has not screened a unit of the Product for fluorine or organic fluorine[.]").) In support, Defendants cite three cases for the legal premise that, to defeat a Rule 12(b)(1) facial challenge in an economic injury case involving the purchase of a purportedly adulterated product, a plaintiff must expressly allege the specific item he or she purchased is, in fact, adulterated. (Mem. at 12–13 (citing *Schloegel v. Edgewell Personal Care Co.*, No. 4:21-CV-0631-DGK, 2022 WL 808694, at *1 (W.D. Mo. Mar. 16, 20122); *Doss v. Gen. Mills, Inc.*, No. 18-61924-CIV, 2019 WL 7946028, at *2–3 (S.D. Fla. June 14, 2019), *aff'd*, 816 F. App'x 312 (11th Cir. 2020); *Pels v. Keurig Dr. Pepper, Inc.*, No. 19-CV-3052-SI, 2019 WL 5813422, at *1 (N.D. Cal. Nov. 7, 2019)).)

6 Alongside her Opposition, Solis proffers a declaration from her counsel, Sean L. Litteral, attaching a copy "of the fluorine and organic fluorine testing results by Galbraith Laboratories, showing 7600ppm of Fluorine and 7600ppm of Organic Fluorine." (Litteral Decl., Ex. 1 to Opp'n, ECF No. 20-1.) The Galbraith's report indicates that the results pertain to a sample of "CoverGirl TruBlend Pressed Powder" that was screened on May 11, 2022. (Lab Report, Ex. A to Litteral Decl., ECF No. 20-1.) In her Opposition, Solis states that she commissioned Galbraith's report. (Opp'n at 13–14.) But nowhere in the Litteral Declaration or the Galbraith report does it indicate the test results pertain to the unit of Product Solis purchased in December 2021. *See George v. Grossmont Cuyamaca Cmty. Coll. Dist. Board of Governors*, 22-cv-0424-BAS-DDL, 2022 WL 18330467, at *10 (S.D. Cal. Nov. 29, 2022)2022 WL 18330467, at *10 (S.D. Cal. Nov. 29, 2022) ("[S]tatements made in briefs neither constitute well-plead[ed] allegations entitled to the presumption of truth nor admissible evidence[.]"). Indeed, there is no

> attestation suggesting Solis purchased the unit of Product Galbraith tested.

To the extent those precedents might be fairly interpreted to support Defendants' contention, this Court respectfully disagrees Solis must, as a matter of law, proffer a formulaic recitation that the specific unit of Product she purchased contains PFAS. Defendants do not cite to any Ninth Circuit decision that goes so far. And that premise is incongruent with the standard under which Rule 12(b)(1) facial challenges are adjudicated: district courts must accept the allegations of the complaint as true and draw all reasonable inferences from those allegations in favor of the plaintiff. *See* *Doe v. Holly*, 557 F.3d 1066, 1073 (9th Cir. 2009) (per curiam) (citing *Wolfe v. Stankman*, 392 F.3d 358, 362 (9th Cir. 2004)), *cert denied*, 561 U.S. 1024 (2010). As the Supreme Court opined in *Lujan v. Defenders of Wildlife*, "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that the general allegations embrace those specific facts that are necessary to support the claim.' " 504 U.S. at 562 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

Thus, to survive Defendants' facial challenge, Solis need not explicitly allege the unit of Product she purchased actually contained PFAS or that all units of the Product contain PFAS, but may simply aver facts from which this Court can make such reasonable inferences. The Amended Complaint permits just that. Unlike in *Schloegel* and *Doss*, where the plaintiffs hedged their bets by averring "some" of the units of product at issue had been adulterated, Solis repeatedly alleges that the CoverGirl's TruBlend Pressed Powder, as a product line, contains PFAS. (*See* Am. Compl. ¶¶ 10, 51, 62, 68, 139, 247.) Solis also alleges the Product's marketing and advertising "was uniform and pervasive." (*Id.* ¶ 64; *see also id.* ¶ 138.) This would include the Product's labeling, which, as reflected in the image for which Defendants sought —and this Court granted—judicial notice, expressly discloses the Product contains PTFE. These allegations distinguish the Amended Complaint from the pleadings in *Schloegel, Doss*, and *Pels*, because they contain facts that lend easily to the inference Solis purchased a unit of the Product with PFAS. *Cf.* *Rice-Sherman v. Big Heart Pet Brands, Inc.*, Case No. 19-cv-3613-WHO, 2020 WL 1245130, at *7 ("A fair reading of their FAC shows that they allege that all Nature's Food recipe products are falsely advertised. Nowhere in the FAC do plaintiffs allude that *some* of Nature's Recipe Food is grain-free but that a subset of the product is not.") (emphasis added); *Von Slomski v. Hain Celestial Grp., Inc.*, No. SACV131757AGANX, 2014 WL 12771116, at *5 (C.D. Cal. June 10, 2014) (finding allegations sufficient for standing because "Plaintiffs broadly allege[d] that the teas contain pesticides, rather than merely alleging that some of the packages contain pesticides").

***12** Accordingly, the Court is unpersuaded by this strand of Defendants' Rule 12(b)(1) argument.

* * * *

Based on the foregoing, the Court finds Solis does not sufficiently allege she suffered a concrete economic injury arising from her December 2021 purchase of the Product. Nor does Solis assert she suffered any other injury-in-fact that would supply her with Article III standing to pursue her claims. Accordingly, she fails to satisfy her burden of demonstrating the "triad of injury in fact, causation and redressability," which "constitutes the core of Article III's case-or-controversy requirement," and, thus, her Amended Complaint warrants dismissal under Rule 12(b)(1). *See* *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998).

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendants' Motion to dismiss the Amended Complaint pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction. That dismissal is **WITHOUT PREJUDICE** to Solis filing a corrective pleading that resolves the deficiencies delineated herein. If Solis wishes to do so, she must file her Second Amended Complaint **on or before March 31, 2023**.

IT IS SO ORDERED.

All Citations

Slip Copy, 2023 WL 2394640

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192-3008

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **SUNDAY RILEY MODERN SKINCARE, LLC, a limited liability company, and** **SUNDAY RILEY, individually and as an officer of SUNDAY RILEY MODERN SKINCARE, LLC.**	**DECISION AND ORDER** **DOCKET NO. C-4729**

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondents with violations of the Federal Trade Commission Act.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further

conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

    a. Respondent Sunday Riley Modern Skincare, LLC, a Texas limited liability company with its principal office or place of business at 4444 Westheimer Road, Suite G305, Houston, Texas 77027-4455.

    b. Respondent Sunday Riley, an officer of Corporate Respondent, Sunday Riley Modern Skincare, LLC. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of Sunday Riley Modern Skincare, LLC. Her principal office or place of business is the same as that of Sunday Riley Modern Skincare, LLC.

2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Clearly and Conspicuously" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

    1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

    2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

    3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "Close Proximity" means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.

C. "Respondents" means the Corporate Respondent and the Individual Respondent, individually, collectively, or in any combination.

1. "Corporate Respondent" means Sunday Riley Modern Skincare, LLC, a limited liability company, and its successors and assigns.

2. "Individual Respondent" means Sunday Riley.

D. "Unexpected Material Connection" means any relationship that might materially affect the weight or credibility of a testimonial or endorsement and that would not reasonably be expected by consumers.

Provisions

I. Prohibited Representations Regarding Endorsements

IT IS ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of any product must not make any misrepresentation, expressly or by implication, about the status of any endorser or person providing a review of the product, including a misrepresentation that the endorser or reviewer is an independent or ordinary user of the product.

II. Required Disclosure of Material Connections

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of any product must not make any representation, expressly or by implication, about any consumer or other endorser of such product without disclosing, Clearly and Conspicuously, and in Close Proximity to that representation, any Unexpected Material Connection between such endorser and (1) any Respondent; or (2) any other individual or entity affiliated with the product.

III. Notification of Disclosure Responsibilities

IT IS FURTHER ORDERED that Respondents provide each employee, agent, and representative with a clear statement of his or her responsibilities to disclose clearly and conspicuously and in close proximity to any endorsement in any online review, social media posting, or other communication endorsing any Respondent's product, the employee's, agent's, or representative's connection to the product, and obtaining from each such recipient a signed and dated statement acknowledging receipt of that statement and expressly agreeing to comply with it. Delivery and acknowledgement must occur within 10 days after the effective date of this Order for current employees, agents, and representatives. For all others, delivery and acknowledgement must occur before they assume their responsibilities.

IV. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is the majority owner or controls directly or indirectly, and Corporate Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

V. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondents must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, Individual Respondent must: (a) identify all her telephone numbers and all her physical, postal, email and Internet addresses, including all residences; (b) identify all her business activities, including any business for which such Respondent performs services whether as an employee or otherwise and any entity in which such Respondent has any ownership interest; and (c) describe in detail such Respondent's involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. Each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Respondent must submit notice of any change in: (a) name,

including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services whether as an employee or otherwise and (ii) any entity in which such Respondent has any ownership interest and over which such Respondent has direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580. The subject line must begin: In re *Sunday Riley Modern Skincare, LLC*.

VI. Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Corporate Respondent and Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. copies or records of all consumer or other complaints relating to the independence or veracity of any product reviewer or endorser or the disclosure of Unexpected Material Connections by any endorser, whether received directly or indirectly, such as through a third party, and any response;

E. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

F. a copy of each unique advertisement or other marketing material, including product reviews and social media endorsements, making a representation subject to this Order; and

G. for 5 years from the date created or received, all records, whether prepared by or on behalf of Respondents, that tend to show any lack of compliance by Respondents with this Order.

VII. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, each Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning the Individual Respondent, pursuant to Section 604(2) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

VIII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on November 6, 2040, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioners Chopra and Slaughter dissenting.

April J. Tabor
Acting Secretary

SEAL:
ISSUED: November 6, 2020

CLASS SETTLEMENT AGREEMENT

This Class Settlement Agreement ("Agreement") is entered into this _ day of December, 2018 by and between Plaintiff Jeannie Patora ("Plaintiff"), on behalf of herself and each of the members of the Settlement Class, on the one hand, and Defendant Tarte, Inc. ("Tarte" or "Defendant"), a New York corporation with its principal place of business at 1375 Broadway, New York, New York, 10018, on the other (collectively, Plaintiff and Defendant are the "Parties"). The Parties intend for this Agreement to fully, finally, and forever resolve, discharge, and settle all released rights and claims, subject to the terms and conditions set forth herein.

I. RECITALS

1.1 On November 13, 2017, the Sultzer Law Group, P.C., counsel for Plaintiff ("Plaintiff's Counsel") sent a pre-suit notice letter to Defendant alleging that the marketing of Defendant's products that bear the trademark "high-performance naturals" was false and misleading because the products contain certain ingredients Plaintiff alleged were non-natural. The letter enclosed a draft complaint for a civil action to be filed in the United States District Court for the Southern District of New York, and demanded that Defendant preserve certain records related to the allegations in the draft complaint.

1.2 The draft complaint sought certification of a nationwide class and a New York subclass under both Rule 23(b)(3) and 23(b)(2), and alleged seven counts of wrongdoing: (i) violation of New York GBL § 349; (ii) violation of New York GBL § 350; (iii) violation of consumer protection statutes of more than forty states; (iv) breach of express warranty; (v) violation of the Magnusson-Moss Warranty Act; (vi) breach of implied warranty of merchantability; (vii) breach of implied warranty of fitness for a particular purpose.

1.3 Upon receipt of the pre-suit notice letter and draft complaint, Defendant (through Defendant's Counsel) engaged in confidential pre-litigation settlement negotiations with Plaintiff (through her counsel), comprised of correspondence and numerous telephone calls. The Parties exchanged confidential information, including information regarding sales of the products bearing the labeling challenged by Plaintiff.

1.4 On March 23, 2018, the Parties attended an in-person mediation in New York City. The mediation was before Hon. Stephen M. Orlofsky of Blank Rome LLP, and was attended by Plaintiff's Counsel, Defendant's Counsel and Defendant's General Manager. Although the Parties did not reach a settlement, Defendant's Counsel and Plaintiff's Counsel continued to engage in extensive settlement discussions. On or about July 24, 2018, Plaintiff's Counsel and Defendant's Counsel spoke on the phone and agreed upon a framework for a resolution of the matter. Over the next several months, Plaintiff's Counsel and Defendant's Counsel negotiated a term sheet setting out the basic outline of a settlement agreement providing for both monetary and injunctive relief for Plaintiff and the putative class, and a broad release for Defendant. The term sheet was executed by Plaintiff's Counsel and Defendant's Counsel on September 18, 2018. Thereafter, the Parties began drafting and negotiating this Class Settlement Agreement in order to resolve this Action on a classwide basis, with Court approval.

1.5 As soon as practicable following the execution of this Agreement, Plaintiff will file the Complaint in this Action, captioned *Patora v. Tarte, Inc.*, in the United States District Court for the Southern District of New York. On the same date as the filing of the Complaint in this Action, Defendant will file a Notice of Settlement indicating that the parties had

entered into this Class Settlement Agreement and would be seeking the Court's approval to resolve this dispute on a classwide basis.

II. DEFINITIONS

2.1 "Action" means the lawsuit to be captioned *Patora v. Tarte, Inc.*, and filed in the United States District Court for the Southern District of New York.

2.2 "Agreement" or "Settlement Agreement" means this Class Settlement Agreement and any exhibits attached or incorporated hereto, including any amendments the Parties may agree to, and any exhibits to such amendments.

2.3 "Attorneys' Fees and Expenses" means any funds the Court may award to Class Counsel as compensation for any fees and expenses incurred in connection with this Action and/or the Settlement, as set forth in Section VIII of this Class Settlement Agreement. Attorneys' Fees and Expenses do not include costs or expenses associated with Class Notice or the administration of the settlement.

2.4 "Claim Form" means the document to be submitted by Claimants seeking payment pursuant to Section 4.2 of this Class Settlement Agreement. The Claim Form will accompany the mailed Class Notice and will be available online at the Settlement Website, substantially in the form of Exhibit A to this Class Settlement Agreement.

2.5 "Claim Period" means the time period during which the members of the Settlement Class may submit a Claim Form to the Settlement Administrator for review. The Claim Period shall run for a period of time ordered by the Court, and last at least ninety (90) calendar days from the date of the first publication of the Summary Settlement Notice or Class Notice, whether online, via print publication, or via press release, whichever is earlier.

2.6 "Claimant" means a member of the Settlement Class who submits a claim for payment as described in Section 4.2 of this Class Settlement Agreement.

2.7 "Class Action Settlement Administrator," "Settlement Administrator," or "Notice Administrator" means the company jointly selected by Class Counsel and Defendant's Counsel and approved by the Court to provide Class Notice and to administer the claims process.

2.8 "Class Counsel" means the Sultzer Law Group, P.C., 85 Civic Center Plaza, Suite 104, Poughkeepsie, NY, 12601.

2.9 "Class Notice" or "Long Form Notice" means the legal notice of the proposed Settlement terms, substantially in the form of Exhibit B, as approved by Defendant's Counsel and Class Counsel, subject to approval by the Court, to be provided to potential members of the Settlement Class in the methods set forth below.

2.10 "Class Period" means the period from November 13, 2013, to the deadline for claim submission set forth in the Class Notice.

2.11 "Complaint" means the operative Complaint in the Action.

2.12 "Court" means the United States District Court for the Southern District of New York.

2.13 "Defendant's Counsel" means Arnold & Porter Kaye Scholer LLP, 10th Floor, Three Embarcadero Center, San Francisco, CA 94111-4024.

2.14 "Effective Date" means:

(a) if no appeal is taken from the Order and Final Judgment, thirty-five (35) days after the Court enters the Order and Final Judgment of this Class Settlement Agreement; or

(b) if an appeal is taken from the Order and Final Judgment, the date on which all appellate rights (including petitions for rehearing or re-argument, petitions for rehearing *en banc*, petitions for certiorari or any other form of review, and proceedings in the United States Supreme Court or any other appellate court) have expired, been exhausted, or been finally disposed of in a manner that affirms the Order and Final Judgment.

2.15 "Final Approval" of this Class Settlement Agreement means the date that the Order and Final Judgment is entered in this Action approving this Class Settlement Agreement.

2.16 "Fund Institution" means a third-party banking institution where the cash funds Defendant will pay under the terms of this Agreement will be deposited into a Qualified Settlement Service Award Fund account. Pursuant to Section 4.1, Class Counsel will select the Fund Institution, and Defendant's Counsel will approve it.

2.17 "Initial Claim Amount" means the amount a member of the Settlement Class claims as a cash payment on a Claim Form that is timely, valid, and approved by the Settlement Administrator. The Initial Claim Amount is subject to *pro rata* increase or decrease, depending on the value of all approved Claims submitted, pursuant to Section 4.4.

2.18 "Notice Plan" means the plan for publication of Class Notice developed by the Settlement Administrator, attached hereto as Exhibit C.

2.19 "Order and Final Judgment" means the final order to be entered by the Court approving the Settlement pursuant to the terms and conditions of this Agreement, dismissing the Action with prejudice, releasing claims, and otherwise directing as the Court or the Parties deem necessary and appropriate to effectuate the terms and conditions of this Agreement.

2.20 "Preliminary Approval" means the order preliminarily approving this Agreement, preliminarily certifying the Settlement Class, approving the Notice of Proposed Settlement, and issuing any necessary related orders.

2.21 "Products" means Defendant's High-Performance Naturals-branded products, and any similar Tarte products, including those products purchased by members of the Settlement Class during the Class Period, as well as any such products or similar products purchased by members of the Settlement Class in the future, provided that there is no substantial change in their formulation or Defendant's labeling, marketing or advertising that would be material to the claims resolved in this Settlement Agreement and that would contravene Sections 4.5, 4.6, and 4.7 of this Agreement.

2.22 "Proof of Purchase" means a receipt or other documentation reasonably establishing the fact of purchase, date of purchase, and the price paid for a Product during the Settlement Class Period in the United States. Proof of Purchase may be in the form of any reasonably reliable proof customarily provided to Claims Administrators to establish proof of purchase for class membership, such as an itemized store receipt or loyalty/membership card print-outs, or original UPC code for each purchased product.

2.23 "Qualified Settlement Fund" means the type of fund, account, or trust, created pursuant to 26 C.F.R. § 1.468B-1, that the Fund Institution will establish to receive payments under this Agreement.

2.24 "Related Actions" means any action previously filed, threatened to be filed, or filed in the future in any state or federal court asserting claims and/or alleging facts substantially similar to those asserted and alleged in this Action.

2.25 "Released Claims" means any claim, cross-claim, liability, right, demand, suit, matter, obligation, damage, restitution, disgorgement, loss or cost, attorney's fee or expense, action, or cause of every kind and description that any Plaintiff, the Settlement Class or any member thereof had or have, including assigned claims, whether in arbitration, administrative, or judicial proceedings, whether as individual claims, claims asserted on a class basis or on behalf of the general public, whether known or unknown, asserted or unasserted, suspected or unsuspected, latent or patent, that is, has been, could reasonably have been, or in the future might reasonably be asserted by Plaintiff or members of the Settlement Class either in the Action or in any action or proceeding in this Court or in any other court or forum, including any Related Actions, regardless of legal theory or the law under which such action may be brought, and regardless of the type or amount of relief or damages claimed, against any of the Released Persons, arising out of or relating to the allegations in the Complaint or the labels on the Products (all sizes and fragrances) and Websites or that otherwise relates in any way to advertising, formulation, labeling, or marketing, in any format or medium, of Defendant's Products as natural, high-performing, or as high-performance naturals™. Plaintiff and the Settlement Class agree that the modifications to the labeling, packaging, marketing, and advertising of the Products set forth in Section 4.5 below are satisfactory to Plaintiff and the Settlement Class and alleviate each and every alleged deficiency with regard to the advertising, formulation, labeling, packaging, advertising, and marketing of the Products (and similar deficiencies, if any), with regard to other or future Products set forth in or related to the Complaint and/or Related Actions. For the avoidance of doubt, the term "Released Claims" includes only those claims that arise out

of or relate to the allegations in the Complaint, Related Actions, or Defendant's advertising, formulation, labeling, marketing and advertising of the Products.

2.26 "Released Persons" means and includes Tarte, Inc., and its current and former parents, subsidiaries, affiliates and controlled companies both inside and outside the United States, predecessors, and successors, suppliers, distributors, retailers, customers, and assigns, including the present and former directors, officers, employees, shareholders, agents, insurers, partners, privies, representatives, attorneys, accountants, and all persons acting by, through, under the direction of, or in concert with them.

2.27 "Residual Fund" means the value of any funds remaining in the Settlement Fund, less all Claimants' Initial Claim Amounts; less Class Notice and administration costs, and less all Attorneys' Fees and Expenses and Service Awards pursuant to Court Order or otherwise specified in this Agreement.

2.28 "Service Award" means the amount the named Plaintiff, Jeannie Patora, will receive for her service as class representative, pursuant to Section 8.6.

2.29 "Settlement Amount" means One Million Seven Hundred Thousand Dollars ($1,700,000.00).

2.30 "Settlement Class" means all persons and entities that, during the Class Period, both resided in the United States and purchased in the United States any of the Products for personal use and not for resale. Excluded from the Settlement Class are: (a) Defendant's board members or executive-level officers, including its attorneys; (b) governmental entities; (c) the Court, the Court's immediate family, and the Court's staff; and (d) any person that timely and properly excludes himself or herself from the Settlement Class in accordance with the procedures approved by the Court.

2.31 "Settlement Fund" means the Settlement Amount that Defendant will pay in cash to the Settlement Fund Institution to be used to pay members of the Settlement Class who submit valid and timely Claim Forms, pursuant to Section 4.2. The Settlement Fund will also be used to pay for any award of Attorneys' Fees and Expenses that the Court orders, any Class Notice and administration costs, Service Awards, and other costs pursuant to the terms of Section 4.1 of this Agreement.

2.32 "Settlement Hearing(s)" means the hearing or hearings the Court will hold to consider and determine whether it should approve the proposed settlement contained in this Agreement as fair, reasonable, and adequate, and whether it should enter Judgment approving the terms of this Agreement. Settlement Hearings include both a "Preliminary Approval Hearing" and a "Final Approval Hearing" or "Fairness Hearing," to be held after preliminary approval is granted, as the Court so orders.

2.33 "Settlement Website" means the website to be created for this settlement that will include information about the Action and the Agreement, relevant documents, and electronic and printable forms relating to the Agreement, including the Claim Form. The Settlement Website shall be activated by the date of the first publication of the Summary Settlement Notice or Class Notice, whichever is earlier, and shall remain active until ninety (90) calendar days after the Court enters the Order and Final Judgment.

2.34 "Summary Settlement Notice" or "Short Form Notice" means the Summary Class Notice of proposed class action settlement, to be disseminated by publication substantially in the form of Exhibit D attached to this Agreement. Any changes to the Summary Settlement Notice or Short Form Notice from the form set forth in Exhibit D must be jointly approved by Class Counsel and Defendant's Counsel.

2.35 "Tally" or "Final Tally" means the calculation and report the Settlement Administrator shall provide to the Parties, which shall include the value, number, and type of timely, valid, and approved Claims. The Final Tally shall also include the amount that members of the Settlement Class timely and validly claimed. The Settlement Administrator shall give the Final Tally to the Parties no later than seven (7) calendar days after the close of the Claim Period.

2.36 "Tarte, Inc." or "Tarte" means Defendant Tarte, Inc., a New York corporation with its principal place of business located at 1375 Broadway, New York, New York, 10018, and its predecessors, subsidiaries, shareholders, affiliates, officers, directors, partners, employees, agents, servants, assignees, successors, and/or other transferees or representatives.

2.37 "Website" means US-facing websites for Defendant, including https://tartecosmetics.com/en_US/home.

III. CERTIFICATION OF THE CLASS AND PRELIMINARY APPROVAL

3.1 For the purposes of settlement and the proceedings contemplated herein, the Parties stipulate and agree that a nationwide Settlement Class should be certified. Such certification is for settlement purposes only, and has no effect for any other purpose.

3.2 The certification of the Settlement Class shall be binding only with respect to this Agreement. In the event that the Effective Date does not occur for any reason, the Preliminary Approval, and all of its provisions, shall be vacated by its own terms, and this Action shall revert to the status that existed prior to the date of this Agreement.

3.3 As part of the settlement process, Defendant consents to Plaintiff's application to the Court for entry of an Order which, among other things: (a) preliminarily certifies the

Settlement Class in accordance with the definition set forth in Section 2.30 of this Agreement; (b) preliminarily approves this Agreement for purposes of issuing Class Notice; (c) approves the timing, content, and manner of the Class Notice and Summary Settlement Notice; (d) appoints the Settlement Administrator; (e) appoints the Sultzer Law Group P.C. as Class Counsel and Plaintiff Jeannie Patora as Class Representative; and (f) makes such orders as are necessary and appropriate to effectuate the terms and conditions of this Agreement.

IV. SETTLEMENT CONSIDERATION AND BENEFITS

The settlement relief includes three components to benefit the Settlement Class: (a) a Settlement Fund from which member of the Settlement Class who submit timely, valid, and approved claims will obtain refunds; (b) modifications to the labeling of the in store displays where the Products are sold; and (c) modifications to Website(s) where Defendant advertises and sells the Products.

4.1 Settlement Fund

(a) Settlement Fund. Defendant shall establish a Settlement Fund with a value of One Million Seven Hundred Thousand Dollars ($1,700,000.00) and shall make all cash payments due pursuant to Section 4.2 by paying this amount into a Qualified Settlement Fund at the Fund Institution.

The Settlement Fund shall be applied to pay in full and in the following order: (i) any necessary taxes and tax expenses; (ii) all costs and expenses associated with disseminating notice to the Settlement Class, including but not limited to the Class Notice and Summary Settlement Notice; (iii) all costs and expenses associated with the administration of the Settlement, including but not limited to processing claims and fees of the Class Action

Settlement Administrator; (iv) any Attorneys' Fees and Expenses award made by the Court to Class Counsel pursuant to Section VIII of this Class Settlement Agreement; (v) any Service Award made by the Court to Plaintiff under Section 8.6 of this Class Settlement Agreement; (vi) cash payments distributed to Settlement Class Members who have submitted timely, valid, and approved Claims pursuant to the Claims Process outlined in Section 4.2 and the Monetary Relief outlined in Section 4.3 of this Class Settlement Agreement; and (vii) the Residual Funds, if any, pursuant to Section 4.4 of this Agreement.

(b) Defendant's Funding of the Settlement Fund

(i) Within ten (10) days after Preliminary Approval, Defendant shall fund the costs associated with carrying out the Notice Plan.

(ii) Within thirty-five (35) calendar days after the entry of Final Approval, Defendant shall fund the Settlement Fund with the entire Settlement Amount. This deadline may be extended by mutual consent of the Parties.

(c) The Parties must approve any payment of costs or expenses under Sections 4.1(a)(i), 4.1(a)(ii), and 4.1(a)(iii).

(d) In no circumstances shall Defendant's total contribution to or liability for the Settlement Fund exceed the One Million Seven Hundred Thousand Dollars ($1,700,000.00). Thus, under this Agreement, the Parties agree that the Settlement Fund encompasses the full extent of Defendant's monetary payment due. These payments, pursuant to the terms and conditions of this Agreement, and any other non-monetary obligations of and considerations due from Defendant set forth in this Agreement, will be in full satisfaction of all individual and class claims asserted in or that could have been asserted in this Action.

(e) Defendant and the Released Parties are not obligated (and will not be obligated) to compute, estimate, or pay any taxes on behalf of Plaintiff, Plaintiff's Counsel, Class Counsel, any member of Settlement Class, the Notice Administrator, or the Settlement Administrator.

(f) In the event the Effective Date does not occur, all amounts paid into the Settlement Fund, less amounts incurred for claims administration and notice, shall be promptly returned to Defendant, and this Action shall revert to its status that existed prior to the date of this Agreement, except as otherwise ordered by the Court.

4.2 **Eligibility and Process for Obtaining a Cash Payment**

To be eligible for a cash payment, a member of the Settlement Class must submit a timely and valid Claim Form, which will be evaluated by the Settlement Administrator.

(a) **Claim Form Availability.** The Claim Form shall be in a substantially similar form to that attached as Exhibit A. The Claim Form will be: (i) included on the Settlement Website to be designed and administered by the Settlement Administrator in consultation with Defendant and Class Counsel, and members of the Settlement Class shall be allowed to complete the Claim Form online; and (ii) made readily available from the Settlement Administrator, including by requesting a Claim Form from the Settlement Administrator by mail, e-mail, or calling a toll-free number provided by the Settlement Administrator.

(b) **Timely Claim Forms.** Members of the Settlement Class must submit a timely Claim Form, which is one postmarked or submitted online before or on the last day of the Claim Period, the specific date of which will be prominently displayed on the Claim Form and Class Notice. For a non-online Claim Form, the Claim Form will be deemed to

have been submitted on the date of the postmark on the envelope or mailer. For an online Claim Form and in all other cases, the Claim Form will be deemed to have been submitted on the date it is received by the Settlement Administrator.

(c) **Validity of Claim Forms.** Members of the Settlement Class must submit a valid Claim Form, which must contain the Settlement Class member's name and mailing address, attestation of purchase(s) as described in Section 4.2(d), type(s) and number of Products purchased, and approximate locations and dates of purchase. Subject to Section 4.2(g) herein, Claim Forms that do not meet the requirements set forth in this Agreement and in the Claim Form instructions may be rejected. The Settlement Administrator will determine a Claim Form's validity.

Where a good faith basis exists, the Settlement Administrator may reject a Claim Form for, among other reasons, (i) failure to attest to the purchase of the Products or purchase of products that are not covered by the terms of this Settlement Agreement; (ii) failure to provide adequate verification or additional information about the Claim pursuant to a request of the Settlement Administrator; (iii) failure to fully complete and/or sign the Claim Form; (iv) failure to submit a legible Claim Form; (v) submission of a fraudulent Claim Form; (vi) submission of a Claim Form that is duplicative of another Claim Form; (vii) submission of a Claim Form by a person who is not a member of the Settlement Class; (viii) request by person submitting the Claim Form to pay funds to a person or entity that is not the member of the Settlement Class for whom the Claim Form is submitted; (ix) failure to submit a Claim Form by the end of the Claim Period; or (x) failure to otherwise meet the requirements of this Class Settlement Agreement.

(d) **Attestation of Purchase Under Penalty of Perjury Required.** For claims without proof of purchase, each member of the Settlement Class submitting a Claim Form shall sign (either by hand or electronic signature if the claim is submitted online) and submit a Claim Form that states to the best of his or her knowledge the total number and type of Products that he or she purchased, and the approximate date(s) of his or her purchases. The Claim Form shall be signed under an affirmation stating the following or substantially similar language: "I declare, under penalty of perjury, that the information in this Claim Form is true and correct to the best of my knowledge, and that I purchased the Product(s) claimed above in the United States during the Class Period for personal or household use and not for resale. I understand that my Claim Form may be subject to audit, verification, and Court review."

(e) **Verification of Purchase May Be Required.** The Claim Form shall advise members of the Settlement Class that while proof of purchase is not required to submit a Claim, the Settlement Administrator has the right to request verification or more information regarding the purchase of the Products for the purpose of preventing fraud. If the Settlement Administrator requests such verification and the member of the Settlement Class does not timely comply or is unable to produce documents or additional information to substantiate the information on the Claim Form and the Claim is otherwise not approved, the Settlement Administrator may disqualify the Claim, subject to the reconsideration procedure outline in section 4.2(g) below.

(f) **Claim Form Submission and Review.** Claimants may submit a Claim Form either by mail or electronically. The Settlement Administrator shall review and process the Claim Forms pursuant to the process described in this Agreement to determine each

Claim Form's validity. Adequate and customary procedures and standards will be used by the Settlement Administrator to prevent the payment of fraudulent claims and to pay only legitimate claims. The Parties shall direct the Settlement Administrator to take all reasonable steps, to ensure that Claim Forms completed and signed electronically by members of the Settlement Class conform to the requirements of the federal Electronic Signatures Act, 15 U.S.C. § 7001, *et seq.*

(g) **Claim Form Deficiencies.** In the event the Settlement Administrator rejects a Claim Form pursuant to section 4.2(c) above, the Settlement Administrator shall mail notice of rejection to Settlement Class Members whose Claims have been rejected in whole or in part. Failure to provide all information requested on the Claim Form will not result in immediate denial or nonpayment of a claim. Instead, the Settlement Administrator will take all reasonable and customary steps to attempt to cure the defect and to determine the eligibility of the member of the Settlement Class for payment and the amount of payment based on the information contained in the Claim Form or otherwise submitted, including advising the Settlement Class Members that if they disagree with the determination, the Settlement Class Member may send a letter to the Claims Administrator requesting reconsideration of the rejection and the Claims Administrator shall reconsider such determination, which reconsideration shall include consultation with Class Counsel and Defendant's Counsel. In such event, Settlement Class Members shall be advised of their right to speak with Class Counsel, and Defendant is entitled to dispute claims if available records or other information indicate that the information on the Claim Form is inaccurate or incomplete. The Parties shall meet and confer regarding resolution of such Claims and, if unable to agree, shall submit those Claims to the Court for determination. As to any Claims

being determined by the Court pursuant to this paragraph, the Claims Administrator shall send payment or a letter explaining the Court's rejection of the Claim, within thirty-five (35) days of the Court's determination.

(h) **Failure to Submit Claim Form.** Unless a member of the Settlement Class opts out pursuant to Section VI, any member of the Settlement Class who fails to submit a timely and valid Claim Form shall be forever barred from receiving any payment pursuant to this Agreement, and shall in all other respects be bound by the terms of this Agreement and the terms of the Order and Final Judgment to be entered in the Action. Based on the Release contained in the Agreement, any member of the Settlement Class who does not opt out will be barred from bringing any action in any forum (state or federal) against any of the Released Parties concerning any of the matters subject to the Release.

(i) **Cash Recovery for Members of the Settlement Class.** The relief to be provided to each member of the Settlement Class who submits a timely and valid Claim Form pursuant to the terms and conditions of this Class Settlement Agreement shall be a payment in the form of a cash refund. The total amount of the payment will vary based on: (i) whether the member of the Settlement Class submits valid Proof of Purchase; (ii) whether the member of the Settlement Class provides additional information regarding his or her purchase, such as the specific product purchased and/or his or her satisfaction with that product; and (iii) the total amount of valid claims submitted. Cash refunds will be paid by the Settlement Administrator via check, pursuant to Section 4.3.

(j) **Monetary Relief for Settlement Class.**

(i) Proof of Purchase. Claimants with Proof of Purchase may obtain a full refund for the Product or Products reflected in the Proof of Purchase, provided

they were purchased for personal use during the Class Period, without any limitation on the number of Products purchased. The Initial Claim Amount depends on the number of Products purchased per the Proof of Purchase provided and is subject to a *pro rata* upward or downward adjustment pursuant to Section 4.4.

(ii) Without Proof of Purchase. Members of the Settlement Class who file a Claim Form for purchases of Products for which they are unable to provide Proof of Purchase may seek reimbursement of up to Five Dollars ($5.00) per Product purchased for up to five (5) Products per household by stating under penalty of perjury the type(s) and number of Products purchased, and approximate dates of purchases. Alternately, such Settlement Class members may seek reimbursement of up to Five Dollar ($5.00) per Product purchased for up to ten (10) Products per household by stating under penalty of perjury the type(s) and number of Products purchased, approximate dates of purchases, and retailer and/or location of the purchase(s), and providing additional information regarding the purchase, such as the type of product purchased and/or the Settlement Class member's satisfaction with the product. In such event, any request to provide additional information must be agreed upon by the Parties. The substance of Settlement Class Members' responses to any request for additional information regarding their purchases shall not affect his or her eligibility to receive reimbursement for up to ten (10) Products without proof of purchase. In other words, simply providing the additional information entitles Settlement Class Members' to receive reimbursement for up to ten (10) Products – there is no wrong answer that will reduce the settlement's benefits, as long as the Settlement Class Member is otherwise eligible to receive the benefits. On the Claim Form, the Settlement Class member must state the type of Product(s) purchased and the number of Product(s) purchased during the Class Period. The

Initial Claim Amount depends on the number of Products purchased and whether the additional information described in this section is provided, and is subject to a *pro rata* upward or downward adjustment pursuant to Section 4.4.

4.3 **Distribution to Authorized Settlement Class Members**

(a) The Settlement Administrator shall begin paying timely, valid, and approved Claims via first-class mail no later than ten (10) calendar days after the Effective Date.

(b) The Settlement Administrator shall have completed mailing the payments to Settlement Class Members who have submitted timely, valid, and approved Claims pursuant to the Claim Process no later than twenty (20) calendar days after the Effective Date.

4.4 **Excess or Insufficient Funds in the Settlement Fund**

(a) **Excess Funds.** If, after the payment of all valid Claims, Notice and Administration costs, Attorneys' Fees and Expenses, Service Awards, and any other claim, cost, or fee specified by this Agreement, value remains in the Settlement Fund, it shall be called the Residual Fund. Any value remaining in the Residual Fund shall increase eligible Settlement Class Members' relief on a *pro rata* basis until the Residual Fund is exhausted as follows:

(i) If Residual Funds Available. If there is a Residual Fund, then Settlement Class Members' relief shall be increased on a *pro rata* basis up to a maximum of five hundred percent (500%) of the Eligible Settlement Class Member's Initial Claim Amount. The Settlement Administrator shall determine each authorized Settlement Class member's *pro rata* share based upon each Settlement Class member's Claim Form and the

total number of valid Claims. Accordingly, the actual amount recovered by each Settlement Class Member will not be determined until after the Claim Period has ended and all Claims have been calculated.

(ii) If Excess Residual Funds Remain Available. If excess Residual Funds remain available in the Settlement Fund after the *pro rata* increase pursuant to section 4.4(a)(i) above, then the Parties will meet-and-confer regarding the best method for distributing the funds. The Parties will then seek Court approval for this method, which may include distribution of the funds *cy pres*.

(iii) No funds remaining after the calculations done pursuant to Section 4.4(a)(i)-(ii) or (b) will be returned to Defendant. If there are any funds remaining in the Settlement Fund following the calculations pursuant to the above Sections 4.4(a)(i)-(ii) or (b), including any checks or coupons that were not cashed or redeemed, then the Settlement Administrator shall distribute such remaining funds in the manner approved by the Court under Section 4.4(a)(ii.).

(b) **Insufficient Funds.** If the total amount of the timely, valid, and approved Claims submitted by Settlement Class members exceeds the funds available, considering any fees, payments, and costs set forth in this Agreement that must also be paid from the Settlement Fund pursuant to Section 4.1(a), each eligible Settlement Class member's Initial Claim Amount shall be proportionately reduced on a *pro rata* basis, such that the aggregate value of the cash payments distributed does not exceed the Settlement Fund balance after payment of all other costs. The Settlement Administrator shall determine each authorized Settlement Class member's *pro rata* share based upon each Settlement Class member's Claim Form and the total number of valid Claims. Accordingly, the actual amount recovered

by each Settlement Class member will not be determined until after the Claim Period has ended and all Claims have been calculated.

4.5 **Injunctive Relief: Modification of Product Marketing and the Website**

The primary venues for purchasing the Products are in retail stores, where the Products are displayed at a gondola or other in-store displays, or online, where the Product itself is prominently displayed, and the box may not be displayed at all. Accordingly, and in connection with this Agreement, Defendant will:

(i) ensure that the following explanatory statement, or a similar statement, is displayed on its Website and on in-store displays where the high-performance naturals™ Products are sold: "Formulated with a blend of naturally-derived and other ingredients designed to perform. Visit www.Tartecosmetics.com/"xxx" to see what high-performance naturals™ means to us";

(ii) create a separate web page located at www.Tartecosmetics.com/"xxx" that explains Tarte's philosophy and definitions regarding its use of natural ingredients; and

(iii) abide by all regulatory labeling standards, where applicable, including but not limited to rules and regulations promulgated by the U.S. Food and Drug Administration ("FDA"), Federal Trade Commission ("FTC"), U.S. Department of Agriculture ("USDA"), U.S. Environmental Protection Agency ("EPA"), or other state or federal governmental agencies' regulations, guidance or pronouncements.

The injunctive relief set forth in this Section will be superseded or otherwise modified to conform to any applicable statute, regulation, pronouncement, guidance, or other law issued or promulgated by FDA, FTC, USDA, EPA, or any other state or federal governmental entity or agency that conflicts with the provisions above or that expressly

permits the use of the terms "natural" and/or "high-performance naturals™" without the above restrictions.

Defendant shall make the modifications described above to the Product marketing and Website within ninety (90) days after Final Approval, but shall be able to continue to utilize existing marketing materials, and sell existing inventory of the Products, provided the marketing materials and inventory of the Products were in existence as of the date that is ninety (90) days after Final Approval.

4.6 **Other Injunctive Relief Terms and Conditions**

(a) Plaintiff and the members of the Settlement Class agree that the agreed modifications to the marketing of the Products are satisfactory to Plaintiff and the members of the Settlement Class and alleviate each and every alleged deficiency with regard to the labeling, packaging, advertising, and marketing of the Products and their ingredients (and similar deficiencies, if any, with regard to other of Defendant's products that currently exist or that may exist in the future) set forth in or related to the Complaint, Related Actions or otherwise.

(b) **Expiration.** With respect to each Product or category of Products, as applicable, the injunctive relief requirements by which Defendant agrees to abide as part of this Settlement Agreement and as described in Sections 4.5 and 4.6 shall expire on the earliest of the following dates: (i) the date upon which there are changes to any applicable statute, regulation, pronouncement, guidance, or other law that Defendant reasonably believes would require a modification to any of the Product's labeling in order to comply with the applicable statute, regulation, pronouncement, guidance, or other law; or (ii) the date upon which there are any changes to any applicable federal or state statutes or regulations

that would allow Defendant to label the Product "natural" or used the term "high performance" or "high-performance naturals™" without the labeling modifications and restrictions set forth in this Agreement, including but not limited to changes in FDA, FTC, USDA, EPA, and other state or federal governmental agencies' regulations, guidance, or pronouncements.

4.7 **Permitted Conduct**

(a) Subject to the requirements to modify its marketing of the Products set forth in this Agreement, Defendant shall be permitted to label, market, and advertise its Products using the following language: "natural," "high-performance naturals™," as well as to use the marketing terms "rethink natural" and "remix natural," in reference to products bearing the high-performance naturals™ trademark on the label.

(b) Nothing in this Agreement shall prohibit or limit Defendant's right or ability to use or permit others to use, in accordance with all applicable laws and regulations, their licenses, logos, taglines, product descriptors, or registered trademarks.

(c) Nothing in this Agreement shall preclude Defendant from making claims in accordance with applicable FDA, FTC, USDA and EPA regulations.

(d) The Parties specifically acknowledge that product packaging often changes. Nothing in this Agreement shall require Defendant to continue to use the current trademarks, taglines, and descriptions of its Products, and nothing in this Agreement shall preclude Defendant from making further disclosures or any labeling, marketing, advertising, or packaging changes that (i) Defendant reasonably believe are necessary to comply with any changes to any applicable statute, regulation, pronouncement, guidance, or other law of any kind (including but not limited to the Federal Food, Drug and Cosmetic Act, FDA

regulations, USDA regulations, FTC regulations, EPA regulations and/or state equivalents); (ii) are necessitated by product changes and/or reformulations to ensure that Defendant provides accurate product descriptions; or (iii) do not materially differ from the taglines and product descriptions agreed to in this Agreement.

V. NOTICE TO CLASS AND ADMINISTRATION OF PROPOSED SETTLEMENT

5.1 Duties and Responsibilities of the Settlement Administrator

Class Counsel and Defendant recommend and retain Angeion Group to be the Settlement Administrator for this Agreement. The Settlement Administrator shall abide by and shall administer the Settlement in accordance with the terms, conditions, and obligations of this Class Settlement Agreement and the Orders issued by the Court in this Action.

(a) **Class Notice Duties.** The Settlement Administrator shall, in cooperation with the Parties, be responsible for consulting on and designing the Class Notice, Summary Class Notice, and Claim Form. After the Court's Preliminary Approval of this Agreement and appointment of the Settlement Administrator, the Settlement Administrator shall also be responsible for disseminating the Class Notice, substantially in the form as described in the Notice Plan attached as Exhibit C to this Agreement, as specified in the Preliminary Approval Order, and as specified in this Agreement. The Class Notice and Summary Class Notice will comply with all applicable laws, including, but not limited to, the Due Process Clause of the Constitution. Duties of the Settlement Administrator include, but are not limited to:

(i) consulting on, drafting, and designing the Class Notice, Summary Class Notice, and Claim Form. Class Counsel and Defendant's Counsel shall have

input and joint approval rights, which shall not be unreasonably withheld, over these Notices and the Claim Form or any changes to the Notices and the Claim Form;

(ii) developing a Notice Plan, attached as Exhibit C to this Agreement. Class Counsel and Defendant's Counsel shall have input and joint approval rights, which shall not be unreasonably withheld, over this Notice Plan or changes to this Notice Plan;

(iii) implementing and arranging for the publication of the Summary Settlement Notice and Class Notice via various forms of electronic media, including implementing media purchases, all in substantial accordance with the Notice Plan, attached as Exhibit C. To the extent that the Settlement Administrator believes additional or different Notice should be undertaken than that provided for in the Notice Plan, Class Counsel and Defendant's Counsel shall have input and joint approval rights, which shall not be unreasonably withheld, over any additional or different Notice;

(iv) establishing and publishing the Settlement Website, which shall contain the Class Notice and related documents, including a Claim Form capable of being completed and submitted on-line. The Settlement Website, including the Class Notice, shall remain available for 120 days after the Effective Date;

(v) sending the Class Notice and related documents, including a Claim Form, via electronic mail or regular mail, to any potential member of the Settlement Class who so requests;

(vi) responding to requests from Class Counsel and Defendant's Counsel; and

(vii) otherwise implementing and assisting with the dissemination of the Notice of the Settlement.

(b) **Class Action Fairness Act Notice Duties to State and Federal Officials.** No later than ten (10) calendar days after this Agreement is filed with the Court, the Settlement Administrator shall mail or cause the items specified in 28 U.S.C. § 1715(b) to be mailed to each State and Federal official, as specified in 28 U.S.C. § 1715(a).

(c) **Claims Process Duties.** The Settlement Administrator shall be responsible for implementing the terms of the Claims Process and related administrative activities, including communications with members of the Settlement Class concerning the Settlement, Claims Process, and the options they have. Claims Process duties include, but are not limited to:

(i) executing any mailings required under the terms of this Agreement;

(ii) establishing a toll-free voice response unit to which members of the Settlement Class may refer for information about the Action and the Settlement;

(iii) establishing a post office box for the receipt of Claim Forms, exclusion requests, and any correspondence;

(iv) receiving and maintaining on behalf of the Court all correspondence from any member of the Settlement Class regarding the Settlement, and forwarding inquiries from members of the Settlement Class to Class Counsel or their designee for a response, if warranted; and

(v) receiving and maintaining on behalf of the Court any correspondence with member of the Settlement Class regarding any objections, opt-out

requests, exclusion forms, or other requests to exclude himself or herself from the Settlement, and providing to Class Counsel and Defendant's Counsel a copy within five (5) calendar days of receipt. If the Settlement Administrator receives any such forms or requests after the deadline for the submission of such forms and requests, the Settlement Administrator shall promptly provide Class Counsel and Defendant's Counsel with copies.

(d) **Claims Review Duties.** The Settlement Administrator shall be responsible for reviewing and approving Claim Forms in accordance with this Agreement. Claims Review duties include, but are not limited to:

(i) reviewing each Claim Form submitted to determine whether each Claim Form meets the requirements set forth in this Agreement and whether it should be allowed, including determining whether a Claim Form submitted by any member of the Settlement Class is timely, complete, and valid;

(ii) working with members of the Settlement Class who submit timely claims to try to cure any Claim Form deficiencies;

(iii) using all reasonable efforts and means to identify and reject duplicate and/or fraudulent claims, including, without limitation, maintaining a database of all Claims Form submissions;

(iv) keeping an accurate and updated accounting via a database of the number of Claim Forms received, the amount claimed on each Claim Form, the name and address of the members of the Settlement Class who made the claim, the type of claim made, whether the claim has any deficiencies, and whether the claim has been approved as timely and valid; and

(v) otherwise implementing and assisting with the Claim review process and payment of the Claims, pursuant to the terms and conditions of this Agreement.

(e) **Periodic Updates.** The Settlement Administrator shall provide periodic updates to Class Counsel and Defendant's Counsel regarding Claim Form submissions beginning within seven (7) calendar days after the commencement of the dissemination of the Class Notice or the Summary Settlement Notice and continuing on a weekly basis thereafter and shall provide such an update at least ten (10) business days before the Final Approval Hearing. The Settlement Administrator shall also provide such updates to Class Counsel or Defendant's Counsel upon request, within a reasonable amount of time.

(f) **Claims Payment Duties.** The Settlement Administrator shall be responsible for sending payments to all eligible members of the Settlement Class with valid, timely, and approved Claims pursuant to the terms and conditions of this Agreement. Claims Payment duties include, but are not limited to:

(i) Within seven (7) days of the Effective Date, providing a report to Class Counsel and Defendant's Counsel calculating the amount and number of valid and timely claims that requested refunds, including any to be paid pursuant to the Residual Funds described in Section 4.4;

(ii) Pursuant to Sections 4.3, 4.4, and 4.5, once the Settlement Fund has been funded, sending checks to members of the Settlement Class who submitted timely, valid, and approved Claim Forms;

(iii) Once payments to the Settlement Class have commenced, pursuant to the terms and conditions of this Agreement, the Settlement Administrator shall

provide a regular accounting to Class Counsel and Defendant's Counsel that includes but is not limited to the number and the amount of claims paid.

(g) **Reporting to Court.** Not later than ten (10) calendar days before the date of the Fairness Hearing, the Settlement Administrator shall file a declaration or affidavit with the Court that: (i) includes a list of those persons who have opted out or excluded themselves from the Settlement; and (ii) describes the scope, methods, and results of the notice program.

(h) **Duty of Confidentiality.** The Settlement Administrator shall treat any and all documents, communications, and other information and materials received in connection with the administration of the Settlement as confidential and shall not use or disclose any or all such documents, communications, or other information to any person or entity, except to the Parties or as provided for in this Agreement or by Court Order.

(i) **Right to Inspect.** Class Counsel and Defendant's Counsel shall have the right to inspect the Claim Forms and supporting documentation received by the Settlement Administrator at any time upon reasonable notice.

(j) **Failure to Perform.** If the Settlement Administrator misappropriates any funds from the Settlement Fund or makes a material or fraudulent misrepresentation to, or conceals requested material information from, Class Counsel, Defendant, or Defendant's Counsel, then the Party who discovers the misappropriation or concealment or to whom the misrepresentation is made shall, in addition to any other appropriate relief, have the right to demand that the Settlement Administrator immediately be replaced. If the Settlement Administrator fails to perform adequately on behalf of the Parties, the Parties may agree to remove the Settlement Administrator. Neither Party shall unreasonably withhold consent to

remove the Settlement Administrator. The Parties will attempt to resolve any disputes regarding the retention or dismissal of the Settlement Administrator in good faith. If unable to so resolve a dispute, the Parties will refer the matter to the Court for resolution.

VI. OBJECTIONS AND REQUESTS FOR EXCLUSION

6.1 A member of the Settlement Class may either object to this Agreement pursuant to Section 6.2 or request exclusion from this Agreement pursuant to Section 6.3.

6.2 Members of the Settlement Class shall have the right to object to this Settlement and to appear and show cause, if they have any reason why the terms of this Agreement should not be given Final Approval, pursuant to this paragraph:

(a) A member of the Settlement Class may object to this Agreement either on his or her own without an attorney, or through an attorney hired at his or her own expense;

(b) Any objection to this Agreement must be in writing, signed by the objecting member of the Settlement Class (and his or her attorney, if individually represented, including any former or current counsel who may be entitled to compensation for any reason related to the objection), filed with the Court, with a copy delivered to Class Counsel and Defendant's Counsel at the addresses set forth in the Class Notice, no later than thirty (30) days before the Fairness Hearing.

(c) Any objection regarding or related to this Agreement shall contain a caption or title that identifies it as "Objection to Class Settlement in *Patora v. Tarte, Inc.*"

(d) Any objection regarding or related to this Agreement shall contain information sufficient to identify and contact the objecting member of the Settlement Class (or his or her individually-hired attorney, if any), as well as a specific, clear and concise statement of his or her objection, the facts supporting the objection, the legal grounds and

authority on which the objection is based, and whether he or she intends to appear at the Final Approval Hearing, either with or without counsel.

(e) Any objection shall include documents sufficient to establish the basis for the objector's standing as a member of the Settlement Class, such as (i) a declaration signed by the objector under penalty of perjury, with language similar to that included in the Claim Form attached hereto as Exhibit A, including a statement that the member of the Settlement Class purchased at least one of the Products during the Class Period; or (ii) receipt(s) reflecting such purchase(s).

(f) Any objection shall also include a detailed list of any other objections submitted by the Settlement Class Member, or his/her counsel, to any class actions submitted in any court, whether state or otherwise, in the United States in the previous five (5) years. If the Settlement Class Member or his/her counsel has not objected to any other class action settlement in any court in the United States in the previous five (5) years, he/she shall affirmatively state so in the written materials provided in connection with the Objection to this Settlement.

(g) Class Counsel and Defendant shall have the right to respond to any objection no later than seven (7) days prior to the Fairness Hearing. The Party so responding shall file a copy of the response with the Court, and shall serve a copy, by regular mail, hand or overnight delivery, to the objecting member of the Settlement Class or to the individually-hired attorney for the objecting member of the Settlement Class; to Class Counsel; and to Defendant's Counsel.

(h) If an objecting member of the Settlement Class chooses to appear at the hearing, no later than fifteen (15) days before the Fairness Hearing, a Notice of Intention

to Appear, either In Person or Through an Attorney, must be filed with the Court, listing the name, address and telephone number of the attorney, if any, who will appear.

(i) Any Settlement Class Member who fails to file and serve timely a written objection and notice of his/her intent to appear at the Final Approval Hearing pursuant to this Section shall not be permitted to object to the Settlement and shall be foreclosed from seeking any review of the Settlement or the terms of the Agreement by any means, including but not limited to an appeal.

6.3 **Requests for Exclusion.** Members of the Settlement Class shall have the right to elect to exclude themselves, or "opt out," of the monetary portion of this Settlement, relinquishing their rights to cash compensation under this Class Settlement Agreement and preserving their claims for damages that accrued during the Class Period, pursuant to this paragraph:

(a) A member of the Settlement Class wishing to opt out of this Agreement must send to the Class Action Settlement Administrator by U.S. Mail a personally-signed letter including his or her name and address, and providing a clear statement communicating that he or she elects to be excluded from the Settlement Class.

(b) Any request for exclusion or opt out must be postmarked on or before the opt-out deadline date specified in the Preliminary Approval Order, which shall be no later than thirty (30) calendar days before the Final Approval Hearing (the Opt-Out Deadline). The date of the postmark on the return-mailing envelope shall be the exclusive means used to determine whether a request for exclusion has been timely submitted.

(c) The Class Action Settlement Administrator shall forward copies of any written requests for exclusion to Class Counsel and Defendant's Counsel, and shall file a list

reflecting all requests for exclusion with the Court no later than ten (10) calendar days before the Settlement Hearing.

(d) The Request for Exclusion must be personally signed by the member of the Settlement Class.

6.4 Any member of the Settlement Class who does not file a timely written request for exclusion as provided in the preceding Section 6.3 shall be bound by all subsequent proceedings, orders, and judgments, including, but not limited to, the Release in this Action, even if he or she has litigation pending or subsequently initiates litigation against Defendant relating to the claims and transactions released in this Action.

6.5 Any member of the Settlement Class who does not request exclusion from the Settlement has the right to object to the Settlement. Members of the Settlement Class may not both object to and opt out of the Settlement. Any member of the Settlement Class who wishes to object must timely submit an objection as set forth in Section 6.2 above. If a member of a Settlement Class submits both an objection and a written request for exclusion, he or she shall be deemed to have complied with the terms of the procedure for requesting exclusion as set forth in Section 6.3 and shall not be bound by the Agreement if approved by the Court, and the objection will not be considered by the Court.

VII. RELEASES

7.1 Upon the Effective Date of this Class Settlement Agreement, Plaintiff and each member of the Settlement Class, and each of their successors, assigns, heirs, and personal representatives, shall be deemed to have, and by operation of the Order and Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Released Persons. The Released Claims shall be construed as

broadly as possible to effect complete finality over this litigation involving the advertising, labeling, and marketing of the Products as set forth herein.

7.2 In addition, with respect to the subject matter of this Action, by operation of entry of the Final Order and Judgment, Plaintiff and each member of the Settlement Class, and each of their respective successors, assigns, legatees, heirs, and personal representatives, expressly waive any and all rights or benefits they may now have, or in the future may have, under any law relating to the releases of unknown claims, including, without limitation, Section 1542 of the California Civil Code, which provides:

> A General Release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

In addition to the foregoing, by operation of entry of the Final Order and Judgment, Plaintiff and each member of the Settlement Class shall be deemed to have waived any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States or any foreign country, and any and all principles of common law that are similar, comparable, or equivalent in substance or intent to Section 1542 of the California Civil Code.

7.3 Plaintiff understands that the facts upon which this Agreement is executed may hereafter be other than or different from the facts now believed by Plaintiff and Class Counsel to be true and nevertheless agree that this Class Settlement Agreement and the Release shall remain effective notwithstanding any such difference in facts.

7.4 To the extent permitted by law, this Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceeding that may be instituted, prosecuted, or attempted in breach of or contrary

to this Agreement, including but not limited to any Related Actions, or any other action or claim that arises out of the same factual predicate or same set of operative facts as this Action.

7.5 CLASS ENJOINED: On the Effective Date, all members of the Settlement Class who did not opt out of the Settlement Class (and any person or entity claiming by or through him, her, or it, as heir, administrator, devisee, predecessor, successor, attorney, representative of any kind, shareholder, partner, director or owner of any kind, affiliate, subrogee, assignee, or insurer) will be forever barred and permanently enjoined from directly, indirectly, representatively or in any other capacity, filing, commencing, prosecuting, continuing, litigating, intervening in, participating in as class members or otherwise, or receiving any benefits or other relief from any other lawsuit, whether individually or on behalf of or as a member of any class, any other arbitration, or any other administrative, regulatory, or other proceeding against Defendant (and Defendant's current and former parents, subsidiaries, affiliates and controlled companies, officers, directors, members, managers, shareholders, employees, predecessors, successors, assigns, agents and attorneys) that arises out of or relates to the Released Claims; and all persons and entities shall be forever barred and permanently enjoined from filing, commencing, or prosecuting any other lawsuit, whether individually or as a class action, against Defendant (including by seeking to amend a pending complaint to include class allegations or by seeking class certification in a pending action in any jurisdiction) on behalf of Settlement Class members who have not timely opted out of the Settlement Class if such other lawsuit is arises from or otherwise relates to the Released Claims.

VIII. ATTORNEYS' FEES AND EXPENSES AND CLASS REPRESENTATIVE SERVICE AWARDS

8.1 Class Counsel agrees to make, and Defendant agrees not to oppose, an application for an award of Attorneys' Fees and Expenses in the Action that will not exceed an amount equal to one third (33.33...%) of the Settlement Fund. This amount shall be paid from the Settlement Fund and shall be the sole aggregate compensation paid by Defendant for Class Counsel representing the Class. The ultimate award of Attorneys' Fees and Expenses will be determined by the Court.

8.2 Class Counsel, in its sole discretion, shall allocate and distribute the Court's award of Attorneys' Fees and Expenses. Class Counsel shall indemnify Defendant and its attorneys against any disputes, including amongst lawyers working at the direction of or in conjunction with Class Counsel, relating to the allocation and distribution of Class Counsel's Attorneys' Fees and Expenses.

8.3 Class Counsel agrees that any award of Attorneys' Fees and Expenses will be sought solely and exclusively in the Action. Class Counsel agrees that they will not seek or accept more than Five Hundred Sixty-Six Thousand, Six Hundred Sixty-Six Dollars ($566,666.00) in Attorneys' Fees and Expenses.

8.4 Defendant will not appeal from any order with respect to the award of Attorneys' Fees and Expenses provided that the order does not award Attorneys' Fees and Expenses in excess of the amount stated in Section 8.1. Defendant shall have the right to appeal in the event of an award of Attorneys' Fees and Expenses in excess of such amount. Defendant shall also have the right to withdraw from the Class Settlement Agreement in the event of an award of Attorneys' Fees and Expenses to Class Counsel is in excess of such amount.

8.5 Within five (5) days of the Effective Date, the Settlement Administrator shall cause the Attorneys' Fees and Expenses awarded by the Court to be paid to Class Counsel as directed by Class Counsel. In the event the Effective Date does not occur, all amounts paid to Class Counsel as Attorney's Fees and Expenses awarded by the Court shall be promptly returned to Defendant.

8.6 Within five (5) days after the Effective Date, the Settlement Fund shall pay a Service Award of two thousand five hundred dollars ($2,500.00), or any such other amount that is Ordered by the Court, to Plaintiff.

IX. NO ADMISSION OF LIABILITY

9.1 Defendant has denied and continues to deny that the labeling, advertising, or marketing of the Products is false, deceptive, or misleading to consumers or violates any legal requirement, including but not limited to the allegations that Defendant engaged in unfair, unlawful, fraudulent, or deceptive trade practices, breached any implied or express warranty, was unjustly enriched or engaged in negligent misrepresentation, or violated the Magnusson Moss Warranty Act or any other statute, regulation, or common law or industry standard. Defendant is entering into this Agreement solely because it will eliminate the uncertainty, distraction, burden, and expense of further litigation. The provisions contained in this Agreement and the manner or amount of relief provided to members of the Settlement Class herein shall not be deemed a presumption, concession, or admission by Defendant of any fault, liability, or wrongdoing as to any facts or claims that have been, or might have been, or might be alleged or asserted in the Action, or in any other action or proceeding that has been, will be, or could be brought, and shall not be interpreted, construed, deemed, invoked, offered, or received into evidence or otherwise used by any person in any action or proceeding, whether civil, criminal, or administrative, for any purpose other than as provided expressly herein.

9.2 In the event that the Court does not approve this Agreement substantially in the form submitted (or in a modified form mutually acceptable to the Parties), or this Agreement is terminated or fails to become effective or final in accordance with its terms, Plaintiff and Defendant shall be restored to their respective positions in the Action as of the date hereof. In such event, the terms and provisions of this Agreement shall have no further force and effect and shall not be used in the Action or in any other proceeding or for any purpose, and the Parties will jointly make an application requesting that any Judgment entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*.

9.3 By entering into this Agreement, Defendant is not consenting to or agreeing to certification of the Settlement Class for any purpose other than to effectuate the settlement of the Action. The Parties agree that if the Court does not approve this Agreement substantially in the form submitted (or in a modified form mutually acceptable to the Parties), including, without limitation, if the Court grants a fee application that would cause the total award for Attorneys' Fees and Expenses to Class Counsel to exceed Five Hundred Sixty Six Thousand, Six Hundred Sixty-Six Dollars ($566,666.00), or if this Agreement is terminated or fails to become effective or final in accordance with its terms, the Action shall proceed as if no Party had ever agreed to such settlement, without prejudice to the right of any Party to take any and all action of any kind in the Action.

X. ADDITIONAL PROVISIONS

10.1 Plaintiff and Class Counsel warrant and represent to Defendant that they have no present intention of initiating any other claims or proceedings against Defendant or any of its affiliates, or any entity that manufactures, distributes, or sells the Products or any other product that is marketed or labeled using the Tarte brand name or the high-performance naturals™

trademark, and, except for the claims hereby settled, Plaintiff and Class Counsel warrant and represent to Defendant that they have no present knowledge and are not presently aware of any factual or legal basis for any such claims or proceedings, other than claims or proceedings that may already be pending against Defendant.

10.2 The Parties agree that information and documents exchanged in negotiating this Agreement were exchanged pursuant to Federal Rule of Evidence 408, and that no such confidential information exchanged or produced by either side may be used for or revealed for any other purpose than this Settlement. This does not apply to publicly available information or documents.

10.3 The Parties agree to return or dispose of confidential documents and information exchanged in negotiating this Agreement within fifteen days of the Effective Date. This does not apply to publicly available information or documents.

10.4 The Parties agree that the terms of this Agreement were negotiated at arm's length and in good faith by the Parties and reflect a settlement that was reached voluntarily after consultation with experienced legal counsel.

10.5 The Parties and their respective counsel agree to use their best efforts and to cooperate fully with one another (i) in seeking preliminary and final Court approval of this Settlement Agreement; and (ii) in effectuating the full consummation of the Settlement Agreement provided for herein.

10.6 Each counsel or other person executing this Agreement on behalf of any Party hereto warrants that such person has the authority to do so.

10.7 This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same

instrument. Executed counterparts shall be deemed valid if delivered by mail, courier, electronically, or by facsimile.

10.8 This Agreement shall be binding upon and inure to the benefit of the settling Parties (including all members of the Settlement Class), their respective agents, attorneys, insurers, employees, representatives, officers, directors, partners, divisions, subsidiaries, affiliates, associates, assigns, heirs, successors in interest, and shareholders, and any trustee or other officer appointed in the event of a bankruptcy, as well as to all Released Persons as defined in Section 2.26. The waiver by any Party of a breach of this Agreement by any other Party shall not be deemed a waiver of any other breach of this Agreement.

10.9 This Agreement and any exhibits attached to it constitute the entire agreement between the Parties and supersedes any prior agreements or understandings, whether oral, written, express, or implied between the Parties with respect to the subject matter of the Agreement.

10.10 No amendment, change, or modification of this Agreement or any part thereof shall be valid unless in writing, signed by all Parties and their counsel, and approved by the Court.

10.11 The Parties each represent to the other that they have received independent legal advice from attorneys of their own choosing with respect to the advisability of making the settlement provided for in this Agreement, and with respect to the advisability of executing this Agreement, that they have read this Agreement in its entirety and fully understand its contents, and that each is executing this Agreement as a free and voluntary act.

10.12 Except as otherwise provided herein, all notices, requests, demands, and other communications required or permitted to be given pursuant to this Agreement shall be in writing

and shall be delivered personally, by facsimile, by e-mail, or by overnight mail, to the undersigned counsel for the Parties at their respective addresses.

10.13 The titles and captions contained in this Agreement are inserted only as a matter of convenience and for reference, and shall in no way be construed to define, limit, or extend the scope of this Agreement or the intent of any of its provisions. This Agreement shall be construed without regard to its drafter, and shall be construed as though the Parties participated equally in the drafting of it.

10.14 The Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of the Agreement and the Parties to the Agreement submit to the jurisdiction of the Court for those purposes.

10.15 To the extent Class Counsel wish to issue any general or public communication about the settlement that is the subject of this Agreement, any such public statement shall be limited to publicly available information and documents filed in this action and/or in a form mutually agreed upon by Class Counsel and Defendant's Counsel.

IN WITNESS WHEREOF, Tarte, Inc., Jeannie Patora, on behalf of herself and all others similarly situated, and Plaintiff's Counsel, each intending to be legally bound hereby, have duly executed this Agreement as of the date set forth below:

Dated: 12/12/18

By: Jeannie Patora
Plaintiff Jeannie Patora

TARTE, INC.

Dated: 12/6/18

By: [signature]
Name: Scott McDonough
Title: GM

THE SULTZER LAW GROUP

Dated: 12/12/18

By: [signature]
Jason P. Sultzer
Attorneys for Plaintiff and the Class

EXHIBIT A

Your claim must be submitted online or postmarked by: DATE

Patora v. Tarte, Inc., No. 18-cv-11760 (SDNY)
Settlement Claim Form

HPN-WEB
Instructions

IMPORTANT LEGAL MATERIALS

CLAIM FORM

GENERAL INSTRUCTIONS

This Claim Form should be filled out online or submitted by mail if you [claim definition].

Settlement Class Members who seek payment from the Settlement must complete and return this Claim Form. Claim Forms can be completed online at the Settlement Website, [**website]**, or can be completed and mailed to the Settlement Administrator at [address]. **Claim Forms submitted by mail must be POSTMARKED OR SUBMITTED ONLINE NO LATER THAN [DATE], 2019, or they will be rejected.**

Before you complete and submit this Claim Form by mail or online, you should read and be familiar with the Class Notice (the "Notice") and the Settlement Agreement available at **[website]**. Defined terms (with initial capital letters) used in these General Instructions have the same meaning as set forth in the Notice and Settlement Agreement. By submitting this Claim Form, you acknowledge that you have read and understand the Notice, and you agree to the Release included as a material term of the Settlement Agreement.

If you fail to submit a timely Claim Form, your claim will be rejected and you will be precluded from any recovery from the Settlement Fund. If you are a member of the Settlement Class and you do not timely and validly seek exclusion from the Settlement Class, you will be bound by any judgment entered by the Court approving the Settlement even if you do not submit a Claim Form. To receive the most current information and regular updates, please visit the Settlement Website at **[website]**. You will also be able to submit your claim on the Settlement Website.

SECTION A: Claimant Information

SECTION B: For Each Product you have purchased during the Class Period, you may choose to fill out sections B1 or B2 (but not both), and you may also choose to fill out section C. However, you may not include the same purchases in more than one section. Completing Section B2 allows you to submit claims for up to ten (10) Products, but requires that you provide more information than in Section B1, which allows you to submit claims for up to five (5) Products.

SECTION B1: Include in Section B1 of this Claim Form the type(s), number of Products purchased and approximate dates of purchase. You may claim up to five (5) Products in this section. *If you claim products in this section, you may not claim products in Section B2.* You may also claim additional Products in Section C (with proof of purchase) but you may not include the same purchases in more than one section.

SECTION B2: Include in Section B2 of this Claim Form the type(s), number of Products purchased, retailer purchased from and location of purchase, approximate dates of purchase and satisfaction with the Product. You may claim up to ten (10) Products total under this Section. *If you claim products in this section, you may not claim products in Section B1.* You may also claim additional Products in Section C (with proof of purchase) but you may not include the same purchases in more than one section.

SECTION C: Include in Section C of this Claim Form purchases of Products you made during the Class Period for which you have retained proof of purchase. Proof of purchase means a receipt or other documentation reasonably establishing the fact of purchase, such as a loyalty/membership card print-out, or picture of UPC code for each eligible purchased product during the Settlement Class Period.

SECTION D: Certification Under Penalty of Perjury.

Claim Form Reminder Checklist
Before Submitting this Claim Form, please make sure you:

1. Complete all fields in Section A of this Claims Form.

2. Complete Sections B and C to report the products you purchased. You may choose Section B1 or B2, but not both. Do not include the same purchases in more than one section.

3. YOU MUST sign the certification under penalty of perjury in Section D of this Claim Form.

Your claim must be submitted online or postmarked by: DATE, 2019

Patora v. Tarte, Inc., No:18-cv-11760 (SDNY)
Settlement Claim Form

HPN-WEB

SECTION A. Claimant Information

Claimant Name: _____ _____ _____
First Name MI Last Name

Street Address: _____

Street Address2: _____

City: _____ State: _____ Zip Code: _____

Phone Number: (___ ___ ___) ___ ___ ___ - ___ ___ ___ ___

E-mail Address (if any): _____

It is your responsibility to notify the Claims Administrator of any changes to your contact information after the submission of your Claim Form.

SECTION B. No Proof of Purchase

Complete this section for any purchased Products for which you do not have Proof of Purchase. You may complete Section B1 or B2 but not both. Completing Section B2 allows you to submit claims for up to ten (10) Products, but requires that you provide more information than in Section B1, which allows you to submit claims for up to five (5) Products. You may also complete Section C, but may not include the same purchases in more than one section.

Section B1

The actual benefit you will receive will depend upon, among other things, how many Settlement Class Members submit a timely and complete claim form. You may receive $5.00 per unit, or more or less, depending upon how many claims are actually submitted, for up to five (5) units claimed in this section.

Purchase Information

1. Please provide the following information regarding your purchase of up to five (5) of the Products:

Approx. Date Purchased (Month & Year)	Identify Which Product You Purchased

Section B2

The actual benefit you will receive will depend upon, among other things, how many Settlement Class Members submit a timely and complete claim form. You may receive $5.00 per unit, or more or less depending upon how many claims are actually submitted, for up to ten (10) units claimed in this section. You may complete Section B1 or B2 but not both. You may also complete Section C, but do not include the same purchases in more than one section.

1. Please provide the following information regarding your purchase of up to ten (10) of the Products:

Approx. Date Purchased (Month & Year)	Product You Purchased	Quantity	Retailer Where Purchased	Location of Retailer Where Purchased	Satisfaction (1 -5, 5 being extremely satisfied)

2. Please identify the reason(s) you purchased the product (check all that apply):

Price:	YES	❑	NO	❑
Quality:	YES	❑	NO	❑
Ingredients:	YES	❑	NO	❑
Design:	YES	❑	NO	❑
Other:	YES	❑	NO	❑

SECTION C. Proof of Purchase

Complete this entire Claim Form and attach proof of purchase for the Products. You may receive a full refund for each unit, or more or less depending upon how many claims are actually submitted. Proof of purchase means a receipt or other documentation reasonably establishing proof of purchase for the Products purchased during the Settlement Class Period in the United States. You may complete either Section B1 or B2 in addition to this Section C, but may not include the same purchases in more than one section.

Total number of Products purchased during the Class Period for which I am attaching documentation: ☐

SECTION D. Certification Under Penalty of Perjury and Submission to Jurisdiction

By signing below, you are submitting to the jurisdiction of the United States District Court for the Southern District of New York, and are agreeing to the terms of the Release set forth in the Settlement Agreement.

I declare under penalty of perjury under the laws of the United States and the state where this Claim Form is signed that the information I have supplied in this Claim Form is true and correct to the best of my recollection, and that this form was executed on the date set forth below.

I understand that all information provided on this Claim Form is subject to verification and that I may be asked to provide supplemental information by the Settlement Administrator before my Claim will be considered complete and valid.

Signature: _____ Dated: _____

Print Name: _____

EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

If you purchased certain Tarte, Inc. ("Tarte") Products Between November 13, 2013 and [DATE], 2019 You May be Eligible to Receive a Cash Payment from a Class Action Settlement.

A Federal Court authorized this notice. This is not a solicitation from a lawyer.

- A proposed nationwide Settlement has been reached in a class action lawsuit involving certain Tarte products marketed as "high-performance naturals®." The Settlement resolves litigation over whether the Defendant allegedly violated state and federal laws regarding the labeling, marketing, and advertising of these products.

- You may be eligible to participate in the proposed Settlement, if it is finally approved, if you purchased certain high-performance naturals®-branded products between November 13, 2013 and [**Date**], 2019.

- The Settlement will provide cash payments to those who qualify. You must file a Claim Form by [**Date**] to receive a payment from the Settlement.

- Your legal rights are affected whether you act, or don't act. **Please read this notice carefully**.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT

SUBMIT A CLAIM FORM BY [DATE], 2019	This is the only way to get a payment.
EXCLUDE YOURSELF BY [DATE], 2019	Receive no payment from the Settlement. This is the only option that allows you to ever be, or continue to be, a part of any other lawsuit against the Defendant about the legal claims in this case.
OBJECT BY [DATE], 2019	Write to the Court about why you think the settlement is unfair, inadequate, or unreasonable by following the instructions in this notice.
GO TO A HEARING [DATE], 2019	Ask to speak in Court about the fairness of the Settlement. You do not need to attend the hearing to receive payment.
DO NOTHING	Get no payment. Give up rights to ever sue the Defendant about the claims in this case.

- These rights and options—**and the deadlines to exercise them**—are explained in this notice. The deadlines may be moved, canceled, or otherwise modified, so please check the Settlement Website, [website], regularly for updates and further details.

- The Court in charge of this case has yet to decide whether to approve the Settlement. Payments will be made if the Court approves the Settlement and after any appeals are resolved. Please be patient.

WHAT THIS NOTICE CONTAINS:

BASIC INFORMATION

1. Why is there a notice?

This Notice relates to a proposed settlement of a class action lawsuit involving products sold by Tarte, Inc. ("Tarte") and marketed as high-performance naturals®. You received this notice because you may be a Settlement Class Member able to receive payment from a proposed settlement of the class action lawsuit *Patora v. Tarte, Inc.,* Case No. 7:18-cv-11760. You have a right to know about a proposed Settlement of a class action lawsuit, and about your options, before the Court decides whether to approve the Settlement.

The Court in charge of this case is the United States District Court for the Southern District of New York (the "Court"). The individual who sued is called the Plaintiff, and the company she sued, Tarte, is called the Defendant.

2. What is this lawsuit about?

The lawsuit alleges that the Defendant violated certain laws in labeling, marketing, and advertising of certain Tarte products marketed as high-performance naturals®. The Defendant denies any and all wrongdoing of any kind whatsoever, and denies any liability to Plaintiff and to the Settlement Class.

3. Why is this a class action?

In a class action, one or more people, called "Class Representatives," sue on behalf of people who have similar claims. All these people are in a "class" or "class members," except for those who exclude themselves from the class. United States District Court Judge Kenneth M. Karas in the United States District Court for the Southern District of New York is in charge of this class action.

4. Why is there a Settlement?

The Defendant does not admit that it did anything wrong and both sides want to avoid the cost of further litigation. The Court has not decided in favor of the Plaintiff or the Defendant. The Class Representative and her attorneys think the Settlement is best for everyone who is affected. The Settlement provides Settlement Class Members with the opportunity to receive Settlement benefits.

WHO IS IN THE SETTLEMENT?

5. How do I know if I am in the Settlement?

The Settlement Class includes all persons and entities that, between November 13, 2013 and [**date**], both resided in the United States and purchased in the United States any of the high-performance naturals® branded products for personal use and not for resale. Excluded from the Settlement Class are: (a) Defendant's board members or executive-level officers, including its attorneys; (b) governmental entities; (c) the Court, the Court's immediate family, and the Court staff; and (d) any person that timely and properly excludes himself or herself from the Settlement Class in accordance with the procedures approved by the Court.

6. Which Products are included in the Settlement?

The Settlement covers all products marketed and sold by Tarte as high-performance naturals® between November 13, 2013 and [**date**].

7. What if I am still not sure if I am included in the Settlement?

If you are not sure whether you are a Settlement Class Member, or have any other questions about the Settlement Agreement, you should visit the Settlement Website, [**website**], or call the toll-free number, [**phone**].

SETTLEMENT BENEFITS

8. What does the Settlement provide?

The Settlement provides for the establishment of a Settlement Fund with a value of $1,700,000.00 to pay (1) claims of eligible Settlement Class Members; (2) the costs of Class Notice and administration of the Settlement; (3) any Attorneys' Fees and Expenses awarded by the Court; and (4) any Service Award made by the Court to Plaintiff. Settlement Class Members who timely submit valid Claim Forms are entitled to receive a cash payment from the Settlement Fund. The

actual amount recovered by each Settlement Class Member will not be determined until after the Claim Period has ended and all Claims have been calculated, and is explained further below.

9. What can I get from the Settlement?

If you submit a valid Claim Form by the deadline, you can get a payment from the Settlement Fund. If you have proof of purchase for the product that is the subject of your claim, you can receive a full refund for that product, without any limitation on the number of products, provided you purchased the products for personal use. If you do not have proof of purchase, you can receive up to five dollars per product purchased for up to five products by stating under penalty of perjury the type and number of products purchased, and the approximate dates. Alternately, if you do not have proof of purchase, you can receive up to five dollars per product purchased for up to ten products by stating under penalty of perjury the type and number of products purchased, and the approximate dates of the purchases, and providing additional information such as the location of purchase and your satisfaction with the product. If, after subtracting from the Settlement Fund the costs of Class Notice and Administration, any Attorneys' Fees and Expenses and Service Awards for the Class Representatives, the funds remaining in the Settlement Fund are insufficient to pay all of the Approved Claims, then Settlement Class Member payments will be reduced proportionately.

If, after the payment of all valid Claims, Notice and Settlement Administration costs, Attorneys' Fees and Expenses, and Service Awards, any monies remain in the Settlement Fund, Settlement Class Members' payments will be increased proportionately up to 500% of the Eligible Settlement Class Member's Initial Claim Amount.

10. What am I giving up to stay in the Class?

Unless you exclude yourself from the Settlement, you cannot sue the Defendant, continue to sue, or be part of any other lawsuit against the Defendant based on the issues in this case. It also means that you will be bound by the Settlement Agreement and any final judgment by the Court. The claims that Settlement Class members are releasing are described in Section 2.25 of the Settlement Agreement and the persons and entities being released from those claims are described in Section 2.26 of the Settlement Agreement. You must read these provisions to understand the legal claims that you give up if you stay in the Settlement Class. The Settlement Agreement is available at the Settlement Website, [**website**].

HOW TO GET A PAYMENT

11. How can I get a payment?

To be eligible to receive a payment from the Settlement, you must complete and submit a Claim Form by [date]. You can complete and submit your Claim Form online at the Settlement Website, [website]. The Claim Form can also be downloaded from the Settlement Website, or you can request a Claim Form be sent to you by sending a written request to the Settlement Administrator by mail or email, or by calling toll-free.

MAIL: HPN Class Action
Settlement Administrator
1650 Arch Street, Suite 2210
Philadelphia, PA 19103

EMAIL: info@HPNSettlement.com

PHONE: 1-855-211-0656

Please read the instructions carefully, fill out the Claim Form, and mail it postmarked no later than **[Date], 2019** to: Tarte Class Action, Settlement Administrator, 1650 Arch Street, Suite 2210, Philadelphia, PA 19103, or submit your Claim Form online at the Settlement Website, www.HPNsettlement.com, by **[Date], 2019**.

If you do not submit a valid Claim Form by the deadline, you will not be able to receive a payment.

12. When will I get my payment?

Payments will be mailed to Settlement Class Members who send in valid and timely Claim Forms after the Court grants "final approval" to the Settlement and after any and all appeals are resolved. If the Court approves the Settlement after a hearing on **[Date], 2019**, there may be appeals. It's always uncertain whether these appeals can be resolved, and

resolving them can take time. Please be patient.

EXCLUDING YOURSELF FROM THE SETTLEMENT

If you don't want a payment from the Settlement Fund, and you want to keep the right to sue or continue to sue the Defendant about the issues in this case, then you must take steps to remove yourself from the settlement. This is called excluding yourself or "opting out" of the Settlement Class.

13. How do I opt out of the Settlement?

To exclude yourself (or "Opt-Out") from the Settlement, you must complete and mail to the Settlement Administrator, by U.S. Mail, a written request that includes the following:

- Your name and address;
- The name of the case: *Patora v. Tarte, Inc.*, 7:18-cv-11760 (S.D.N.Y.);
- A clear statement that you want to be excluded from this Settlement; and
- Your own signature.

You must mail your exclusion request, postmarked no later than **[DATE], 2019** to:

HPN Class Action
Settlement Administrator
Attn: Exclusion Requests
P.O. Box 58220
1500 John F. Kennedy Blvd, Suite C31
Philadelphia, PA 19102

If you do not include the required information or do not submit your request for exclusion on time, you will remain a Settlement Class Member and, if the Settlement is finally approved, you will be bound by the Settlement and will not thereafter be able to sue the Defendant about the claims in this lawsuit.

14. If I don't exclude myself, can I sue the Defendant for the same thing later?

No. Unless you exclude yourself, you give up any right to sue the Defendant for the claims that this Settlement resolves. If you have a pending lawsuit, speak to your lawyer in that lawsuit immediately. You may need to exclude yourself from this Settlement Class in order to continue your own lawsuit.

15. If I exclude myself, can I still get a payment?

No. You will not get any money from the Settlement if you exclude yourself. If you exclude yourself from the Settlement, do not send in a Claim Form.

OBJECTING TO THE SETTLEMENT

16. How can I tell the Court if I do not like the Settlement?

If you are a Class Member, you can object to the Settlement or to Class Counsel's request for Attorneys' Fees and Expenses. To object, you must send a letter that includes the following:

- Your name, address, telephone number, and, if available, email address;
- The name, address, email address, and telephone number of your lawyer, if you have one, including any former or current counsel who may be entitled to compensation for any reason related to the objection;
- The name of the case: Objection to Class Settlement in *Patora v. Tarte, Inc.*, 7:18-cv-11760 (S.D.N.Y.);
- The factual and legal reason(s) why you object to the Settlement, accompanied by any support for your objection;
- A statement of whether you intend to appear at the Fairness Hearing, either with or without counsel;

- A statement of your membership in the Settlement Class, including all information required by the Claim Form;
- A detailed list of any other objections submitted by you or your counsel, to any class actions submitted in any court, whether federal, state or otherwise, in the United States in the previous five (5) years, or a statement that you have not objected to any class action settlement in any court in the United States in the previous five (5) years; and
- Your own signature and, if you have one, your lawyer's signature.

Your objection, along with any supporting material you wish to submit, must be filed with the Court, with copies delivered to Class Counsel and Defendant's Counsel no later than **[Date], 2019** at the following addresses:

Court	Class Counsel	Defense Counsel
The United States District Court for the Southern District of New York The Hon. Charles L. Brieant Jr. Federal Building and United States Courthouse 300 Quarropas Street White Plains, NY 10601	Adam Gonnelli Sultzer Law Group 85 Civic Center Plaza Suite 104, Poughkeepsie, NY, 12601	Trenton Norris Arnold & Porter Kaye Scholer LLP 10th Floor Three Embarcadero Center San Francisco, CA 94111-4024

17. What is the difference between objecting and excluding?

Objecting is telling the Court that you do not like something about the Settlement. You can object to the Settlement only if you do not exclude yourself from the Settlement. Excluding yourself from the Settlement is telling the Court that you do not want to be part of the Settlement. If you exclude yourself from the Settlement, you cannot object to the Settlement because it no longer affects you.

THE LAWYERS REPRESENTING YOU

18. Do I have a lawyer in this case?

Yes. The Court has provisionally appointed lawyers as "Class Counsel," meaning that they were appointed to represent all Class Members: Adam Gonnelli of The Sultzer Law Group.

You will not be charged for these lawyers; they will be paid out of the Settlement Fund. If you want to be represented by your own lawyer, you may hire one at your own expense.

19. How will the lawyers be paid?

Class Counsel intends to file a motion on or before **[DATE], 2019** seeking an amount not to exceed $566,666.00 in Attorneys' Fees and Expenses. The fees and expenses awarded by the Court will be paid from the Settlement Fund. The Court will determine the amount of Attorneys' Fees and Expenses to award. Class Counsel will also request that $2,500.00 be paid from the Settlement Fund to the named Plaintiff, who helped the lawyers on behalf of and to the benefit of the Class.

THE COURT'S FAIRNESS HEARING

20. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Fairness Hearing on **[DATE] at[TIME]** at the United States District Court for the Southern District of New York, before the Honorable Kenneth M. Karas, United States District Judge, in Courtroom 521, in the Hon. Charles L. Brieant Jr. Federal Building and United States Courthouse, 300 Quarropas Street, White Plains, New York 10601.

The hearing may be moved to a different date or time without additional notice, so it is a good idea to check the Settlement Website, www.HPNsettlement.com, for updates. At the Fairness Hearing, the Court will consider whether the Settlement Agreement is fair, reasonable, and adequate. The Court will also consider how much to pay Class Counsel and the Class Representative. If there are objections, the Court will consider them at this time. After the hearing, the Court will decide whether to approve the Settlement. We do not know how long these decisions will take.

21. Do I have to come to the hearing?

No. Class Counsel will answer any questions that the Court may have, but you may come at your own expense. You don't need to attend the hearing in order to receive a payment. If you send an objection, you don't have to come to Court to talk about it. As long as you mailed your written objection on time to the proper addresses, the Court will consider it. You may also pay your own lawyer to attend, but it's not necessary.

22. May I speak at the hearing?

Yes. You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must file with the Court a "Notice of Intent to Appear." In your Notice, you must include the following:

- Your name, address, telephone number, and, if available, email address;
- The name, address, email address, and telephone number of any lawyer(s) who will be appearing on your behalf at the Fairness Hearing;
- The name of the case: *Patora v. Tarte, Inc.*, *7:18-cv-11760* (S.D.N.Y.); and
- Your own signature and, if you have one, your lawyer's signature.

Your Notice of Intent to Appear must be filed with the Court no later than [**DATE**].

IF YOU DO NOTHING

23. What happens if I do nothing at all?

If you do nothing, you will not get a payment from the Settlement. Unless you exclude yourself, you won't be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against the Defendant about the issues in this case, ever again.

GETTING MORE INFORMATION

24. How do I get more information?

This notice summarizes the proposed Settlement. More details are in the Settlement Agreement. You can review a complete copy of Settlement Agreement and other information at the Settlement Website, www.HPNsettlement.com. If you have additional questions or want to request a Claim Form, you can visit the Settlement Website, www.HPNsettlement.com. You can also write to the Settlement Administrator by mail or email, or call toll-free.

MAIL: HPN Class Action
Settlement Administrator
1650 Arch Street, Suite 2210
Philadelphia, PA 19103

EMAIL: info@HPNSettlement.com

PHONE: 1-855-211-0656

Updates will be posted at the Settlement Website as information about the Settlement process becomes available.

PLEASE DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE CONCERNING THIS CASE.

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Jeannie Patora, individually on behalf of herself and all others similarly situated, Plaintiff, v. Tarte, Inc., Defendant.	Case No. 7:18-cv-11760-KMK **NOTICE PLAN AND DECLARATION OF STEVEN WEISBROT OF ANGEION GROUP, LLC IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

I, Steven Weisbrot, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am a partner at the class action notice and settlement administration firm Angeion Group, LLC ("Angeion"). I am fully familiar with the facts contained herein based upon my personal knowledge.

2. I have been responsible in whole or in part for the design and implementation of hundreds of court-approved class action notice and administration programs and have taught numerous accredited Continuing Legal Education courses on the Ethics of Legal Notification in Class Action Settlements, using Digital Media in Class Action Notice Programs, as well as Class Action Claims Administration, generally. I am the author of multiple articles on Class Action Notice, Class Action Claims Administration, and Notice Design in publications such as *Bloomberg*, *BNA Class Action Litigation Report*, *Law360*, the ABA *Class Action and Derivative Section Newsletter*.

3. I am a certified professional in digital media sales by the Interactive Advertising Bureau ("IAB") and I am co-author of the Digital Media section of Duke Law's *Guidelines and Best Practices—Implementing 2018 Amendments to Rule 23*.

4. I have given public comment and written testimony to the Judicial Conference Committee on Rules of Practice and Procedure on the role of direct mail, email, digital media

and print publication, in fulfilling Due Process notice, and I have met with representatives of the Federal Judicial Center to discuss the 2018 amendments to Rule 23 and suggest educational programs for the judiciary concerning class action notice procedures.

5. Prior to joining Angeion's executive team, I was employed as Director of Class Action services at Kurtzman Carson Consultants, an experienced class action notice and settlement administrator. Prior to my notice and claims administration experience, I was employed in private law practice.

6. My notice work comprises a wide range of class action settlements that include product defect, false advertising, consumer fraud, employment, antitrust, tobacco, banking, firearms, insurance, and bankruptcy cases. I have been at the forefront of infusing digital media, as well as big data and advanced targeting, into class action notice programs. For example, the Honorable Sarah Vance stated in her December 31, 2014 Order in *In Re: Pool Products Distribution Market Antitrust Litigation*, MDL No. 2328:

> To make up for the lack of individual notice to the remainder of the class, the parties propose a print and web-based plan for publicizing notice. The Court welcomes the inclusion of web-based forms of communication in the plan…. The Court finds that the proposed method of notice satisfies the requirements of Rule 23(c)(2)(B) and due process.
>
> The direct emailing of notice to those potential class members for whom Hayward and Zodiac have a valid email address, along with publication of notice in print and on the web, is reasonably calculated to apprise class members of the settlement.

As detailed below, courts have repeatedly recognized my work in the design of class action notice programs:

(a) On *February* 24, 2017, The Honorable Ronald B. Rubin in *James Roy et al. v. Titeflex Corporation et al.*, No. 384003V (Md. Cir. Ct.), noted when granting preliminary approval to the settlement:

> What is impressive to me about this settlement is in addition to all the usual recitation of road racing litanies is that there is going to

> be a) public notice of a real nature and b) about a matter concerning not just money but public safety and then folks will have the knowledge to decide for themselves whether to take steps to protect themselves or not. And that's probably the best thing a government can do is to arm their citizens with knowledge and then the citizens can make a decision. To me that is a key piece of this deal. ***I think the notice provisions are exquisite.*** (Emphasis added).

(b) *Likewise*, on May 12, 2016, in his Order granting preliminary approval of the settlement in *In Re Whirlpool Corporation Front Loading Washer Products Liability Litigation*, MDL No. 2001 (N.D. Ohio), the Honorable Christopher A. Boyko ruled:

> The Court, having reviewed the proposed Summary Notices, the proposed FAQ, the proposed Publication Notice, the proposed Claim Form, and the proposed plan for distributing and disseminating each of them, finds and concludes that the proposed plan for distributing and disseminating each of them will provide the best notice practicable under the circumstances and satisfies all requirements of federal and state laws and due process.

(c) In *In Re LG Front Load Washing Machine Class Action Litigation*, Civil Action No. 08-51 (MCA) (LDW) (D.N.J.), the Honorable Madeline Cox Arleo ruled:

> This Court further approves the proposed methods for giving notice of the Settlement to the Members of the Settlement Class, as reflected in the Settlement Agreement and the joint motion for preliminary approval. The Court has reviewed the notices attached as exhibits to the Settlement, the plan for distributing the Summary Notices to the Settlement Class, and the plan for the Publication Notice's publication in print periodicals and on the internet, and finds that the Members of the Settlement Class will receive the best notice practicable under the circumstances. The Court specifically approves the Parties' proposal to use reasonable diligence to identify potential class members and an associated mailing and/or email address in the Company's records, and their proposal to direct the ICA to use this information to send absent class members notice both via first class mail and email. The Court further approves the plan for the Publication Notice's publication in two national print magazines and on the internet. The Court also approves payment of notice costs as provided in the Settlement. The Court finds that these procedures, carried out with reasonable diligence, will constitute the best notice practicable under the circumstances and will satisfy due process.

7. By way of background, Angeion is an experienced class action notice and claims administration company formed by a team of executives that have had extensive tenures at five other nationally recognized claims administration companies. Collectively, the management team at Angeion has overseen more than 2,000 class action settlements and distributed over $10 billion to class members. The executive profiles as well as the company overview are available at http://www.angeiongroup.com/meet_the_team.htm.

8. This declaration will describe the notice program that Angeion has proposed to use in this Litigation, including certain considerations that informed the development of the notice program, and why it will provide due process of law to the Settlement Class.

OVERVIEW OF THE NOTICE PROGRAM

9. Angeion believes that the notice program is the best notice that is practicable under the circumstances and fully comports with due process and Rule 23 of the Federal Rules of Civil Procedure. The notice program features a robust media campaign consisting of state-of-the-art targeted internet banner notice and print publication to notify the Class. The notice program also includes an informational website and toll-free telephone line where Class Members can learn more about their rights and responsibilities in the litigation.

10. The digital portion of the notice program is designed to deliver an approximate 70% reach with an average frequency of 3.00 times. In practice, this means that 70% of our target audience is likely to see a digital advertisement concerning the Settlement an average of 3.00 times each. The 70% reach is separate and apart from the print media notice and social media efforts described in greater detail below.

11. In addition, Angeion will establish a dedicated website and toll-free line for this Settlement, both of which are difficult to measure in terms of reach percentage but will nonetheless aid in informing the class of their rights and responsibilities under the Settlement. Angeion will report to the court the number of visitors and/or page views the website garners.

12. The Federal Judicial Center states that a publication notice plan that reaches 70% of class members is one that reaches a "high percentage" and is within the "norm." Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, "Managing Class Action Litigation: A Pocket Guide or Judges," at 27 (3d Ed. 2010).

13. For the reasons described in greater detail below, it is my opinion that the notice program here is the best notice that is practicable under the circumstances and fully comports with due process and Rule 23 of the Federal Rules of Civil Procedure.

CLASS DEFINITION

14. Counsel for the Parties have informed me that the settlement class Plaintiff will seek to certify consists of all persons and entities that, during the Class Period, both resided in the United States and purchased in the United States any of Defendant's "High-Performance Naturals"-branded products for personal use and not for resale (the "Settlement Class"). Excluded from the Settlement Class are: (a) Defendant's board members or executive-level officers, including its attorneys; (b) governmental entities; (c) the Court, the Court's immediate family, and the Court's staff; and (d) any person that timely and properly excludes himself or herself from the Settlement Class in accordance with the procedures approved by the Court.

MEDIA NOTICE TARGET AUDIENCE

15. This matter contemplates a nationwide Settlement Class. To create the media notice program and verify its effectiveness, data from 2018 comSCORE//GfK MRI Media + Fusion was used to profile the class. As the *Tarte* brand is not a measured entity in MRI, the following target definition was used to profile Class Members:

- Department, Clothing, Shoes & Specialty Stores Shopped Last 3 Months [Sephora]; Or
- Department, Clothing, Shoes & Specialty Stores Shopped Last 3 Months [Ulta].

16. I have been advised by counsel that Sephora and Ulta are the two top retailers for the *Tarte* brand, accounting for over two-thirds of all retail sales. Based on the target definition, the potential Target Audience size is estimated to be 21,794,000. It is important to note that the

Target Audience is intentionally overinclusive—consisting of *all* purchasers at two major retailers where the Class Products are sold—based on objective syndicated data, and if were taken as standalone effort, would allow the Parties to report the reach and frequency to the Court with the confidence that the reach within the target audience and the number of exposure opportunities, complies with Due Process and exceeds the Federal Judicial Center's threshold as to reasonableness in notification programs.

17. As it relates to the Target Audience, understanding the socio-economic characteristics, interests and practices of a target group aids in the proper selection of media to reach that target. Here, the Target Audience has the following characteristics:

- Women ages 18-54, with an average age of 43;
- 53.38% are married;
- 25.44% have a college degree;
- 61.27% live in households with a total income above $75K; and
- 67.83% are employed, with 52.49% working full time

18. To identify the best vehicles to deliver messaging to the Target Audience, traditional media quintiles were reviewed, which measure the degree to which an audience uses a particular form of media relative to the general population. Here, objective syndicated data demonstrate that members of the target audience are "heavy" internet users, using the internet an average of 23 hours per week. Likewise, members of the Target Audience read an average of 6 newspapers per month.

19. Given the strength of our target audience's internet use as well as their newspaper use, Angeion recommends utilizing print publication combined with a robust internet advertising campaign.

ONLINE NOTICE

20. Angeion utilizes advanced targeting, machine learning, and a known and verifiable target audience profile, to ensure that members of the target audience are reached online. Through this "programmatic" approach, Angeion's focus will be on effectively reaching the prototypical

individual Class Member. Purchasing display and mobile inventory programmatically provides the highest reach, allows for numerous advanced targeting layers.

21. Specifically, multiple targeting layers will be implemented to help ensure delivery to the most appropriate users, inclusive of search targeting, category contextual targeting, keyword contextual targeting, and site retargeting. The banner advertisements will run on desktop and mobile devices to reach the most qualified audience on the websites where Class Members are likely to surf, shop and browse. Search terms will be relevant to the *Tarte* and the High-Performance Naturals brand. Moreover, Angeion will target users who are currently browsing or have recently browsed content in contextual categories such as 'Tarte skincare' and "High Performance Naturals" to help qualify impressions to ensure messaging is served to the most relevant audience. Additionally, where available, purchase data will be utilized to further qualify the audience.

22. Angeion also employs Lotame, a demand management platform ("DMP"), as well as Integral Ad Science ("IAS"), an online ad verification and security provider, to provide a greater quality of service to ad performance.

23. Lotame allows Angeion to learn more about the online audiences that are being reached. From this data, demographic profiles can be refined and leveraged for changes in targeting strategies to increase the overall performance of the digital campaign.

24. Angeion also utilizes IAS, the leading ad verification company, to recognize and foil fraudulent internet activity. IAS has received the Media Rating Council "MRC" accreditation for Sophisticated Invalid Traffic ("SIVT") detection for desktop and mobile web traffic, which adds a critical level of safety to the notice program.

25. The internet banner notice portion of the notice program will be implemented using a 4-week desktop and mobile campaign, utilizing standard IAB sizes (160x600, 300x250, 728x90, 300x600, 320x50 and 300x50). A 3x frequency cap will be imposed to maximize reach. The banner notice portion of the notice program is designed to result in serving approximately 45,767,000 impressions.

26. Further, to track campaign success, we will implement conversion pixels throughout the Settlement Website, to better understand audience behavior and identify those members of the Target Audience who are most likely to convert. The programmatic algorithm will change based on success and failure to generate conversions throughout the process. Successful conversion on the Claim Form Submission button will be the primary goal, driving optimization and results.

PUBLICATION NOTICE

27. In addition to the internet banner notice campaign described above, the notice program utilizes print publication notice to reach potential Class Members.

28. The notice plan will effectuate publication of the Summary Notice in four ¼ page ads in the California regional edition of *USA Today*, to run one time per week in four consecutive weeks. This choice of publication also satisfies the requirements of the California Consumers Legal Remedies Act ("CLRA").

RESPONSE MECHANISMS

29. The notice program will implement the creation of a case-specific Settlement Website where Class Members can easily view general information about this class action, review relevant Court documents and view important dates and deadlines pertinent to the Settlement.

30. The Settlement Website will be designed to be user-friendly and make it easy for Class Members to find information about the Settlement or file a claim. The website will also have a Frequently Asked Questions tab, and a "Contact Us" page whereby Class Members can send an email with any additional questions to a dedicated email address.

31. Importantly, Class Members will be able to submit their Claim Form and supporting documentation online via the Settlement Website.

32. A toll-free hotline devoted to this case will be implemented to further apprise Class Members of the rights and options in the Settlement. The toll-free hotline will utilize an interactive voice response ("IVR") system to provide Class Members with responses to

frequently asked questions and provide essential information regarding the Settlement. This hotline will be accessible 24 hours a day, 7 days a week.

REACH AND FREQUENCY

33. This declaration provides the reach and frequency evidence which courts systematically rely upon in reviewing class action notice programs for adequacy. It further provides the objective syndicated data source, from which the percentages are derived. The reach percentage and the number of exposure opportunities, meets or exceed the guidelines as set forth in the Federal Judicial Center's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide.*

34. Specifically, the media notice program is designed to deliver an approximate 70% reach with an average frequency of 3.00 times. This reach percentage is ***not*** inclusive of the publication notice described herein, nor does it include the Settlement website and toll-free telephone hotline, as those are not readily calculable in the reach percentage but will nonetheless substantially aid in informing the Class Members of their rights and options under the Settlement.

PLAIN LANGUAGE NOTICE DESIGN

35. The Settlement notices are designed to be "noticed," reviewed, and—by presenting the information in plain language—understood, by Settlement Class Members. The design of the Notices follows principles embodied in the Federal Judicial Center's illustrative "model" notices posted at www.fjc.gov. The notice forms contain plain-language summaries of key information about Settlement Class members' rights and options. Consistent with normal practice, prior to published, all notice documents will undergo a final edit for accuracy.

36. Rule 23(c)(2) of the Federal Rules of Civil Procedure requires class action notices to be written in "plain, easily understood language." Angeion maintains a strong commitment to

adhering to this requirement, and it is my opinion that the notice forms here fully satisfy this requirement.

37. My colleagues and I have had the opportunity to review and edit the notice forms for this case. In my opinion, all the forms of notice are noticeable, clear, and concise, and are written in plain, easily understood language. The notice forms effectively communicate key information about the Settlement and are designed to alert the reader that the Notice is an important document and that the content may affect them.

CLAIMS PROCESSING AND DISTRIBUTION

38. Angeion will cause all electronic and hard copy claims to be processed, reviewed and de-duplicated prior to preparing the finalized Distribution List.

39. Once the finalized Distribution List has been prepared, Angeion will utilize traditional bank checks to distribute class members payments to the address that class members provided during the claims process.

40. In an effort to deliver checks to the intended Class Member recipients, the notice program provides that any checks returned as undeliverable by the USPS which have a forwarding address will be re-mailed to that forwarding address; any checks that are returned as undeliverable by the USPS without a forwarding address will be subject to address verification searches ("skip tracing"), utilizing a wide variety of data sources, including public records, real estate records, electronic directory assistance listings, etc. to locate updated addresses. Checks will then be re-mailed to updated addresses located through skip tracing.

CONCLUSION

41. In my opinion, the Notice Program will provide full and proper notice to Settlement Class Members before any claims, opt-out and objection deadlines.

42. It is my opinion that the Notice Program provides Class Members Due Process of Law and is the best notice that is practicable under the circumstances and is fully compliant with Rule 23 of the Federal Rules of Civil Procedure.

43. After effectuating the notice plan, Angeion will provide a final report verifying its effective implementation.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: January 24, 2019

STEVEN WEISBROT

EXHIBIT D

IMPORTANT NOTICE FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

If you purchased certain Tarte High-Performance Naturals ("HPN") Products, you may be eligible to receive a cash payment from a class action Settlement.

If you purchased certain Tarte products marketed as high-performance naturals®, you may be eligible to receive a payment. There is a class action Settlement involving Tarte products marketed as high-performance naturals®. The Action alleged that Tarte violated state and federal laws regarding the labeling, marketing, and advertising of the high-performance naturals® product line. Tarte denies any and all wrongdoing of any kind whatsoever and denies any liability to Plaintiff and to the Settlement Class. The Court has not decided who is right. Both sides have agreed to settle the dispute. The Settlement provides an opportunity for payments and other benefits to Settlement Class Members.

WHO IS INCLUDED IN THE SETTLEMENT?

All persons and entities who, between November 13, 2013 and [**date**], resided in the United States and purchased in the United States for personal use and not for resale, any products marketed by Tarte as high-performance naturals®, are included in the Settlement Class. More information is available at the Settlement Website, [**website**], or by calling [**number**].

WHAT DOES THE SETTLEMENT PROVIDE?

The Settlement provides a Settlement Amount of $1,700,000.00 to pay (1) Claims of eligible Settlement Class Members; (2) the costs of Class Notice and administration; (3) Attorneys' Fees and Expenses; and (4) any Service Award made by the Court to Plaintiff. Settlement Class Members who timely submit valid Claim Forms are entitled to receive a cash payment from the Settlement. The actual amount recovered by each Settlement Class Member will not be determined until after the Claim Period has ended and all claims have been calculated.

WHAT ARE MY RIGHTS?

1. Participate in the Settlement by Submitting a Claim. If you wish to participate in the Settlement and be eligible to receive benefits under the Settlement, you MUST fill out and submit a Claim Form by **[Date], 2019**. You can obtain a Claim Form by (1) Visiting the Settlement Website, www.HPNsettlement.com, where you can file your claim online or print a Claim Form to submit by mail; (2) Mailing a written request for a Claim Form to: HPN Class Action, Settlement Administrator, 1650 Arch Street, Suite 2210, Philadelphia, PA 19103; (3) Emailing the Settlement Administrator at [**email**]; or (4) Calling Toll-Free [**number**]. If you do not timely submit a valid Claim Form and do not exclude yourself from the Settlement, you will be bound by the Settlement but will not receive any benefits of the Settlement.

2. You Can Object to the Settlement. If you do not agree with the Settlement or any part of it, you may submit a written objection to the Court. The deadline for submitting an objection is **[Date], 2019**.

3. You Can "Opt Out" of the Settlement. If you don't want to be legally bound by the Settlement, you must exclude yourself by **[Date], 2019**, or you won't be able to sue, or continue to sue, Tarte about the claims in this case. If you exclude yourself, you cannot get money from this Settlement. The detailed Class Notice, available at [website], explains how to exclude yourself or object.

4. If you do nothing you will be bound by the Court's decisions. The Court will hold a hearing on **[Date], 2019 at [Time]** to consider whether to approve the Settlement, a request for Attorneys' Fees and Expenses up to $566,666.00, and Service Awards for the Plaintiff totaling $2,500.00, from the Settlement Amount. You or your own lawyer may appear and speak at the hearing at your own expense.

FOR MORE INFORMATION:
Call Toll-Free [number]or visit [website]

2016 WL 538458
United States District Court, D. Utah, Central Division.

VITAMINS ONLINE, INC., Plaintiff,
v.
HEARTWISE, INC., Defendant.

Case No. 2:13–CV–982–DAK
|
Signed February 9, 2016

Attorneys and Law Firms

Chad E. Nydegger, Workman Nydegger, Salt Lake City, UT, Robert L. Florence, Workman Nydegger, Atlanta, GA, for Plaintiff.

Alan R. Houston, Brian C. Johnson, William B. Ingram, Strong & Hanni, Salt Lake City, UT, for Defendant.

MEMORANDUM DECISION AND ORDER

DALE A. KIMBALL, United States District Judge

***1** This matter is before the court on the Plaintiff Vitamins Online, Inc.'s Motion for Partial Summary Judgment, Defendant Heartwise, Inc.'s Motion to Strike Affidavit/ Declaration in Support of Motion, Defendant HeartWise, Inc.'s Counter-Motion for Summary Judgment, and Plaintiff Vitamins Online's Motion to Conduct Discovery Pursuant to Federal Rule of Civil Procedure 56(d). A hearing on the matter was held on January 27, 2016. At the hearing, Vitamins Online was represented by Chad Nydegger. HeartWise was represented by Brian Johnson, William B. Ingram, and Alan R. Houston. Before the hearing, the court carefully considered the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to the matter. Now being fully advised, the court renders the following Memorandum Decision and Order.

BACKGROUND

Plaintiff Vitamins Online, Inc. ("Vitamins Online") is a Utah-based company that manufactures and sells a variety of dietary supplements online, including on Amazon.com, under the brand name NutriGold. Osman Khan is the Chief Financial Officer ("CFO") of Vitamins Online. Defendant HeartWise, Inc. d/b/a NatureWise ("NatureWise") also sells dietary supplements, including on Amazon.com. DavidPaul Doyle is NatureWise's Chief Executive Officer ("CEO"). For purposes of this suit, Vitamins Online and NatureWise sell two competing dietary supplements: one containing garcinia cambogia and one containing green coffee.

Vitamins Online began selling its NutriGold Garcinia Cambogia and NutriGold Green Coffee products on Amazon.com before 2010. Before 2010, there was little demand and competition on Amazon.com for these products because they were not well known to consumers.

On September 10, 2011, Dr. Mehmet Oz, the famous television personality known as "Dr. Oz," showcased dietary supplements containing green coffee extract for weight loss purposes on his television show, "The Dr. Oz Show." During his show, Dr. Oz recommended that consumers look for dietary supplements containing green coffee extract with at least 45% chlorogenic acid and without any binders, fillers, or other artificial ingredients. After Dr. Oz's show, the demand for dietary supplements containing green coffee extract, and particularly those products that met Dr. Oz's recommendations, exploded. Specifically, Vitamins Online's sales of NutriGold Green Coffee on Amazon.com increased significantly because NutriGold Green Coffee was already on the market and fortuitously met all of Dr. Oz's recommendations.

In 2012, Dr. Oz featured dietary supplements containing garcinia cambogia extract for weight loss purposes on "The Dr. Oz Show." Dr. Oz advised listeners to look for garcinia cambogia dietary supplements with at least 60% Hydroxycitric Acid ("HCA") that was bound to potassium and calcium. Demand for garcinia cambogia products exploded after Dr. Oz's show, and, specifically, Vitamins Online's sales of NutriGold Garcinia Cambogia on Amazon.com increased significantly because the NutriGold Garcinia Cambogia was already on Amazon.com and satisfied the criteria identified by Dr. Oz.

***2** The increased demand for dietary supplements containing green coffee and garcinia cambogia extracts following Dr. Oz's television shows attracted others, including NatureWise, to begin offering competing products. NatureWise advertised its products as having the qualities and characteristics that Dr. Oz recommended.

After entering the green coffee and garcinia cambogia markets on Amazon.com, NatureWise began a practice of having its employees vote on the helpfulness of reviews on its product pages. Amazon.com lists the reviews on its product pages using a formula that takes into account the helpfulness of the review based on the voting. By having its employees vote that positive reviews were helpful and negative reviews were unhelpful, NatureWise increased the likelihood that potential customers would see positive reviews of its products first and negative reviews last. NatureWise also encouraged customers to repost their positive reviews on Amazon.com by offering them free products or gifts cards. NatureWise would review and, in some cases, edit the reviews before asking the customers to post them on Amazon.com.

On October 28, 2013, Vitamins Online filed a Complaint against NatureWise and DavidPaul Doyle in this Court claiming unfair competition under the Lanham Act and the common law for false advertising. The Complaint included a demand for a jury trial. David Paul Doyle was later dismissed from the case. The Answer from NatureWise included a counterclaim against Vitamins Online and a Third-Party Complaint against NutriGold and Osman Khan. The Court held a hearing on and denied NatureWise's Motion for Judgment on the Pleadings because Vitamins Online's Complaint stated sufficient facts to make a plausible claim for unfair competition. After that denial, Vitamins Online filed a Motion for Partial Summary Judgment. NatureWise responded with a Motion to Strike Affidavit/Declaration related to Vitamins Online's motion and a Counter-Motion for Summary Judgment. Vitamins Online then filed a Motion to Conduct Discovery Pursuant to Federal Rule of Civil Procedure 56(d).

DISCUSSION

Because the motions for summary judgment are dependent on the evidence that the court determines it should consider, the court will first address NatureWise's Motion to Strike Affidavit/Declaration related to Vitamins Online's Motion for Partial Summary Judgment. The court will then address the summary judgment motions together. Finally, the court will address Vitamins Online's Motion to Conduct Discovery Pursuant to Federal Rule of Civil Procedure 56(d) because it is conditional on the Court's decision to the summary judgment motions.

MOTION TO STRIKE

As an initial matter, the Rules of Practice for the United States District Court for the District of Utah expressly prohibit the filing of a motion to strike evidence as inadmissible in a response or reply to a motion. *See* DUCivR 7-1(b)(1)(B). But, in a previous order issued by the court in this case, the court determined that, because it did not cause any prejudice to Vitamins Online, the court would construe the Motion to Strike as an objection to the exhibits at issue, *see* Mem. Decision and Order 2-3, ECF No. 134, which would have been the appropriate way for NatureWise to raise its arguments, *see* DUCivR 7-1(b)(1)(B).

When determining whether evidence should be considered to decide a motion for summary judgment, the general rule is that evidence submitted at the summary judgment stage may be in a "form of evidence that is usually inadmissible at trial" so long as "the content or substance of the evidence [is] admissible." *Johnson v. Weld County*, 594 F.3d 1202, 1210 (10th Cir. 2010). *See also* Fed. R. Civ. Proc. 56(c)(2) ("A party may object that the material cited to support or dispute a fact *cannot be presented in a form that would be admissible at trial*." (emphasis added)). But this general rule does not give the court "a license to relax the content or substance of the Federal Rules of Evidence when viewing" summary judgment evidence. *Id.* For example, the court should not consider hearsay evidence on summary judgment, *see id.*, and the court should only consider evidence that has been properly authenticated, *see* *Law Co. v. Mohawk Const. & Supply Co.*, 577 F.3d 1164, 1170 (10th Cir. 2009).

***3** NatureWise argues that the majority of Vitamins Online's Exhibits and corresponding purported "Undisputed Material Facts" should be stricken because they are unsupported by admissible evidence. Specifically, NatureWise argues that, except for discovery responses, correspondence between counsel for the parties, and deposition transcripts, the court should strike all of Vitamins Online's Exhibits, including product labels and packaging, third-party test results, emails, marketing materials, product websites, and a clinical study.

NatureWise objects to the consideration of the Exhibits it has identified for three reasons: (1) the Exhibits are inadmissible hearsay pursuant to Federal Rule of Evidence 802, (2) the Exhibits lack foundation pursuant to Federal Rule of Evidence 901, and (3) the third-party test results

and the clinical study are inadmissible as unsubstantiated expert testimony under Federal Rule of Evidence 702. Each of the Exhibits offered by Vitamins Online was produced by NatureWise in the course of discovery. Vitamins Online offered each of the Exhibits by attaching the Exhibits to its attorney's declaration stating that each Exhibit was a true and correct copy of what had been produced by NatureWise in the course of discovery. Essentially, NatureWise is arguing that, because Vitamins Online offered the Exhibits into evidence without personally asserting any of the statements and without personal knowledge of any of the statements, the statements cannot be considered on a motion for summary judgment because they are hearsay and lack foundation.

NatureWise's arguments incorrectly apply the principles of the Federal Rules of Evidence. By offering true and correct copies of documents produced by NatureWise during discovery, Vitamins Online is stating that it has personal knowledge that the documents being offered are true and correct copies. Vitamins Online "is not attesting to the facts contained within the attached documents." *OFI Intern., Inc. v. Port Newark Refrigerated Warehouse*, 2015 WL 140134, at *3 (D.NJ 2015) (citations omitted). Because NatureWise produced the documents at issue during discovery, some courts would consider them to be "self-authenticating" and to "constitute the admissions of a party opponent." *Anand v. BP W. Coast Prods. LLC*, 484 F. Supp 2d 1086, 1092 n.11 (C.D. Cal. 2007). Other courts have even pointed out to litigants like NatureWise that "it is disingenuous and wasteful to object to one's own documents based upon personal knowledge or authentication." *OFI Intern.*, 2015 WL 140134, at *3.

In this case, the court does not need to go as far as stating that all of the documents are self-authenticating and admissions of a party opponent to show that they are admissible. The product labels, product packaging, emails from customers, marketing materials, and the clinical study are not hearsay because Vitamins Online is not offering them in evidence "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c)(2). Instead, Vitamins Online is offering the documents into evidence to show that NatureWise made certain claims about its products in commerce, the state of mind of customers or potential customers, and the fact that a clinical study was performed. The third-party tests and the emails from NatureWise employees also do not qualify as hearsay because they were "made by [NatureWise] in an individual or representative capacity," "made by a person whom [NatureWise] authorized to make a statement on the subject," or "made by [NatureWise's] agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(A), (C), and (D). Even if NatureWise did not authorize the labs to perform the third-party tests, as it did in this case, several courts have clarified that "raw data generated" by a machine is not hearsay because a hearsay statement requires a person as a declarant. *U.S. v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007) ("Accordingly, 'nothing 'said' by a machine ... is hearsay' " (citing 4 Mueller & Kirkpatrick, *Federal Evidence*, § 380, at 65 (2d ed. 1994)). *See also* *United States v. Hamilton*, 413 F.3d 1138, 1142-43 (10th Cir. 2005) (determining that header information on pornographic images retrieved from the Internet was not hearsay because the header information was generated by a computer). Although the processes used to generate the raw data can be challenged, those challenges go to the weight of the evidence and not its admissibility.

***4** Each of the documents offered into evidence by Vitamins Online were also sufficiently authenticated. NatureWise argues that Vitamins Online does not have personal knowledge that the Exhibits are what they claim to be and has not produced a declaration, affidavit, or deposition testimony from anyone with personal knowledge. Again, NatureWise does not correctly apply the standard required by the Federal Rules of Evidence. Courts in the Tenth Circuit "do not require an affidavit to authenticate every document submitted for consideration at summary judgment." *Law Co.*, 577 F.3d at 1170. In determining whether a document has been properly authenticated at the summary judgment stage, "Rule 56(c) and the Federal Rules of Evidence control." *Id.* Under Rule 56(c), affidavits are one of many forms of evidence that can support a factual position. Other forms include "depositions, documents, electronically stored information, ... stipulations ..., admissions, interrogatory answers, or other materials." Fed R. Civ. P. 56(c)(1)(A). Under Federal Rule of Evidence 901, evidence satisfying the authentication requirement can include "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Fed. R. Evid. 901(b)(4).

In this case, most of the documents at issue can be sufficiently authenticated with circumstantial evidence such as email addresses in headers, company logos and other trademarks on the documents, company letterhead and signatures on lab reports, and publication information on the clinical study. Even without sufficient circumstantial evidence, much of

the evidence can be authenticated at trial through DavidPaul Doyle because, as a Rule 30(b)(6) witness, he is required to "testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). His lack of personal knowledge about specific emails or third-party tests does not prevent him from being able to authenticate those documents on behalf of NatureWise.

Finally, NatureWise objects that the third-party tests and the clinical study offered by Vitamins Online are inadmissible as unsubstantiated expert testimony. Federal Rule of Evidence 702 places restrictions on the admissibility and content of the testimony of any "witness who is qualified as an expert by knowledge, skill, experience, training, or education." One of the restrictions is that the expert may only testify if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." *Id.* 702(a). NatureWise argues that, because scientific, technical, or other specialized knowledge was required to perform the third-party tests and the clinical study, the documents constitute expert testimony and are subject to the restrictions in Federal Rule of Evidence 702.

First, because the clinical study is being offered simply to show that a clinical study was performed and not to discuss the results or conclusions of the study, the court concludes that the clinical study as offered in this case is not expert testimony and is not subject to the restrictions of Federal Rule of Evidence 702. Second, the third-party tests do not constitute the testimony of a witness. The court agrees with the Fourth Circuit and "reject[s] the characterization of the raw data generated by the lab's machines as statements *of the lab technicians* who operated the machines. The raw data generated by the diagnostic machines are the 'statements' *of the machines* themselves, not their operators." *Washington*, 498 F.3d at 230. Because the third-party tests do not constitute the testimony of a witness, the court concludes that they also are not subject to the restrictions of Federal Rule of Evidence 702.

Therefore, the court rejects each of the objections that NatureWise brought against the evidence offered by Vitamins Online, and the court will consider all of the evidence to determine the issues raised in the summary judgment motions.

MOTIONS FOR SUMMARY JUDGMENT

"Summary judgment is appropriate if the pleadings, depositions, other discovery materials, and affidavits demonstrate the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Sally Beauty Co., Inc. v. Beautyco, Inc.*, 304 F.3d 964, 971 (10th Cir. 2002) (citing Fed. R. Civ. P. 56(c)). "An issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Id.*

***5** The initial burden is on the moving party to show that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant has met its initial burden of demonstrating the absence of a genuine issue of material fact, "the burden shifts to the nonmoving party to go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial." *Sally Beauty Co.*, 304 F.3d at 971 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must "construe the evidence and the reasonable inferences drawn therefrom in the light most favorable to the nonmovant," *id.* at 972 (citing *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1089 (10th Cir. 1999)), but conclusory statements and attorney arguments submitted by the nonmoving party do not create a genuine issue of material fact, *see* *Adler v. Wal-mart Stores, Inc.*, 144 F.3d 664, 671-72 (10th Cir. 1998).

In its Motion for Partial Summary Judgment, Vitamins Online argues that the undisputed material facts show that, as a matter of law, NatureWise has falsely advertised about the ingredients and effectiveness of its products as defined by the Lanham Act and that Vitamins Online is entitled to an injunction. NatureWise filed a Counter-Motion for Summary Judgment arguing that Vitamins Online failed to demonstrate that the representations were material, that they caused actual injury to Vitamins Online, and that Vitamins Online is entitled to an injunction. NatureWise further moves for summary judgment on Vitamins Online's claims that NatureWise manipulated Amazon.com's customer review system under the argument that Vitamins Online did not demonstrate that NatureWise's conduct amounted to either literally false or impliedly false representations.

The court will divide the analysis of the motions for summary judgment into the arguments related to the Lanham Act claims and the arguments related to the injunction.

a. Lanham Act Claims

The Lanham Act provides a private cause of action to "any person who believes that he or she is or is likely to be damaged" by, among other things, "a false or misleading representation of fact, which ... in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities ... of his or her or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1) (2012). Courts have interpreted that statute as requiring a plaintiff to provide evidence of at least four elements in order to survive a motion for summary judgment under this section of the Lanham Act:

> "(1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are ... likely to cause confusion or mistake as to ... the characteristics of the goods or services; and (4) injure the plaintiff."

Cottrell, Ltd. v. Biotrol Int'l, Inc., 191 F.3d 1248, 1252 (10th Cir. 1999) (citations omitted). *See also* *Sally Beauty Co.*, 304 F.3d at 980. Some courts list materiality as an additional element of a Lanham Act claim, *see* *Novell, Inc. v. Network Trade Center, Inc.*, 25 F. Supp. 2d 1218, 1227-28 (D. Utah 1997) (listing as an additional element that "the deception is material in that it is likely to influence purchasing decisions"), but the Tenth Circuit has not yet decided "whether the Lanham Act imposes a materiality inquiry," *Gen. Steel Domestic Sales, LLC v. Chumley*, No. 14-1119, 2015 WL 4591924, at *3 (10th Cir. July 31, 2015). In this case, the court does not need to determine whether materiality is an additional element in a Lanham Act claim because the court can resolve the summary judgment motions on other elements of the claims.

***6** NatureWise does not dispute that its representations were made in commerce or that, if the representation were false, that they were likely to cause confusion. Therefore, the court will focus on the first and fourth elements of the Lanham Act claims.

i. False or Misleading Representations of Fact

To meet the first element of a Lanham Act claim, the plaintiff can either show that the representations are literally false or impliedly false. A representation is literally false when it states that a product "has certain qualities that it in fact does not actually have" and is impliedly false when the "statements ..., while literally true or ambiguous, convey a false impression or are misleading in context, as demonstrated by actual consumer confusion." *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 13-14 (7th Cir. 1992). *See also* *Vincent v. Utah Plastic Surgery Soc.*, 621 Fed. Appx. 546, 550 (10th Cir. 2015) ("To prevail on their implied falsity claims, however, Plaintiffs must show 'actual consumer deception.' ").

Vitamins Online argues that NatureWise made several literally false representations regarding the ingredients and effectiveness of its products ("Ingredients Claims.") Because the court concludes below that genuine issues of material fact exist as to whether the Ingredients Claims caused injury to Vitamins Online, the court does not analyze whether the Ingredients Claims are literally false.

In addition to the Ingredients Claims, Vitamins Online also alleges that NatureWise made impliedly false representations by manipulating the ranking and number of positive reviews on NatureWise's product pages on Amazon.com ("Amazon Review Claims"). Specifically, Vitamins Online references NatureWise's practices of having its employees vote on the helpfulness of product reviews and of offering free products or gift cards to customers if they reposted favorable reviews on Amazon.com. NatureWise argues that the Amazon Review Claims should be dismissed because they do not meet the first element of a Lanham Act claim of being either literally or impliedly false. NatureWise argues that Vitamins Online has not shown that the votes or the reviews themselves are counter to the actual user experience, so they are not literally false. NatureWise also argues that Vitamins Online has not shown that they are impliedly false because Vitamins Online has not offered evidence of any actual consumer deception. Vitamins Online argues that the Lanham Act is broad enough to cover new deceptive practices, like these, that have and will arise in e-commerce.

The court first notes that Vitamins Online is not arguing that the Amazon Review representations were literally false. More specifically, Vitamins Online is not arguing that NatureWise employees were voting as helpful reviews that were in reality unhelpful or that the reposts from consumers were counter to their actual experience with the NatureWise products. Instead, Vitamins Online is arguing that the voting and the rewarding

are giving a false impression that many unbiased consumers find positive reviews to be helpful and negative reviews to be unhelpful and that a high number of unbiased consumers chose to post positive reviews on Amazon.com without any anticipation of reward.

***7** The court agrees with Vitamins Online that the Lanham Act is broad enough to cover a wide range of deceptive practices, potentially including voting on and incentivizing online reviews, and that the conduct of NatureWise may qualify as representations that convey a false impression or are misleading in context. However, Vitamins Online has not yet shown the actual consumer deception required to succeed on a claim for impliedly false advertising. Vitamins Online believes that it will be able to obtain this evidence through consumer surveys conducted and analyzed by expert witnesses and has moved the court pursuant to Federal Rule of Civil Procedure 56(d) for additional time to conduct this discovery. Because the court has decided to grant Vitamins Online's 56(d) motion, the court denies the Amazon Review portion of NatureWise's Counter-Motion for Summary Judgment without prejudice.

ii. Injury

In order to succeed on a Lanham Act claim, a plaintiff must also show that the false or misleading statements caused the plaintiff injury. The standard for determining whether a plaintiff has provided sufficient evidence of injury is dependent on the relief that the plaintiff is seeking. *See* *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1335 (8th Cir. 1997) ("[C]ases involving injunctive relief and those seeking monetary damages under the Lanham Act have different standards of proof."). When a plaintiff is seeking injunctive relief, the "plaintiff does not need to establish actual damages, and is instead held to a lesser standard of proving that it is likely that the defendant's advertising has caused or will cause plaintiff injury." *Berken v. Jude*, No. 12-CV-02555-RPM, 2013 WL 6152347, at *2 (D. Colo. Nov. 22, 2013). In other words, when the plaintiff is seeking an injunction, "[t]he statute demands only proof providing a reasonable basis for the belief that the plaintiff is likely to be damaged as a result of the false advertising" and not "proof of actual loss and specific evidence of causation." *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 190 (2d Cir. 1980). In contrast, a "heightened level of ... proof of causation and specific injury" is required when the plaintiff is seeking money damages, *Porous Media Corp.*, 110 F.3d at 1335-36, in order to "prevent the plaintiffs from receiving a windfall unrelated to their own damages," *Berken*, 2013 WL 6152347, at *2.

In cases involving comparative advertising, advertising that makes reference to or comparison with a competitor's products and in cases involving a "two-player market," most courts apply a presumption of likely injury on a Lanham Act claim for purposes of injunctive relief. *See, e.g.,* *Porous Media Corp.*, 110 F.3d at 1334 ("[When] the defendant made false statements about its own product with no reference to another's product ... the court required specific proof of causation and damage. This is in contract to a case of comparative advertising."); *McNeilab, Inc. v. American Home Products Corp.*, 848 F.2d 34, 38 (2d Cir. 1988) ("A misleading comparison to a specific competing product necessarily diminishes that product's value in the minds of the consumer."); *Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247, 262 (2d Cir. 2014) ("In a false advertising case such as this one, where the parties are direct competitors in a two-player market, and where literal falsity and willful, deliberate deception have been proved, the presumptions of injury and consumer confusion may be used for the purposes of awarding both injunctive relief *and* monetary damages to a successful plaintiff). In one case, the Tenth Circuit has even suggested that the presumption of likely injury may extend beyond comparative advertising cases to cases involving an "obvious competitor," but that statement was not a necessary part of the resolution or determination of that case. *Hutchinson v. Pfeil*, 211 F.3d 515, 522 (10th Cir. 2000). Since *Hutchinson*, one court concluded that the plaintiff was entitled to the presumption for obvious competitors, but the court still required the plaintiff "to support that presumption with ... evidence of injury." *Berken*, 2013 WL 6152347, at *3.

***8** Vitamins Online argues that, as an obvious competitor to NatureWise, Vitamins Online is entitled to the presumption of likely injury for obvious competitors. To show that they are obvious competitors, Vitamins Online provides evidence that both parties offered the same products for sale on Amazon.com, that NatureWise's false representations mirror Vitamins Online's true representations, and that NatureWise has instructed its graphic designer to create an advertisement for NatureWise that is similar to Vitamins Online's Amazon.com product page. Vitamins Online also offers evidence of injury in the form of declining sales

corresponding to NatureWise's increasing sales and a drop in Vitamins Online's ranking on Amazon.com.

NatureWise argues that Vitamins Online has not shown that NatureWise's false claims were at least impliedly directed at Vitamins Online to make them obvious competitors. NatureWise also argues that Vitamins Online has not shown a logical causal connection between the false representations and Vitamins Online's sales position because Vitamins Online's declining sales could be due to truthful advertising by NatureWise, the numerous other competitors in the nutritional supplement market, or poor business strategies by Vitamins Online.

The presumption of injury for obvious competitors on a Lanham Act claim has, at best, a thin legal foundation. Because this case does not involve comparative advertising and because Vitamins Online and NatureWise are not in a two-player market, the court declines to apply a presumption of injury on the Lanham Act claim in this case. But the court does consider evidence that Vitamins Online and NatureWise are competitors to be relevant to the analysis of whether NatureWise's false representations injured Vitamins Online.

Without the presumption of injury, the court concludes that genuine issues of material fact exist as to whether NatureWise's false representations injured Vitamins Online. Vitamins Online does offer some evidence of causation and injury. For example, Vitamins Online does show that its products compete with NatureWise's products in a relevant market. Because the products compete on Amazon.com, a logical causal connection exists between NatureWise's false representations and Vitamins Online's sales position. Each consumer that purchases a NatureWise product due to NatureWise's false representations results in one less consumer in the relevant market willing to purchase a competing Vitamins Online product. Vitamins Online has also offered evidence that its decline in sales corresponds in time to an increase in NatureWise's sales for competing products.

Although Vitamins Online has offered some evidence of injury that may have been caused by NatureWise's false representations, the evidence is not sufficient to demonstrate that Vitamins Online is entitled to judgment as a matter of law. Vitamins Online needs more than a logical causal connection between NatureWise's false representations and Vitamins Online's sales position. For example, Vitamins Online could have provided additional evidence through consumer testimony or consumer surveys to strengthen the causal connection between the representations and the lost sales. With nothing more than logic to connect the false representations with the decline in sales, the court concludes that judgment as a matter of law is improper.

Despite not offering enough evidence to demonstrate that it is entitled to summary judgment as a matter of law, Vitamins Online did offer enough evidence to show that there is a genuine issue for trial. NatureWise argues that the loss of sales could be caused by other factors such as truthful advertising by NatureWise, other competitors in the market, or poor business practices by Vitamins Online. But arguing that the cause of the decline in sales is not known supports the conclusion that a genuine issue of material fact exists for trial and not the conclusion that NatureWise is entitled to judgment as a matter of law.

b. Injunctive Relief

***9** Under the Lanham Act, a court has the power to grant an injunction "according to the principles of equity and upon such terms as the court may deem reasonable." 15 U.S.C. § 1116(a) (2012). In order to qualify for injunctive relief, "[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Because the court concludes that genuine issues of material fact exist as to whether Vitamins Online has suffered irreparable injury, the court will only address that element of the injunctive relief analysis.

Some courts have recognized a presumption of irreparable injury for purposes of injunctive relief under the Lanham Act. The presumption of irreparable injury typically arises in cases involving literally false representations and comparative advertising. *See, i.e., McNeilab, Inc.*, 848 F.2d at 38 ("This case, by contrast, presents a false comparative advertising claim. ... In that context, we recently confirmed that irreparable harm will be presumed."). In dicta, the Tenth Circuit implied that this presumption might also extend to cases involving "an obvious competitor." *Hutchinson*, 211 F.3d at 522. However, in *eBay, Inc. v. MercExchange, LLC*, the United States Supreme Court discouraged the use of a "categorical rule" to "replace traditional equitable

considerations" when determining whether to issue an injunction. 547 U.S. at 392-93. Since *eBay*, several courts have determined that "relying on presumptions of irreparable harm for injunctive relief is not appropriate." *Leatherman Tool Grp., Inc. v. Coast Cutlery Co.*, 823 F. Supp. 2d 1150, 1157-58 (D. Or. 2011).

Even if it is not entitled to the presumption, Vitamins Online argues that it has suffered irreparable harm because its sales and ranking position on Amazon.com have plummeted as a result of NatureWise's false advertising. NatureWise argues that the claims constitute non-comparative advertising and, therefore, Vitamins Online cannot claim a presumption of causation and injury. NatureWise further argues that Vitamins Online has not shown that the allegedly false statements caused injury because it has not accounted for purchasing decisions for reasons other than the allegedly false advertising.

The court declines to apply a presumption of irreparable injury to obvious competitors for purposes of injunctive relief under the Lanham Act. After *eBay*, the validity of any presumption of irreparable injury for purposes of an injunction is questionable, and, in particular, the presumption for obvious competitors is problematic because of the small amount of legal support for it. Without applying the presumption, the court concludes that Vitamins Online has not presented enough evidence of irreparable harm to show that it is entitled to judgment as a matter of law, but it has presented enough to show that a material issue of genuine fact exists for trial.

MOTION TO CONDUCT DISCOVERY PURSUANT TO RULE 56(d)

Federal Rule of Civil Procedure 56(d) gives a court the discretion to allow a party time to take discovery "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." In order to obtain relief under Rule 56(d), a non-movant to a motion for summary judgment must identify "(1) the probable facts not available, (2) why those facts cannot be presented currently, (3) what steps have been taken to obtain these facts, and (4) how additional time will enable the party to obtain those facts and rebut the motion for summary judgment." *Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1096 (10th Cir. 2010) (citations omitted). "Unless dilatory or lacking in merit, the motion should be liberally treated." *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992) (citations omitted).

***10** Vitamins Online argues that expert consumer surveys, which, pursuant to the court's amended scheduling order, were not yet due at the time the motions at issue were filed, would provide evidence that NatureWise's conduct related to the Amazon Review Claims conveyed a false and misleading message to consumers. Vitamins Online argues that this evidence would demonstrate the existence of a genuine issue of material fact that could then be used to rebut NatureWise's argument that its manipulation of the Amazon product review system does not constitute a false or deceptive statement actionable under the Lanham Act. At the time of the filing of the motions at issue, Vitamins Online had already retained survey and analysis experts and conducted one consumer survey, but the analysis of the survey had not yet taken place. Additional time would allow Vitamins Online to complete the analysis of the initial consumer survey and obtain other consumer surveys as needed.

The court concludes that Vitamins Online has met its burden of showing that it should be allowed additional time to conduct discovery pursuant to Rule 56(d). Expert reports are a common and recommended way to show actual consumer deception and injury under the Lanham Act. Vitamins Online has been taking steps to obtain that evidence according to the court's schedule. If Vitamins Online is allowed to complete expert discovery, Vitamins Online will be able to demonstrate whether consumers were actually deceived by NatureWise's actions, which may allow it to rebut NatureWise's Counter-Motion for Summary Judgment on the Amazon Review Claims.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that NatureWise's Motion to Strike [Docket No. 66] is DENIED; Vitamins Online's Partial Motion for Summary Judgment [Docket No. 52] is DENIED; NatureWise's Counter-Motion for Summary Judgment [Docket No. 74] is DENIED, but is denied without prejudice regarding the Amazon Review Claims; and Vitamins Online's Motion to Conduct Discovery Pursuant to Rule 56(d) [Docket No. 100] is GRANTED.

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United States District Court, N.D. California.

Phillip WHITE, Plaintiff,
v.
The KROGER CO., et al., Defendants.

Case No. 21-cv-08004-RS
|
Signed 03/25/2022

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ORDER DENYING MOTION TO DISMISS

RICHARD SEEBORG, Chief United States District Judge

I. INTRODUCTION

***1** In this putative class action plaintiff alleges that sunscreen products produced by defendant Fruit of the Earth, and sold by defendant The Kroger Co. under its "house brand," are misleadingly labeled as "reef friendly," when they in fact contain ingredients with the potential to damage reefs. Plaintiff advances claims under California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. ("UCL"); California False Advertising Law, Cal. Bus. & Prof. Code § 17500 et seq. ("FAL"); and the California Consumers Legal Remedies Act, Cal Civ. Code § 1750 et seq. ("CLRA"), as well as breach of implied warranty and "unjust enrichment."

Kroger moves to dismiss the operative First Amended Complaint in its entirety, arguing the claim "reef friendly" is inactionable as it is "mere puffery," and that in any event the question should be left to agency regulation under the primary jurisdiction doctrine. Kroger also raises several other challenges to portions of the complaint. The motion to dismiss will be denied.

II. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While "detailed factual allegations" are not required, a complaint must have sufficient factual allegations to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). This standard asks for "more than a sheer possibility that a defendant has acted unlawfully." *Id.* The determination is a context-specific task requiring the court "to draw on its judicial experience and common sense." *Id.* at 679. Claims sounding in fraud must meet a somewhat higher specificity standard as provided by Rule 9 of the Federal Rules of Civil Procedure.

A motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims alleged in the complaint. *See Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011). Dismissal under Rule 12(b)(6) may be based on either the "lack of a cognizable legal theory" or on "the absence of sufficient facts alleged under a cognizable legal theory." *Id.* at 1242 (internal quotation marks and citation omitted). When evaluating such a motion, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1140 (9th Cir. 2017).

III. DISCUSSION

A. Puffery

Claims under the UCL, FAL, and CLRA are governed by the "reasonable consumer" standard. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016). Under this standard, a plaintiff must "show that 'members of the public are likely to be deceived.' " *Id.* (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)). This requires more than a "mere possibility" that defendants' use of the term "reef friendly" on their products "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Id.* (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003)). Rather, it must be "probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie*, 105 Cal. App. 4th at 508 (; *see also* *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1304 (2011) (emphasizing that "the standard is not a least sophisticated consumer," but a reasonable one).

***2** Kroger acknowledges the "reasonable consumer" inquiry is ordinarily fact-intensive and not well-suited for resolution at the pleading stage. Kroger insists, however, that the question of whether a challenged representation is "mere puffery," and therefore inactionable, is a separate issue, and one of pure law. It would not be proper to disregard potential factual issues regarding how reasonable consumers would understand a representation when evaluating whether it constitutes "puffery." In some instances, however, it is possible to conclude at the pleading stage that an alleged misrepresentation is too generalized, vague, subjective, and/or constitutes exaggerated boasting, such that a consumer cannot reasonably rely on the claim. Kroger, however, has failed to show that "reef friendly" is such a term in the context of the allegations of the complaint here.

Kroger relies on cases where "friendly" was used in very different circumstances. *See, e.g., Wedi Corp. v. Wright*, 840 F. App'x 272, 273 (9th Cir. 2021) ("[U]ser-friendly ... non-actionable puffery"); *Klaehn v. Cali Bamboo*, LLC, 2021 WL 3044166, at *8 (S.D. Cal. June 14, 2021) ("[P]et friendly" is "non-actionable puffery"). Where a reasonable inference exists that consumers may be looking for sunscreen products that are not damaging to reefs, however, "reef friendly" may reasonably be understood as implying defendants' products meet those criteria.

To be sure, Kroger points to some cases where even the words "environmentally friendly" have been found too vague—but that is a much broader term. Furthermore, as plaintiff points out, the Federal Trade Commission has promulgated "Guides for the Use of Environmental Marketing Claims," codified at 16 C.F.R. 260.1, et seq. ("Green Guides"), to "help marketers avoid making environmental marketing claims that are unfair or deceptive" based on the FTC's "views on how reasonable consumers likely interpret [those] claims." *Id.* at § 260.1(a), (d). In the FTC's view, "[u]nqualified general environmental benefit claims ... likely convey that the product ... has specific and far-reaching environmental benefits and may convey that the item ... has no negative environmental impact." *Id.* at § 260.4(b) (providing "Eco-Friendly" as an example) (emphasis added). The California legislature codified the Green Guides to make it "unlawful for a person to make an untruthful, deceptive, or misleading environmental claim, whether explicit or implied." Cal. Bus. & Prof. Code § 17580.5. California viewed terms "on the label or container of a consumer good" like "environmental choice," ecologically friendly," earth friendly," "environmentally friendly," ecologically sound," "environmentally sound," "environmentally safe," "ecologically safe," environmentally lite," "green product," "or any other like term," to mean that the product "is not harmful to, or is beneficial to, the natural environment." *Id.* at §§ 17580(a), 17581 (criminalizing such claims).

While neither the FTC guides nor the California statute directly creates a private cause of action, they do undermine any argument that "reef friendly" can be dismissed as mere puffery. Kroger's response is that the California statute does not *specifically* list "reef friendly" as a prohibited term, and that under "basic statutory interpretation principles" California law should therefore be read as hurting, rather than helping plaintiff's position. Kroger's attempt to invoke "*expressio unius est exclusio alterius*," is misdirected because as noted above the statutes *expressly* extend to "ecologically *friendly*," "earth *friendly*," "environmentally *friendly*," ... or *any other like term*." § 17580(a) (emphasis added). Accordingly, the complaint is not subject to dismissal on grounds that the alleged misrepresentations are mere puffery.

B. Primary jurisdiction

The primary jurisdiction doctrine applies when there is: "(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity

in administration." *Clark v. Time Warner*, 523 F.3d 1110, 1115 (9th Cir. 2008). "In practice, this means that the court either stays proceedings or dismisses the case without prejudice, so that the parties may seek an administrative ruling." *Id.* at 1115. The doctrine of primary jurisdiction may only be properly invoked "in a limited set of circumstances"; it "is not designed to 'secure expert advice' from agencies every time a court is presented with an issue conceivably within the agency's ambit." *Id.* at 1114 (internal quotations omitted). "It is to be used only if a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Id.* (internal quotations omitted).

***3** Kroger points to pending legislation in Congress that, if enacted, likely will result in the FDA eventually developing regulations that may govern sunscreen ingredients and how they may be represented, in connection with reef health. That possibility is too remote at this juncture to warrant a stay or dismissal, particularly where evaluating the merits of the misrepresentation claim under existing law is well within the expertise of the courts.

C. Rule 9(b)

Kroger argues the claims sounding in fraud are not pleaded with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure. The complaint, however, quite clearly sets out what representation is allegedly misleading, where and how defendants make the representation, and why plaintiffs contend it is misleading. This is sufficient. *See Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) ("To satisfy Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about [the purportedly fraudulent] statement, and why it is false." (cleaned up).) Kroger's argument that the studies cited in the complaint do not prove plaintiff's claims or that the allegations are otherwise factually insufficient misconstrues plaintiff's pleading burden. *See Locklin v. Strivectin Operating Company, Inc.*, No. 21-cv-07967-VC (N.D. Cal. Mar. 23, 2022).

D. Other issues

Kroger argues the breach of implied warranty claim fails because plaintiff fails to explain how the challenged sunscreen products do "not possess even the most basic degree of fitness for ordinary use." *Mocek v. Alfa Leisure, Inc.*, 114 Cal.App.4th 402, 406 (2003). Under Cal. Com. Code § 2314(2)(f), however, the implied warranty of merchantability includes a promise that the goods "[c]onform to the promises or affirmations of fact made on the container or label...." Plaintiff has adequately alleged breach of that implied promise.

Kroger's challenges to plaintiff's standing with respect to specific sunscreen products he did not purchase and to his ability to represent a nationwide class both represent matters that are better addressed at the class certification stage, notwithstanding the fact that in some circumstances they can be decided at the pleading stage.

Finally, while the viability of "unjust enrichment" as a standalone claim remains a matter of some dispute, there is no basis to dismiss it here where underlying claims remain. Accordingly, it may go forward.

IV. CONCLUSION

The motion to dismiss is denied.

IT IS SO ORDERED.

All Citations

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