UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DARREN MILLAM; and DONALD SPRINKEL, individually and on behalf of all others situated,

Plaintiffs,

v.

ENERGIZER BRANDS, LLC; and ENERGIZER HOLDINGS, INC.,

Defendants.

Case No. 5:21-cv-01500-JWH-SHKx

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT [ECF No. 26]

Before the Court is the motion of Defendants Energizer Holdings, Inc., and Energizer Brands, LLC (jointly, "Energizer"), to dismiss the Amended Complaint of Plaintiffs Darren Millam and Donald Sprinkel, on behalf of themselves and all others similarly situated.[1] The Court finds this matter appropriate for resolution without a hearing. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support and in opposition,[2] the Court orders that the Motion is **GRANTED**, as set forth herein.

I. BACKGROUND

A. Procedural Background

Plaintiffs filed their putative class action Complaint commencing this action in September 2021.[3] Plaintiffs then filed their putative class action Amended Complaint in three months later, in which they assert three claims for relief:

- violations of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, *et seq.*;[4]
- violations of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq.*;[5] and
- violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*[6]

Energizer filed the instant Motion in January 2022, and it is fully briefed.

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[1] Defs.' Mot. to Dismiss Pl.'s Am. Compl. (the "Motion") [ECF No. 26].

[2] The Court considered the following papers: (1) Am. Compl. (the "Amended Complaint") [ECF No. 22]; (2) the Motion (including its attachments); (3) Pls.' Opp'n to the Motion (the "Opposition") [ECF No. 32]; and (4) Defs.' Reply in Supp. of the Motion (the "Reply") [ECF No. 33].

[3] *See* Compl. [ECF No. 1].

[4] Amended Complaint ¶¶ 53-64.

[5] *Id.* at ¶¶ 64-79.

[6] *Id.* at ¶¶ 80-88.

B. Factual Background[7]

In 2020, Energizer began advertising "AA MAX" batteries as "UP TO 50% LONGER LASTING THAN BASIC ALKALINE IN DEMANDING DEVICES,"[8] as seen below:

Plaintiffs "saw and relied" on that statement (the "Statement") in deciding to purchase Energizer's AA MAX batteries.[9] Plaintiffs thus believed that those batteries "had comparative benefits, including longer battery life," relative to competitors.[10] Plaintiffs allege that the Statement is false, however, because "Energizer AA MAX batteries are not 'UP TO 50% LONGER LASTING' than most alkaline batteries . . . ."[11]

II. LEGAL STANDARD

A. Motion to Dismiss Under Rule 12(b)(6)

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in a complaint. *See*

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[7] Plaintiffs allege the facts set forth in this section, which are assumed to be true for the purposes of this Motion. *See Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1120 (9th Cir. 2002).

[8] *Id.* at ¶ 17.

[9] *Id.* at ¶¶ 6 & 8.

[10] *Id.*

[11] *Id.* at ¶ 28.

Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Although a complaint attacked by a Rule 12(b)(6) motion "does not need detailed factual allegations," a plaintiff must provide "more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

To state a plausible claim for relief, the complaint "must contain sufficient allegations of underlying facts" to support its legal conclusions. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." *Twombly*, 550 U.S. at 555 (citations and footnote omitted).

Accordingly, to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," which means that a plaintiff must plead sufficient factual content to "allow[] 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) (internal quotation marks omitted). A complaint must contain "well-pleaded facts" from which the Court can "infer more than the mere possibility of misconduct." *Id.* at 679.

"Allegations of fraud," however, "require more detail." *Kim v. Benihana, Inc.*, 2021 WL 1593248, at *3 (C.D. Cal. Feb. 24, 2021). "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Under that standard, the complaint "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." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (quoting *Cafasso, U.S.* ex rel. *v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011)). "A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that a defendant

can prepare an adequate answer from the allegations." *Wool v. Tandem Computers, Inc.*, 818 F.2d 1443, 1439 (9th Cir. 1987) (citations omitted).

Because Plaintiffs' claims sound in fraud,[12] their Amended Complaint must meet the heightened pleading standard under Rule 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (claims under the UCL and CLRA are subject to Rule 9(b)'s heightened pleading standard).

B. Leave to Amend

Pursuant to Rule 15(a), leave to amend "shall be freely granted when justice so requires." The purpose underlying the amendment policy is to "facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Leave to amend should be granted unless the court determines "that the pleading could not possibly be cured by the allegation of other facts." *Id.* (quoting *Doe v. United States*, 8 F.3d 494, 497 (9th Cir. 1995)).

III. DISCUSSION

Energizer seeks the dismissal of each of Plaintiffs' claims for relief for two reasons: (1) Plaintiffs fail to meet the heighted pleading requirements of Rule 9(b) because they do not allege facts showing how the Statement is false; and (2) Plaintiffs fail to meet the reasonable consumer standard.[13] Energizer also contends that Plaintiffs are barred from seeking equitable relief—*i.e.*, for restitution and injunctive relief.[14]

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[12] *See* Motion 15:23-16:8; Opposition 4:16-8:14 (acknowledging that Plaintiffs' claims sound in fraud); Reply 4:3-4.

[13] Motion 11:22-12:6.

[14] *Id.* at 12:7-13.

A. Plaintiffs' Fraud-Based Claims Under the FAL, CLRA, and UCL

1. Particularity Under Rule 9(b)

Energizer argues that Plaintiffs' FAL, CLRA, and UCL claims are not sufficiently particularized because Plaintiffs fail to allege how the Statement is false or misleading.[15] The Court is not convinced. Plaintiffs allege, for example, that "Energizer's 50% Longer Lasting claim misleads consumers, including Plaintiffs, into believing that Energizer AA MAX batteries last up to 50% longer than most, if not all alkaline batteries."[16] Plaintiffs aver facts supporting their purported understanding of the Statement, such as the findings of a consumer survey.[17] Therefore, drawing all inferences in Plaintiffs' favor, the Court concludes that Plaintiffs adequately allege that they understood the Statement to mean that Energizer AA MAX batteries last up to 50% longer than most, if not all, alkaline batteries, and that they purchased the batteries based upon that false understanding. *See In re ConAgra Foods Inc.*, 908 F. Supp. 2d 1090, 1100–01 (C.D. Cal. 2012) ("Drawing all inferences in favor of plaintiffs, as it must, the court concludes that they have adequately alleged they understood that the phrase '100% Natural' meant that Wesson Oil was not made from genetically modified organisms, and that they purchased the product based on this false understanding." (citing cases)).

2. Reasonable Consumer Test

Energizer contends that Plaintiffs' FAL, UCL, and CLRA claims fail because, even if Plaintiffs pleaded their claims with particularity, Plaintiffs do

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[15] *Id.* at 16:13-19:5; *see* Opposition 5:20-6:9 ("Energizer does not contest that plaintiffs satisfy four of the five particularity requirements[—the who, what, when, where.]").

[16] Amended Complaint ¶ 28.

[17] *See id.* at ¶ 34.

not show that a reasonable consumer would have been deceived or misled by the Statement.[18] Energizer's argument is persuasive.

Energizer's Statement declares that Energizer AA MAX batteries are "up to 50% longer lasting than basic alkaline in demanding devices."[19] Plaintiffs allege that the Statement "misleads consumers, including Plaintiffs, into believing that Energizer AA MAX batteries last up to 50% longer than most, if not all[,] alkaline batteries."[20] Plaintiffs also maintain that the Statement is misleading because "Energizer AA MAX batteries are not even close to 50% longer lasting than other competing batteries . . . in most consumer electronic devices."[21]

"Claims brought pursuant to the UCL, FAL, and CLRA are 'governed by the reasonable consumer test.'" *Kim*, 2021 WL 1593248, at *3 (C.D. Cal. Feb. 24, 2021) (quoting *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). "Whether an advertisement is 'misleading' must be judged by the effect it would have on a reasonable consumer." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1161 (9th Cir. 2012). The standard requires more than the "mere possibility" that a label "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner"; it instead requires "a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quotations and citations omitted). Although "whether a business practice is deceptive will usually be a question of fact not appropriate for decision on [a motion to dismiss]," *Davis*, 691 F.3d at 1162, "courts in [the Ninth Circuit] have granted motions to dismiss

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[18] Motion 19:6-24:3.

[19] Amended Complaint ¶ 17.

[20] *Id.* at ¶ 28.

[21] *See id.* at ¶ 30.

after finding that the alleged advertisements include qualifying language which make the meaning of the representation clear," *Sponchiado v. Apple Inc.*, 2019 WL 6117482, at *3 (N.D. Cal. Nov. 18, 2019) (citing cases). *See Moore v. Trader Joe's Co.*, 4 F.4th 874, 882–83 (9th Cir. 2021) ("[W]here plaintiffs base deceptive advertising claims on unreasonable or fanciful interpretations of labels or other advertising, dismissal on the pleadings may well be justified." (quotations and citation omitted)).

Here, Plaintiffs' claims under the UCL, FAL, and CLRA fail because reasonable consumers would not ignore the Statement's plain meaning or read language into the Statement as Plaintiffs propose. Through their reinterpretation of the Statement, Plaintiffs allege that the Statement is false because "Energizer AA MAX batteries are not even close to 50% longer lasting than other competing batteries, like Duracell Coppertop batteries, in most consumer electronic devices."[22] But those allegations ignore the Statement's words and qualifiers: "***up to*** 50% longer lasting than ***basic alkaline*** in ***demanding devices***."[23]

First, Plaintiffs' allege that "most, if not all," batteries are "basic."[24] Yet Plaintiffs cite no facts supporting that conclusory assertion, and the Iveson Declaration—which is incorporated by reference into the Amended Complaint—contradicts that assertion.[25] *See J. K. J. v. City of San Diego*, 17 F.4th 1247, 1255 (9th Cir. 2021) (affirming order dismissing claim where the court relied on facts in video recording incorporated by reference, which contradicted assertions in the complaint).

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[22] *Id.* at ¶ 30.

[23] Motion 22:9-10 (emphasis added).

[24] Amended Complaint ¶ 27.

[25] *See* Motion, Ex. B, Decl. of Raymond D. Iveson (the "Iveson Declaration") [ECF No. 26-1] ¶ 7 (explaining that there are different tiers of batteries, including basic and premium batteries); *see also* Motion 22:11-23:2.

Second, Plaintiffs attempt to reinterpret the Statement by alleging that "demanding" devices refers to "most consumer electronic devices."[26] But Plaintiffs do not state sufficient facts to show why a reasonable consumer would believe "demanding devices" to mean "most" devices.[27] *See Davis*, 691 F.3d at 1162 ("[A] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." (citation omitted)).

And third, Plaintiffs ignore the qualifying phrase "up to 50% long lasting," which a reasonable consumer would not understand to mean that the batteries are ***always*** or ***consistently*** 50% longer lasting. *See Knowles v. Arris Int'l PLC*, 2019 WL 3934781, at *13 (N.D. Cal. Aug. 20, 2019), *aff'd*, 847 F. App'x 512 (9th Cir. 2021) (dismissing UCL, FAL, and CLRA claims based upon statement that product provided "speeds up to 1.4 GBPS," partly because "up to" does not mean "'always' or 'consistently' reaches speeds of 1.4 Gbps"); *Koehler v. Litehouse, Inc.*, 2012 WL 6217635, at *4 (N.D. Cal. Dec. 13, 2012) ("In the instant case, the qualifying term 'may' in the Statements functions in a similar manner to the qualifier 'up to.' 'May' in this context indicates a ***possibility or probability*** that an event will occur." (emphasis added)); *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1013 (N.D. Cal. 2014) (holding that claim that battery life lasts up to 10 days is not a representation that battery "would always last up to 10 days").

Nevertheless, Plaintiffs try to show that the Statement is misleading by alleging that "competing AA alkaline batteries from Duracell, Amazon, Rayovac, Eveready, and others generally last the same or longer than Energizer

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[26] *See* Amended Complaint ¶¶ 29 & 30.

[27] *See* Reply 8:12-21.

AA MAX batteries across several American National Standards Institute ('ANSI') battery discharge testing standards."[28] To support that allegation, Plaintiffs cite "Duracell's product testing" of Energizer's AA MAX batteries against other alkaline batteries—testing that Duracell reported in a motion in a different case.[29] Even if, for the sake of argument, Duracell's test results are relevant, they contain "no indication that the representations upon which Plaintiffs reputedly relied were false." *Tubbs v. AdvoCare Int'l, L.P.*, 2017 WL 11630768, at *4 (C.D. Cal. Dec. 12, 2017). Indeed, the product testing found that Energizer AA MAX batteries lasted the same or longer—and sometimes 100% longer—than other alkaline batteries in 10 of 12 tests in demanding or "high drain" devices.[30] Plaintiffs retort that those results involve battery brands that account for less than 1% of U.S. household battery sales.[31] What matters more, Plaintiffs argue, is that Duracell's testing shows that AA MAX batteries did not last up to 50% longer in 39 of the 42 batteries tested.[32]

But those arguments require the Court to ignore what the Statement says. The Statement does not make representations about AA MAX batteries' performance in ***all*** devices and does not promise that they ***will*** last 50% longer; the Statement is instead qualified by terms that Plaintiffs themselves "relied on"—including "up to" and "than basic alkaline in demanding devices."[33] Plaintiffs argue that the Statement's qualifiers are in "fine print," such that a

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[28] Amended Complaint ¶ 30.

[29] *See id.* at ¶¶ 31-33; *see generally* Motion, Ex. A, Duracell's Mot. for PI (the "Duracell PI Motion") [ECF No. 26-1]; *see* Iverson Declaration ¶¶ 14-25.

[30] *See* Amended Complaint ¶ 32 (table comparing testing in personal grooming devices and digital cameras); Duracell PI Motion 7; Iveson Declaration ¶ 22; Motion 13:1-14:16.

[31] Opposition 7:8-12.

[32] *Id.* at 7:13-8:1.

[33] *See* Amended Complaint ¶ 6.

consumer would "not notice" the qualifying language.[34] But Plaintiffs' own pictures show that the qualifying language—although much smaller than the "50% longer lasting" language—is immediately next to the representations that it qualifies and is not hidden or unreadably small.[35] *See Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (affirming dismissal of consumer fraud claims when "[n]one of the qualifying language is hidden or unreadably small. The qualifying language appears immediately next to the representations it qualifies and no reasonable reader could ignore it."). Plaintiffs, in fact, assert that they themselves viewed and relied on the entire Statement, including its qualifying language.[36]

Further attempting to satisfy the reasonable consumer standard, Plaintiffs refer to a consumer survey that found that consumers who saw an Energizer advertisement believed the large, bolded "50% longer lasting" claim while discounting or failing to notice qualifying language.[37] Although this Court "must accept the allegations surrounding the survey as true at this stage of the litigation," *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1231 (9th Cir. 2019), the consumer survey tested packaging that was materially different from the one at issue.[38] Notably, the version that Plaintiffs allege that they saw is more readable, is different in size, does not have foreign language between parts of the Statement, and is presented in one block of text.[39] The survey thus does not address a reasonable consumer's understanding of the packaging at issue.[40]

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[34] *Id.* at ¶ 17.

[35] *See id.* 6:3-16.

[36] *Id.* at ¶¶ 6 & 8 (noting that Plaintiffs "relied on the statement on the AA MAX's packaging: 'UP TO 50% LONGER LASTING THAN BASIC AKALINE [*sic*] IN DEMANDING DEVICES.'").

[37] *See id.* at ¶ 34; Opposition 12:8-14:7.

[38] *See* Reply 1:24-2:12.

[39] *Id.* at 2:1-16.

[40] *See id.* at 1:24-2:5.

Thus, in this instance, "[t]he survey cannot, on its own, salvage [Plaintiffs' claims]."[41] *Id.* (holding that the consumer survey at issue "does not shift the prevailing reasonable understanding of what reasonable consumers understand the 'diet' to mean or make plausible the allegation that reasonable consumers are misled by the term 'diet'").

In sum, contrary to Plaintiffs' conclusory assertions, "basic" alkaline does not mean "all," "most," or "competing" batteries; "demanding devices" does not mean "most" or "all devices"; and "up to" does not mean "consistently" or "always."[42] Plaintiffs' unsupported attempt to read words into the Statements renders their purported understanding unreasonable. *See, e.g.*, *Elbaz v. Vitals Int'l Grp.*, 2018 WL 5868739, at *3 (C.D. Cal. Apr. 10, 2018) ("No reasonable consumer would understand the representation '100% Natural Preservative System' to mean that every ingredient in the Shampoo is 100% natural . . . . A consumer would have to ignore half of the representation in order to conclude that '100% Natural' applies to the Shampoo as a whole."). Indeed, the Statement "does not simply state" that AA MAX batteries are 50% longer lasting "without elaboration or explanation" or qualification that is readily apparent to a consumer. *Hairston v. S. Beach Beverage Co.*, 2012 WL 1893818, at *4 (C.D. Cal. May 18, 2012) ("Lifewater's label does not simply state that it is 'all natural' without elaboration or explanation. Instead, the 'all natural' language is immediately followed by the additional statement 'with vitamins' or 'with B vitamins.'").

Accordingly, the Court **GRANTS** Energizer's Motion with respect to Plaintiffs' fraud-based claims for relief under the UCL, FAL, and CLRA **with leave to amend**.

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[41] *See id.* at 1:24-2:19.

[42] Motion 23:26-28.

B. Plaintiffs' Unlawful- and Unfair-Prong Claims Under the UCL

Plaintiffs' third claim for relief under the UCL also alleges that Energizer's actions are both unlawful and unfair.[43]

1. Unlawful-Prong Claim under the UCL

Plaintiffs allege that Energizer's actions are "unlawful" under the UCL "because Energizer violated [the FAL] and the CLRA" through its false and misleading advertising.[44] Plaintiffs' unlawful-prong claim thus consists entirely of the allegations proffered to support their fraudulent-prong claim.[45] Therefore, because Plaintiffs' fraudulent-prong claim fails (as discussed above), so too must its unlawful-prong claim. *See Hodsdon v. Mars, Inc.*, 891 F.3d 857, 865 (9th Cir. 2018) ("Plaintiff links his unlawful prong claim to Mars' alleged violation of the CLRA. As discussed above, Mars did not violate the CLRA; thus, it did not violate the unlawful prong of the UCL.").

Accordingly, the Court **GRANTS** Energizer's Motion with respect to Plaintiffs' unlawful-prong claim under the UCL **with leave to amend**.

2. Unfair-Prong Claim Under the UCL

Plaintiffs further allege that Energizer's actions constitute "unfair" conduct under the UCL. The UCL's unfair prong "prohibits a business practice that violates established public policy or [that] is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1104 (N.D. Cal. 2017) (quotations and citation omitted). "California law is currently unsettled with respect to the standard applied to consumer claims under the unfair prong of the UCL." *Id.* "The California Supreme Court has rejected the traditional

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[43] Amended Complaint ¶¶ 83-85.

[44] *See id.* at ¶ 83.

[45] *See, e.g.*, Opposition 17:13-14 ("Energizer's conduct was unlawful because it violated both the FAL and the CLRA.").

balancing test for UCL claims between business competitors and instead requires that claims under the unfair prong be 'tethered to some legislatively declared policy.'" *Id.* (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 186 (1999). "However, the *Cel-Tech* court explicitly limited its holding to claims alleging unfairness to business competitors, and California courts are divided as to the correct test to apply to consumer actions." *Id.* (citing *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735–736 (9th Cir. 2007). For now, the Ninth Circuit permits courts to use either the balancing or the tethering test in consumer actions. *See id.*

Here, Plaintiffs first cite the traditional balancing test.[46] Under the balancing test, "an act or practice is unfair if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." *Berryman v. Merit Property Management, Inc.*, 152 Cal. App. 4th 1544, 1555 (2007). However, merely stating that a practice "was unfair because defendants' conduct was immoral, unethical, unscrupulous, or substantially injurious to consumers" and then offering conclusions that the utility does not outweigh the gravity of the harm—as Plaintiffs do here[47]—is insufficient to establish an unfair-prong claim under the UCL. *Hunter v. Nature's Way Prod., LLC*, 2016 WL 4262188, at *10 (S.D. Cal. Aug. 12, 2016), *on reconsideration*, 2018 WL 340233 (S.D. Cal. Jan. 9, 2018) ("When a plaintiff's claims sound in fraud, courts in this circuit have applied Rule 9(b)'s heightened pleading standard to not just the 'fraudulent' prong of the UCL, but the 'unlawful' and 'unfair' prongs as well . . . . Plaintiffs' conclusory allegations regarding

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[46] *See* Amended Complaint ¶ 85 ("The harm caused by Energizer's wrongful conduct outweighs any utility of such conduct and has caused—and will continue to cause—substantial injury to Plaintiffs Millam and Sprinkel and the California Class.").

[47] *See id.*

Defendants' 'unfair' business practices are not pleaded with sufficient specificity to state a claim under the 'unfair' prong of the UCL."); *see also Benson v. Citibank, N.A.*, 2013 WL 1703380, at *5 (N.D. Cal. Apr. 19, 2013) ("Plaintiff must plead sufficient facts to state a plausible claim under either the tethering or the balancing tests.").

Plaintiffs' unfair-prong claim also relies on Energizer's alleged failure to disclose to consumers the "actual battery life of the AA MAX batteries as compared to other competing batteries . . . ."[48] But a defendant's "failure to disclose information it had no duty to disclose in the first place is not substantially injurious, immoral, or unethical" under the balancing test. *Hodsdon*, 891 F.3d at 867; *see also Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.5 (9th Cir. 2012) ("[T]he failure to disclose a fact that a manufacturer does not have a duty to disclose . . . does not constitute an unfair or fraudulent practice."). Plaintiffs offer no facts showing that Energizer had a duty to disclose to consumers the battery life of AA MAX batteries versus competing batteries. Therefore, Plaintiffs' duty-to-disclose theory fails.

Lastly, regardless of the tests, courts have held that "where the unfair business practices alleged under the unfair prong of the UCL overlap entirely with the business practices addressed in the fraudulent and unlawful prongs of the UCL, the unfair prong of the UCL cannot survive if the claims under the other two prongs of the UCL do not survive." *Hadley*, 243 F. Supp. 3d at 1104–05. Here, Plaintiffs' unfair-prong claim explicitly relies, in part, on Energizer's alleged violations of the CLRA and FAL.[49] Therefore, because the unlawful and fraudulent claims fail based upon Energizer's alleged violations of the CLRA

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[48] *Id.*

[49] *See id.* ("Additionally, Energizer's conduct was 'unfair' because it violated the legislatively declared policies reflected by California's strong consumer protection and false advertising laws, including the CLRA . . . and the FAL . . . .").

and FAL (as detailed above), Plaintiffs' unfair-prong claim must likewise fail to the extent that it relies on those violations.

Accordingly, the Court **GRANTS** Energizer's Motion with respect to Plaintiffs' unfair-prong claim under the UCL **with leave to amend**.

C. Plaintiffs' Equitable Relief

Finally, Energizer argues that Plaintiffs are barred from seeking equitable relief—*i.e.*, for restitution and injunctive relief—because Plaintiffs cannot allege that they lack an adequate legal remedy and because Plaintiffs have not shown a future likelihood of harm.[50] But the Court has determined that none of Plaintiffs' claims for relief is viable, so it does not reach the question whether Plaintiffs are barred from seeking equitable relief. *See Puri v. Costco Wholesale Corp.*, 2021 WL 6000078, at *8 (N.D. Cal. Dec. 20, 2021) ("Because the Court has determined that Puri's claims [under the UCL, FAL, an CLRA] are not viable . . . it does not reach the question of whether Puri has adequately alleged standing for injunctive relief . . . .").

IV. CONCLUSION

For the foregoing reasons, the Court hereby **ORDERS** as follows:

1. Energizer's Motion is **GRANTED**.

2. Plaintiffs' first claim for relief for violations of the FAL, second claim for relief for violations of the CLRA, and third claim for relief for violations of the UCL are all **DISMISSED with leave to amend**.

3. Plaintiffs are **DIRECTED** to file an amended pleading on or before December 29, 2022. If Plaintiffs fail to file an amended pleading by that date, then the Court will **DISMISS with prejudice** the Amended Complaint.

4. If Plaintiffs choose to file an amended pleading, then they are also **DIRECTED** to file contemporaneously therewith a Notice of Revisions to

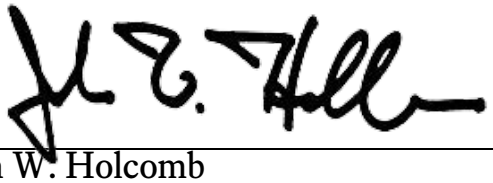
[50] Motion 27:1-31:3.

Complaint that provides the Court with a redline version that shows the amendments to the Amended Complaint.

5. If Plaintiffs choose to file an amended pleading, then Energizer's response thereto is due no later than January 20, 2023.

IT IS SO ORDERED.

Dated: December 9, 2022



John W. Holcomb
UNITED STATES DISTRICT JUDGE