UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-07059 JAK (AGRx)	Date	December 6, 2016
Title	Shane Michael v. Honest Company, Inc. *(Consolidated with Case No. LA CV15-09091 JAK (AGRx): Jonathan D. Rubin v. Honest Company, Inc.)*		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANT'S MOTION TO DISMISS AMENDED CONSOLIDATED COMPLAINT (Dkt. 48)**

I. Introduction

On September 3, 2015, Jonathan Rubin filed a putative class action against The Honest Company ("Honest" or "Defendant") (15-cv-09091-JAK Dkt. 1); Shane Michael filed a parallel action on September 7, 2015 (15-cv-07059-JAK Dkt. 1). On December 10, 2015, the two actions were consolidated, and the plaintiffs were directed to file a consolidated, amended complaint. Dkt. 32. On January 8, 2016, Rubin, Michael, Stavroula Da Silva, Dreama Hembree and Ethel Lung (collectively, "Plaintiffs") filed a First Amended and Consolidated Class Action Complaint ("FAC," Dkt. 36).

The FAC alleges that, from September 20, 2012 to the present (the "Class Period"), Honest

> deceptively and misleadingly labeled, advertised and marketed . . . Honest Hand Soap, Honest Dish Soap, Honest Diapers, and Honest Multi-Surface Cleaner (collectively the "Natural Products") and Honest Sunscreen (together with the Natural Products, the "Honest Products") as both natural and effective, when in fact, the Natural Products contain non-natural ingredients, and Honest Sunscreen is ineffective.

FAC ¶ 1, Dkt. 36.

Plaintiffs seek to represent two proposed classes. The first is defined as all U.S. residents who purchased the Natural Products from any retail store or website and who did not register for membership with Honest during a specified time period (the "Natural Products Class"). The second is defined as all U.S. residents who have purchased Honest Sunscreen ("Sunscreen") from any retail store or website and who did not register for membership with Honest during a

specified time period (the "Sunscreen Class"). FAC ¶ 162, Dkt. 36.[1] Plaintiffs allege that members of the Natural Products Class paid a 10-20% premium for Natural Products based on the representation by Honest that they were natural, when in fact the Natural Products contained synthetic, non-natural ingredients. *Id.* ¶¶ 4, 43. They also allege that the members of the Sunscreen Class purchased that product based on the representation by Honest that the Sunscreen was effective, but it was not; after using the product, Lung's children suffered severe sunburn. *Id.* ¶ 5.

The FAC advances seven causes of action: (i) violation of the California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; (ii) violation of the California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (iii) violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (iv) breach of express warranty; (v) breach of implied warranty of merchantability, Cal. Comm. Code § 2314; (vi) negligent misrepresentation; and (vii) quasi-contract (money had and received).

On February 15, 2016, Defendant filed a motion to dismiss the FAC ("Motion," (Dkt. 48)) on the following grounds: (i) Plaintiffs lack standing to seek injunctive relief or to pursue claims for products they never purchased; (ii) the claims regarding the Sunscreen are based on non-actionable representations; (iii) Plaintiffs failed to state plausible claims under the UCL, FAL, CLRA and for negligent misrepresentation because there are insufficient allegations of reasonable reliance on the alleged misrepresentations; (iv) the claims regarding the Natural Products fail because the term "natural" has no legal meaning; (v) the negligent misrepresentation claim is barred under the economic loss doctrine; (vi) the warranty claims fail because there is no privity between Plaintiffs and Defendants; (vii) the warranty claims fails because Plaintiffs failed to give Honest pre-filing notice; and (viii) Plaintiffs fail to state a basis for the quasi-contract claim. Finally, pursuant to Fed. R. Civ. P. 12(f), Defendant moves to strike from the FAC the citation to internet posts, which it contends contain statements that are both irrelevant and hearsay. Plaintiffs opposed the Motion ("Opposition" (Dkt. 54)) and Defendant replied ("Reply" (Dkt. 58)).

A hearing on the Motion was held on May 9, 2016, and the matter was taken under submission. For the reasons stated in this Order, the Motion is **GRANTED IN PART AND DENIED IN PART**. The Motion is granted, with leave to amend, as to the request for injunctive relief, the quasi-contract claim and the negligent misrepresentation claim. The Motion is denied as to the remaining claims.

[1] These proposed classes "exclude any judge or magistrate assigned to this case; all persons who make a timely election to be excluded from the Class; governmental entities; Defendant and any entity in which Defendant has a controlling interest, and its officers, directors, legal representatives, successors and assigns; and any person who purchased the Honest Products for resale." *Id.* ¶ 162.

II. Factual Allegations

A. Plaintiffs' Purchases

1. The Natural Products

In July 2015, Rubin purchased "lemongrass" Honest Hand Soap and "white grapefruit" Honest Dish Soap from a Gelson's Market in Los Angeles, California. FAC ¶¶ 9, 124, 126, Dkt. 36.

Da Silva purchased Honest Hand Soap and Honest Dish Soap from Target Stores in Florida. *Id.* ¶ 11.

From late 2013 through the summer of 2015, Stavroula purchased Honest Hand Soap and Dish Soap from Target Stores in Florida. *Id.* ¶¶ 123, 125.

2. The Sunscreen

On March 29, 2015, Lung purchased the Sunscreen from Costco Wholesale in Burbank, California. *Id.* ¶ 13.

In late April or early May 2015, Michael purchased the Sunscreen from Costco Wholesale in West Des Moines, Iowa. *Id.* ¶¶ 10, 127.

On June 26, 2015, Hembree purchased the Sunscreen from Costco Wholesale in Burlington, Kansas. *Id.* ¶¶ 12, 128.

B. Defendant's Advertising and the Alleged Misrepresentations

1. In General

Since at least 2012, Defendant designed and implemented a national advertising campaign. It used both traditional and new media, including print circulars, television advertisements, television appearances, social media promotions and statements on certain websites. *Id.* ¶¶ 23, 26. During this campaign it was represented that the statements made by Defendant were "honest" and that its products are "natural" and "effective." *Id.* ¶ 27. Among other things, Defendant represented that the Natural Products do not contain harsh chemicals and are safe, non-toxic and plant-based. *Id.* ¶ 45.

On its website, Honest stated that the company is "Natural, Safe, Beautiful, Effective." *Id.* ¶ 30. In another statement on its website, Honest represented that it is

> Free from fraud or deception, truthful – We believe in transparency and that applies to everything – from what we put into our products and how they are made to our internal operations and how we do things.

> Genuine, real – The Honest Company was started by parents for parents. We are real tangible people, parents that understand what families need and we want to deliver on that – not some big corporation with no social consciousness that only cares about making a profit.
>
> Respectable, praiseworthy – We are people with integrity and we intend on not only doing things right, but also going above and beyond to earn your respect and loyalty – making you so delighted you want to shout it from a rooftop (or tweet it from your iPhone).
>
> Humble – We know no one can be absolutely perfect and a part of our commitment to honesty means we'll admit our flaws. It's pretty scary, but we think it's a good way to keep us focused on constant improvement.

Id. ¶ 35.

During a broadcast on CNN Money, Jessica Alba, who is a co-founder of Honest, and Brian Lee, its Chief Executive Officer, stated that Honest is "natural, honestly effective, non-toxic." *Id.* ¶ 31. Honest provides an "honest FREE guarantee" on its product, which states: "Providing clear, credible, transparent information. No smoke and mirrors. No confusion." *Id.* ¶¶ 33-34. On June 18, 2015, Alba and Christopher Gavigan, who is the Chief Operating Officer of Honest, petitioned federal officials to take certain actions with respect to consumer products that contain toxic chemicals. *Id.* ¶ 40.

2. Alleged Misrepresentations Regarding the Hand Soap

The packaging of Honest Hand Soap includes a statement that the product is "natural, non-toxic, enriching." *Id.* ¶ 47. On the Honest website, the Hand Soap is described as "natural," "non-toxic" and a product that contains "NO harsh chemicals (ever!)." *Id.* ¶¶ 48, 49.

3. Alleged Misrepresentations Regarding the Dish Soap

The website for Target Stores includes a webpage for Honest Dish Soap. It contains statements that the Dish Soap is "Natural," "non-toxic" and contains "no harsh chemicals (ever!)." *Id.* ¶¶ 52-53. The packaging of Honest Dish Soap includes the statements: "No Harsh chemicals (ever!)" and "Natural, non-toxic, biodegradable, pH balanced, ultra-concentrated, and Honestly Free of SLS, SLES, phthalates, synthetic fragrances, glycols, enzymes, dyes, phosphates, 1,4- dioxane, chlorine, DEA, formaldehyde, and caustics." *Id.* ¶ 54. It also states that the product is "plant-based." *Id.* ¶ 56. The webpage of Hones includes statements about Honest Dish Soap. They include that the product has a "natural" formula, is "non-toxic" and contains "no harsh chemicals (ever!)." *Id.* ¶ 58.

4. Alleged Misrepresentations Regarding the Diapers

The Honest website states that Honest Diapers are "natural, safe, effective", "plant-based" and contain "NO HARSH CHEMICALS (EVER)." *Id.* ¶¶ 61, 62, 66. The website also contains the following statements:

- Plant-based (PLA) inner and outer layers—gentle on your baby's bottom
- Super absorbent core with fluff pulp harvested from certified sustainably managed forests—NO chlorine processing or harsh chemical bleaches
- Naturally derived odor inhibitors from citrus and chlorophyll
- Bio-based, gluten free wheat/corn blend in super absorbent core—less sodium polyacrylate
- Simply pure—no fragrances, lotions, or latex
  . . .
- Gentle, safe, and non-irritating for sensitive skin

Id. ¶ 67.

As of January 21, 2013, the website included the statement that Honest Diapers are "100% non-toxic, chlorine-free, sustainable, and plant-based materials – ensuring your baby is safe and NOT exposed to any harsh or synthetic chemicals (ever!)." *Id.* ¶¶ 68-69.

5. Alleged Misrepresentations Regarding the Multi-Surface Cleaner

The Honest website states that Honest multi-surface cleaner is "natural," "naturally fresh" and "Non-Toxic," that it contains "NO HARSH CHEMICALS (EVER)" and that it "[r]epels dust naturally." *Id.* ¶¶ 71, 75, 76.

6. Alleged Misrepresentations Regarding the Sunscreen

The Sunscreen originally contained 20% zinc oxide as its only active ingredient. *Id.* ¶ 78. In March 2015, Defendant reduced this to 9.3% zinc oxide, but continued to advertise the Sunscreen as "effective." *Id.* On or about March 2015 and thereafter, the label of the Sunscreen included the statement that the product provided "broad-spectrum mineral-based protection" or "natural mineral based sun protection." *Id.* ¶ 79. Advertisements for the product stated that it provides "broad spectrum SPF 30" and is "highly effective," "super effective" and "safe." *Id.* ¶ 83. The Honest website included the statement that, "Protecting your skin just got easier with our non-toxic, non-nano, non-whitening sunscreen! Super safe and super effective—providing the best broad spectrum protection for your family." *Id.* ¶ 82. The website also featured the following statements:

- Naturally derived, broad-spectrum (UVA and UVB) SPF mineral sunscreen—everything you need, nothing you don't
- Easy to apply, non-greasy, non-whitening (non-nano!) zinc oxide sunscreen provides safe, effective sun protection for the entire family

. . .

- Hypoallergenic, Non-Nano, Mineral-Based, Biodegradable, Reef Friendly, Water Resistant (80 minutes), pH Balanced

Id. ¶ 82.

The FAC alleges that "sun protection is the product's express purpose and thus any consumer would necessarily rely on such representations [regarding sun protection characteristics] in deciding to purchase the product." *Id.* ¶ 84. It also alleges that consumers like Plaintiffs and members of the Natural Products Class and the Sunscreen Class were a target audience for all such representations. *Id.* ¶¶ 158-61.

C. Alleged Breach of the Natural Products Representations

The FAC alleges that "'[n]atural' in the context of Defendant's products means each product contains no artificial ingredients." *Id.* ¶ 87. Plaintiffs allege, however, that the Natural Products contain the following non natural ingredients:

- Honest Dish Soap: *Methylisothiazolinone* (a synthetic preservative), *Cocamidopropyl Betaine* (a synthetic surfactant), *Phenoxyethanol* (a synthetic preservative)
- Honest Hand Soap: *Phenoxyethanol*
- Honest Multi-Surface Cleaner: *Methylisothiazolinone*
- Honest Diapers: *Sodium Polycrylate* (a petrochemical-based additive)

Id. ¶ 90.

It is also alleges that Defendant has criticized competitors for using "preservatives (and ingredients) with synthetic fragrances" including "Methylisothiazolinone." *Id.* ¶ 94.

Defendant has operated an "honestly blog." There, Defendant stated that Cocamidopropyl Betaine "isn't found in nature" but added that "that's the beauty and power of chemistry!", that Phenoxyethanol is "synthetically produced in a laboratory" and that Sodium Polycrylate is "petroleum-based." *Id.* ¶¶ 95-97. Thus, Plaintiffs allege that Defendant advertised and labeled the Natural Products as "natural" notwithstanding that it knew that the Natural Products contain synthetic, non-natural

ingredients. *Id.* ¶ 98. Plaintiffs allege that they "would all consider purchasing [the] Natural Products in the future if Defendant ceases selling misrepresented products . . . ." *Id.* ¶ 99.

Plaintiffs allege that Defendant was aware of the physical and chemical features of its products and of the alleged breaches of its implied and express warranties. *Id.* ¶ 153. As early as June 28, 2012, a consumer asked Defendant about its inadequate disclosure about the fact that its Dish Soap contained cocamidopropyl betaine, phenoxyethanol and methylisothiazolinone. *Id.* ¶ 154. Similarly, on September 3, 2015, Rubin sent Defendant a CLRA § 1782 (a) notice letter in which he set forth the bases for his claim for breach of implied and express warranties; Defendant was served with a copy of that letter on September 14, 2015. *Id.* ¶¶ 157, 190; FAC Ex. A, Dkt. 36-1 (copy of the letter).

D. Alleged Breach of Sunscreen Representations

Plaintiffs allege that "Defendant falsely represented in advertising and labeling, and continues to so represent, expressly and by necessary implication, that Honest Sunscreen is effective, when Defendant knew the only active ingredient in the Sunscreen had been reduced by more than half in March 2015." FAC ¶ 101, Dkt 36. The initial formula for Honest Sunscreen provided that 20% of its content was zinc oxide, which was the only active ingredient. The product was changed in March 2015, to having 9.3% zinc oxide, while other sunscreens typically contain 18-25% zinc oxide. *Id.* ¶¶ 102-07. After the change in the formula, Honest continued to represent that the Sunscreen was effective and provided "broad spectrum SPF 30 sun protection." *Id*.

Plaintiffs allege that "[t]he advertising representations that a product is 'effective' and provides 'broad-spectrum mineral-based protection' or 'natural mineral based sun protection,' in the context of Honest Sunscreen, mean the product should protect the user from unhealthy exposure to harmful UV rays." *Id.* ¶ 108; *see also id.* ¶ 113 (Lisa Parker, "Burn Notice: Angry Parents, Sunburned Kids and Complaints About a Popular Brand of Sunscreen," NBC Chicago, http://www.nbcchicago.com/ news/local/Angry- Parents-Complaints-About-Popular-Sunscreen-Brand-318367591.html (last visited Jan. 4, 2016) ("I'm not a chemist. . . . But when I buy a bottle that says SPF 30 on it and it has zinc oxide, I just thought I was getting her a bottle that would offer some protection.")).

The FAC alleges that the Sunscreen was ineffective, citing online posts by consumers stating that they had used the Sunscreen, but suffered sunburns. *Id.* ¶ 114. Plaintiffs allege that the product was used as directed by Lung's children, each of whom suffered severe sunburn. *Id.* ¶¶ 5, 143-46. The FAC also alleges that throughout August 2015, Defendant received many customer reviews and complaints to the effect that the Sunscreen did not provide the promised protection from the sun. *Id.* ¶¶ 115-18, 155 (citing news stories, customer reviews on Amazon marketplace webpage of Honest, messages on Twitter and Facebook pages of Honest, and consumer comments on blog managed by Honest). Defendant ran tests on its sunscreen based on these complaints. *Id.* ¶ 156. Furthermore, on September 24, 2015, Michael sent Defendant a CLRA § 1782 (a) notice letter detailing the bases for his claim for breach of implied and express

warranties; Defendant was served with a copy of the letter shortly thereafter. *Id.* ¶¶ 157, 191; FAC Ex. B, Dkt. 36-2 (a copy of the letter).

Notwithstanding the foregoing, the FAC alleges that Defendant continued to represent that its sunscreen was effective. It is also alleged that it responded to these negative comments by stating that: "Our previous Sunscreen formulation had a 40-minute water resistance and customers told us that it didn't apply as easily as they would've liked. Based on our own experience and consumer feedback, we redesigned our Sunscreen Lotion for 80-minute water resistance and an improved formulation that allows for easier application and a lighter-weight feel." FAC ¶¶ 119-20, Dkt. 36. It is also alleged that Defendant stated that the Sunscreen was tested by a third party to ensure that it met FDA standards, but the FDA neither verifies this sort of testing nor requires that manufacturers share the results. *Id.* ¶ 121. Plaintiffs contend that at some point after all of the foregoing events, Honest began removing the Sunscreen from the shelves at retail stores. *Id.* ¶ 122.

E. Plaintiffs' Exposure to and Reliance on Defendant's Advertising Campaign

The FAC alleges that "Rubin, Michael, Da Silva, Hembree, and Lung all actually witnessed Defendant's advertising campaign" (*id.* ¶ 130) and "[p]rior to purchasing Honest Sunscreen, Plaintiffs Michael, Hembree, and Lung all saw Defendant's representations that, among other things, the Sunscreen offered 'broad spectrum SPF 30' sun protection." *Id.* ¶ 139. Specifically, the SAC makes the following specific allegations about the exposure of Plaintiffs to Defendant's advertising campaign:

> *Rubin*: Starting in at least February 2015, Rubin became aware of Honest's representation that its Hand Soap and Dish Soap were natural and non-toxic. *Id.* ¶ 131. From February 2015 to at least July 2015, Rubin viewed Defendant's website several times, saw Defendant's advertisements on Facebook, saw banner advertisements on other websites and viewed videos of Jessica Alba on television and the internet promoting Honest's products as natural and Honest as a company that would only sell natural products. *Id.* In or about July 2015, when Rubin purchased the Honest Hand Soap, he read the representation on its label that the product was "natural." *Id.* ¶ 132. When Rubin paid a premium for the Honest Hand Soap and Dish Soap, he relied on these representations that the products were natural. *Id.* ¶ 133.
>
> *Da* Silva: Starting in late 2013 and through 2015, Da Silva saw Defendant's advertising and labeling representations on product packaging, in-store displays, internet advertising, magazines and advertising and articles in parenting magazines representing that Honest products were natural, non-toxic and plant-based. *Id.* ¶ 134. Da Silva bought the Honest Hand Soap and Dish Soap at a premium price because he relied on these representations that the products were natural. *Id.* ¶ 135.

Michael: Prior to purchasing the Sunscreen, Michael saw Defendant's representations that Sunscreen offered "broad spectrum SPF 30" sun protection. *Id.* ¶ 139.

Hembree: Prior to purchasing the Sunscreen, Hembree saw Defendant's representations that the Sunscreen offered "broad spectrum SPF 30" sun protection. *Id.* ¶ 139. Prior to her purchase of the Sunscreen in June 2015, Hembree had observed Honest's advertising on television, on its Facebook page, its website and in floor displays at Costco and other stores marketing its products, including its sunscreen, as natural, safe and effective. *Id.* ¶ 140.

Lung: Prior to purchasing the Sunscreen, Lung saw Defendant's representations that Sunscreen offered "broad spectrum SPF 30" sun protection. *Id.* ¶ 139. When Lung purchased the Sunscreen in March 29, 2015, she relied on her prior experience with earlier versions of the product, on Defendant's brand and the statement on the product's label that it was SPF 30 and provided broad spectrum protection. *Id.* ¶¶ 141-42.

III. Analysis

A. Legal Standards Under Fed. R. Civ. P. 12(b)(6)

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may bring a motion to dismiss a cause of action that fails to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss a complaint, its allegations are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

B. Application

1. Whether Plaintiffs Have Standing to Assert Claims for Products They Did Not Purchase

a) Legal Standards

"Standing is a threshold matter central to our subject matter jurisdiction." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir. 2011). Therefore,

> [i]n a class action, the plaintiff class bears the burden of showing that Article III standing exists. "[S]tanding requires that (1) the plaintiff suffered an injury in fact, i.e., one that is sufficiently concrete and particularized and actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged conduct, and (3) the injury is likely to be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992). Plaintiffs must show standing with respect to each form of relief sought. Standing exists if at least one named plaintiff meets the requirements.

Id. at 978-79 (internal quotations and citations removed).

"Plaintiffs in a case like this one can show Article III standing by alleging that they purchased a product they otherwise would not have purchased, or that they spent too much on such a product, in reliance on a defendant's representations in ads or on labels." *Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp. 2d 1134, 1140 (N.D. Cal. 2013) (citing *Brazil v. Dole Food Co., Inc.,* 935 F. Supp. 2d 947, 960-62 (N.D. Cal. Mar. 25, 2013)).

"There is no controlling authority on whether Plaintiffs have standing for products they did not purchase" (*Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 868 (N.D. Cal. 2012) (citing *Donohue v. Apple, Inc.,* 871 F.Supp.2d 913, 921-22 (N.D. Cal. 2012) (collecting cases)). However, district courts within the Ninth Circuit have applied three different standards:

> Some federal courts have held, as a matter of law, that a plaintiff lacks standing to assert such claims. *See, e.g., Granfield v. NVIDIA Corp.,* No. C 11–05403 JW, 2012 WL 2847575, at *6 (N.D.Cal. July 11, 2012) ("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, at *4 (N.D. Cal. Apr. 19, 2011) (dismissing claims based on products not purchased for failure to allege economic injury under the UCL); *Carrea v. Dreyer's Grand Ice Cream, Inc.,* No. C 10–01044 JSW, 2011 WL 159380, at *3

(N.D. Cal. Jan. 10, 2011) (dismissing claims based on products other than those purchased by the plaintiff).

Other 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, 992–93 (E.D. Cal. 2012) (analyzing "solely under Rule 23" whether plaintiff may assert claims on behalf of purchasers of products she did not purchase); *Forcellati v. Hyland's, Inc.,* 876 F. Supp. 2d 1155, 1161 (C.D. Cal. 2012) (denying defendants' motion to dismiss because the "argument is better taken under the lens of typicality or adequacy of representation, rather than standing").

The majority of the courts that have carefully analyzed the question 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. *See, e.g., Stephenson v. Neutrogena*, No. 12–cv–00426 PJH, 2012 U.S. Dist. LEXIS 1005099 (N.D. Cal. July 27, 2012) (dismissing claims based on products not purchased because the purchased products were not "similar enough to the unpurchased products such that an individualized factual inquiry was not needed for each product"); *see Astiana v. Dreyer's Grand Ice Cream, Inc.,* No. C–11–2910 EMC, 2012 WL 2990766, at *11 (N.D. Cal. July 20, 2012) (noting that in most reasoned opinions, "the critical inquiry seems to be whether there is sufficient similarity between the products purchased and not purchased"); *see also Anderson v. Jamba Juice,* 888 F. Supp. 2d 1000, 1005–06 (N.D. Cal. 2012) (relying on *Astiana* for the same proposition).

For example, in *Astiana,* the plaintiffs found sufficient similarity where the plaintiffs challenged: "the same kind of food products (*i.e.,* ice cream) as well as the same labels for all of the products—*i.e.,* "All Natural Flavors" for the Dreyer's/Edy's products and "All Natural Ice Cream" for the Haagen–Dazs products. That the different ice creams may ultimately have different ingredients is not dispositive as Plaintiffs are challenging the same basic mislabeling practice across different product flavors." 2012 WL 2990766, at *13. Similarly, in *Anderson v. Jamba Juice Co.,* the court held that the plaintiff, who purchased several flavors of at-home smoothie kits labeled "All Natural," had standing to bring claims on behalf of purchasers of other flavors because the products were sufficiently similar and because the "same alleged misrepresentation was on all of the smoothie kit[s] regardless of flavor. . . ." 888 F. Supp. 2d at 1006 (N.D. Cal.2012).

Where product composition is less important, the cases turn on whether the alleged misrepresentations are sufficiently similar across product lines. For example, in *Koh v. S.C. Johnson & Son, Inc.,* No. C–09000927 RMW, 2010 WL 94265, at *1, *2–3 (N.D. Cal. Jan. 5, 2010), the plaintiff purchased Windex brand glass cleaner

> that bore a label suggesting the product was environmentally-friendly. He also sought to challenge the defendant's use of the identical label on Shout brand stain remover that he had not purchased. *Id.* at *1. Because the labels were identical, the court denied defendant's motion to dismiss for lack of standing and deferred ruling on the standing question until class certification. *Id.* at *3.
>
> Where the alleged misrepresentations or accused products are dissimilar, courts tend to dismiss claims to the extent they are based on products not purchased. For example, in *Larsen v. Trader Joe's Co.,* No. 11–cv–5188–SI (Docket No. 41), 2012 WL 5458396 (N.D. Cal. filed June 14, 2012), the court found that the plaintiffs lacked standing to bring claims based on products they did not purchase. There, the plaintiffs challenged "a wide range of Trader Joe's products (cookies, apple juice, cinnamon rolls, biscuits, ricotta cheese, and crescent rolls) which bear little similarity." *Astiana,* 2012 WL 2990766, at *13 (finding *Larsen* distinguishable). And in *Stephenson v. Neutrogena,* the court dismissed claims based on products not purchased where plaintiff brought suit over six Neutrogena Naturals products but had only purchased the purifying facial cleanser. 2012 U.S. Dist. LEXIS 1005099, at 1.

Miller, 912 F. Supp. 2d at 869-70.

Other district courts have applied similar analyses:

Wilson, 961 F. Supp. 2d at 1140-41 ("In putative class actions like this one, this Court has often held that plaintiffs can demonstrate standing at the pleading stage if they plead sufficiently detailed facts that the non-purchased products are "substantially similar" to the purchased products for which they have standing. 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.") (internal citations removed);

Romero v. Flowers Bakeries, LLC, No. 14-CV-05189-BLF, 2015 WL 2125004, at *5 (N.D. Cal. May 6, 2015) ("Courts in this District have written volumes on the standing analysis for unpurchased products in consumer class actions. This Court follows the middle ground approach requiring a plaintiff to allege facts establishing that unpurchased products are so substantially similar to purchased products as to satisfy Article III requirements. In considering whether unpurchased products are sufficiently similar to purchased products to satisfy Article III, the Court considers factors that 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.") (internal citations and quotations removed);

Anderson v. The Hain Celestial Grp., Inc., 87 F. Supp. 3d 1226, 1233 (N.D. Cal. 2015) ("This court has previously recognized the split in district courts 'as to whether actual purchase

is required to establish the requisite injury-in-fact,' but has adopted at the dismissal stage an approach which examines the extent of alleged product similarity in order to determine whether the claims may proceed past a motion to dismiss. *Smedt v. Hain Celestial Group, Inc.,* No. 5:12–CV–03029–EJD, 2014 WL 2466881, at *6 (N.D. Cal. May 30, 2014). Products are "substantially similar" if "the resolution of the asserted claims will be identical between the purchased and unpurchased products." *Ang v. Bimbo Bakeries USA, Inc.,* No. 13–cv–01196–WHO, 2014 WL 1024182, at *8 (N.D. Cal. March 13, 2014). So long as the plaintiff has alleged sufficient facts to show that the common misleading feature of both purchased and unpurchased similar products can be adjudged without a 'context-specific analysis of each product's label,' then a defendant's motion to dismiss challenging the plaintiff's standing to assert claims based on the unpurchased products can be overcome. *Id.* at *28–29.");

Leonhart v. Nature's Path Foods, Inc, No. 13-CV-00492-BLF, 2014 WL 6657809, at *3 (N.D. Cal. Nov. 21, 2014) ("Courts in this district have adopted three diverging approaches for analyzing standing to pursue claims for nonpurchased products. Under the first approach, the court dismisses all claims based upon unpurchased products. Under the second 'middle ground' approach, the court concludes that substantial similarity between purchased and unpurchased products is sufficient to satisfy Article III requirements as to claims based upon unpurchased products. Finally, under the third approach, the court concludes that as long as the plaintiff has Article III standing to sue for purchased products, any questions regarding standing to sue for unpurchased products should be left for resolution at the class certification stage.").

b) Application

The FAC alleges that Plaintiffs collectively have purchased only three of the five products about which claims are brought -- the Sunscreen, Hand Soap and Dish Soap. Motion, Dkt. 48-1 at 9. As a result, Defendant argues that Plaintiffs lack standing to bring claims concerning the products that none purchased -- the Diapers and Multi-Surface Cleaner. *Id.* at 9, 13-15. Defendant acknowledges that some courts have permitted a plaintiff to pursue claims regarding products not purchased but "substantially similar" to purchased products*, i.e.* products that are of the same type, that contain many of the same ingredients and that have the same alleged mislabeling. Motion, Dkt. 48-1 at 14 (citing *Wilson*, 961 F. Supp. 2d at 1140-41). Defendant argues that the Multi-Surface Cleaner and Diapers are products that do not fit within those standards. *Id.* Defendant argues that Plaintiffs only allege that the Multi-Surface Cleaner contains one ingredient found in the Dish Soap. *Id.* (citing FAC ¶ 90, Dkt. 36). Defendant next notes that Plaintiffs do not allege that either the Diapers or the Multi-Surface Cleaner has a label stating that the product is natural. *Id.* (citing FAC ¶ 52-84, Dkt. 36).

Plaintiffs respond that the Diapers and Multi-Surface Cleaner are substantially similar and were advertised as part of a group of natural products. Opposition, Dkt. 54 at 8. They add that to determine substantial similarity, courts assess the "core factual allegations" at issue with respect to each product line (*Astiana*, 2012 WL 2990766 at *12 (citing *Carideo v. Dell, Inc*., 706 F. Supp.

2d. 1122 (W.D. Wash. 2010)) and compare the language of the advertising as to each line and assess the economic harm allegedly caused by the challenged language. *Mandenlian v. Flax USA, Inc*., 2014 WL 7723578, at *6 (C.D. Cal. Mar. 31, 2014) (finding sufficient similarity where "the same labeling misrepresentations" appear on three different product lines); *Bohac v. General Mills, Inc.*, 2014 WL 1266848, at *11 (N.D. Cal. Mar. 26, 2014) ("Though General Mills argues that the products are not 'substantially similar' because ingredients and labeling vary across the 29 products, these differences do not change the fact that, as alleged, the challenged representations are the same and cause the same harm"); *Dorsey v. Rockhard Laboratories, LLC*, 2014 WL 4678969, at *3-4 (finding sufficient similarity in "phrasing" and "marketing scheme")).

Plaintiffs argue that Defendant used a common advertising campaign in which the company stated that all of its products are "Natural • Safe • Beautiful • Effective." From this they argue that all retail consumers of any of the product were misled and harmed in the same way. Opposition, Dkt. 54 at 13 (citing FAC ¶¶ 30-31, 162, Dkt. 54). With respect to variations in the ingredients in each of the Natural products, Plaintiffs contend "[t]hat the different [products] may ultimately have different ingredients is not dispositive as Plaintiffs are challenging the same basic mislabeling practice . . ." *Id.* at 13 (citing *Astiana,* 2012 WL 2990766 at *13; *Werdebaugh v. Blue Diamond Growers*, 2013 WL 5487236, at *15 (N.D. Cal. Oct. 2, 2013)). Finally, Plaintiffs argue that, as observed by some district courts, Defendants' argument is more properly addressed at the class certification stage. *Id.* at 8, 12.

Having considered the competing positions of the parties and non-binding decisions by other district courts, the "middle ground" approach is the most suitable to determine if Plaintiffs have Article III standing to pursue claims for the Natural Products that they did not purchase. The issue here is whether the Diapers and Multi-Surface Cleaner, which are products that Plaintiffs did not purchase, are substantially similar to ones that they did purchase*, i.e.,* the Hand Soap, Dish Soap and Sunscreen. As noted, the relevant factors to consider in this analysis "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." *Leonhart*, 2014 WL 6657809, at *3 (citing *Wilson*, 961 F.Supp.2d at 1141).

All of the challenged products are all household products. There is some facial similarity between the manner in which diapers, Hand Soap and Sunscreen are used. All are applied to, or have direct contact with the body. There is also some similarity to the manner in which Multi-Surface Cleaner and Dish Soap are used as cleaning agents. On the other hand, there is no allegation that the labelling used on the Diapers and Multi-Surface Cleaner has language that parallels that used on the labels for the Hand Soap, Dish Soap or Sunscreen. Nor is it alleged that the labeling of the Diapers and Multi-Surface Cleaners included any misrepresentations. Instead, the alleged misrepresentations are those made on Defendants' website about the Diapers and Multi-Surface Cleaner. Furthermore, the FAC alleges that the Dish Soap and Multi-Surface Cleaner both include methylisothiazolinone, a synthetic preservative. There is no other ingredient that is common to the products that were purchased by Plaintiffs and those that were

not. FAC ¶ 90, Dkt. 36. A consideration of these allegations does not provide a clear outcome on the analysis of the standing issue.

The FAC also alleges, however, that the advertising campaign that has been used across all of the Natural Products has similarities. Thus, all of the products have been described as "natural, safe, effective", "plant-based," "non-toxic" and contain "NO HARSH CHEMICALS (EVER)." Plaintiffs contend that this campaign has a common theme, i.e., that all of the products of Honest are "natural." Furthermore, Plaintiffs allege that the same harm has been caused to all consumers of the products. Thus, consumers paid a premium price based on the representation that the products were "natural," when they actually included synthetic ingredients. *See Bohac*, 2014 WL 1266848, at *12 ("Without deciding issues relevant to class certification, I am persuaded that Bohac has standing to bring claims challenging the 29 products for having the label '100% NATURAL' and 'all natural.' He claims that all of the products contain essentially the same representations. The harm that he alleges, *i.e.,* that he was misled by that purportedly fraudulent and incorrect representation, is the same for all 29 products.").

Based on the foregoing, Plaintiffs have shown that the Multi-Surface Cleaner and the Honest Diapers is each sufficiently similar to the Natural Products that Plaintiffs purchased to establish standing. Therefore, the Motion is **DENIED** as to the claims relating to both of these products. This conclusion has no effect on a determination of class certification. The issues raised by the presence of products that Plaintiffs did or did not purchase will be evaluated de novo under Fed. R. Civ. P. 23.

2. Whether Plaintiffs Have Article III Standing to Pursue Injunctive Relief

a) Legal Standard

Standing is a threshold matter central to our subject matter jurisdiction." *Ellis*, 657 F.3d at 978. Consequently,

> [i]n a class action, the plaintiff class bears the burden of showing that Article III standing exists. "[S]tanding requires that (1) the plaintiff suffered an injury in fact, i.e., one that is sufficiently concrete and particularized and actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged conduct, and (3) the injury is likely to be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs must show standing with respect to each form of relief sought. Standing exists if at least one named plaintiff meets the requirements.
> In order to satisfy the *Lujan* requirements, the plaintiff must demonstrate that he has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that he will again be wronged in a similar way. Past wrongs do not in themselves amount to a real and immediate threat of injury

> necessary to make out a case or controversy but are evidence bearing on whether there is a real and immediate threat of repeated injury.

Id. at 978-79 (internal quotations and citations removed).

Equitable relief is "unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a likelihood of substantial and immediate irreparable injury." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983) (internal quotation marks removed); *see also O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a . . . case or controversy" sufficient to support a prospective injunction); *Mayfield v. United States,* 599 F.3d 964, 970 (9th Cir. 2010) ("Past exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects."). "These elements of standing must be supported in the same way as any other matter for which a plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006). "In the context of a class action, '[u]nless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief.'" *Romero*, 2015 WL 2125004, at *7 (quoting *Hodgers–Durgin v. de la Vina,* 199 F.3d 1037, 1045 (9th Cir. 1999)).

b) Application

Defendant argues that Plaintiffs lack standing to seek injunctive relief because they have full knowledge of the purported misrepresentations. Under these circumstances, Defendant contends that there is no basis for an alleged risk of future harm. Motion, Dkt. 48-1 at 9, 15 (citing *Gest,* 443 F.3d at 1181 (to have standing to seek injunctive relief, a plaintiff must be "realistically threatened by a *repetition* of the violation.")); Reply, Dkt. 58 at 7 (citing *Mayfield,* 599 F.3d at 970 (plaintiffs face no "real or immediate threat that [they] will be again wronged in a similar way"). Defendant adds that, although Plaintiffs allege that they would consider purchasing the Natural Products in the future if Honest changes the ingredients and discontinues any misrepresentations (FAC ¶ 99, Dkt. 36), this does not constitute a real or immediate threat of being misled. Motion, Dkt. 48-1 at 15 (citing *Romero*, 2015 WL 2125004, at *7 (dismissing request for injunctive relief because since plaintiff has been "clued into these alleged misrepresentations, it is unlikely, based upon her own allegations, that Plaintiff would again suffer the same harm")). Defendant next argues that none of the Plaintiffs has alleged that he or she would consider a future purchase of the Sunscreen. *Id.* Finally, Defendant contends that because Plaintiffs do not have standing to seek injunctive relief, they may not represent a class as to that remedy. *Id.* (citing *Hodgers-Durgin*, 199 F.3d at 1045).

Plaintiffs respond that Defendant's primary argument based on their current knowledge was rejected in *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 533-34 (N.D. Cal. 2012). Opposition, Dkt. 54 at 14. Plaintiffs argue that they have standing to seek injunctive relief because they have alleged that they would consider buying Defendant's products in the future if they are natural

and effective as advertised. Therefore, they contend that, absent an injunction that bars future misconduct by Defendant, Plaintiffs would consider Defendant's products but "could not rely on that representations with any confidence. This is the harm California's consumer protection statutes are designed to redress." *Id.* at 9, 14 (quoting *Ries*, 287 F.R.D. at 533). Plaintiffs add that the logical conclusion of Defendant's position is that any plaintiff who alleges false advertising could not seek injunctive relief as to that misconduct and that this "would eviscerate the intent of the California legislature in creating consumer protection statutes." *Id.* at 14 (quoting *Koehler v. Litehouse, Inc*., 2012 WL 6217635 (N.D. Cal Dec. 13, 2012)).

There is no controlling authority on this issue. *Anderson,* 2015 WL 1744279, at *5 (collecting cases). Some courts have decided that "[c]onstruing Article III standing as narrowly as defendant suggests in consumer protection cases would eviscerate the intent of the California legislature in creating consumer protection statutes because it would effectively bar any consumer who avoids the offending product from seeking injunctive relief." *Larsen v. Trader Joe's Co*., No. C 11-05188 SI, 2012 WL 5458396, at *3-4 (N.D. Cal. June 14, 2012) (citing *Fortyune v. American Multi–Cinema, Inc.*, No. CV 10–5551, 2002 WL 32985838, *7 (C.D. Cal. Oct.22, 2002) ("If this Court rules otherwise [and does not find standing], like defendants would always be able to avoid enforcement of the ADA. This court is reluctant to embrace a rule of standing that would allow an alleged wrongdoer to evade the court's jurisdiction so long as he does not injure the same person twice.")). Other courts have adopted similar positions:

Henderson v. Gruma Corp., No. CV 10-04173 AHM AJWX, 2011 WL 1362188, at *7-8 (C.D. Cal. Apr. 11, 2011) ("If the Court were to construe Article III standing for FAL and UCL claims as narrowly as the Defendant advocates, federal courts would be precluded from enjoining false advertising under California consumer protection laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter ('once bitten, twice shy') and would never have Article III standing);

Lanovaz v. Twinings N. Am., Inc., No. C–12–02646–RMW, 2014 WL 46822, at *10 (N.D. Cal. Jan. 6.2014) ("denying standing in false advertising cases would 'eviscerate the intent of the California legislature in creating consumer protection statutes because it would effectively bar any consumer who avoids the offending product from seeking injunctive relief.'") (quoting *Koehler*, 2012 WL 6217635, at *6).

Other courts have reached a different result on the ground that "the remedial intent behind California's protection statutes" cannot overcome the requirements of Article III. *Romero*, 2015 WL 2125004, at *7. ("Although California courts, unbound by the limitations of Article III standing, robustly enforce California consumer protection laws by granting injunctive relief to enforce important state interests, the federal courts must require plaintiffs to demonstrate constitutional standing as a prerequisite to pursuing injunctive relief. Having failed to demonstrate that she is entitled to seek injunctive relief—in fact, to the contrary, having shown that she won't be fooled again by Defendant's representations of 'all natural' and 'wheat'—Plaintiff has not, nor can she,

establish a real and immediate threat of repeated injury. . . . Thus, Plaintiff will be limited to seeking damages . . . . [T]his outcome may cause Plaintiff to pursue parallel relief in state court, but she may not seek injunctive relief in this action." (internal citations removed)). Other courts have adopted similar positions:

Garrison v. Whole Foods Mkt. Grp., Inc., No. 13–cv–05222–VC, 2014 WL 2451290, at *5 (N.D. Cal. June 2, 2014);

Morgan v. Wallaby Yogurt Co., No. 13–cv–00296–WHO, 2014 WL 1017879, at *6 (N.D. Cal. Mar. 13.2014);

Anderson, 87 F. Supp. 3d at 1234 ("While the court is certainly cognizant of the important state interest underlying California's consumer protection statutes, it almost goes without saying that such an interest can never overcome a constitutional standing prerequisite. Potential 'evisceration' of the intent underlying a statutory scheme may be unfortunate, but it is not a valid reason to confer standing in federal court when the paramount constitutional obligation is otherwise left unsatisfied. This court therefore concurs with those district courts that have required a false-labeling plaintiff to demonstrate potential repetition of harm in order to demonstrate Article III standing for injunctive relief. Here, Plaintiff does not allege that she will re-purchase any of Defendant's 'Dream' line products.").

In this action, the FAC alleges that Plaintiffs "would all consider purchasing Honest Natural Products in the future if Defendant ceases selling misrepresented products as alleged in this Complaint." FAC ¶ 99, Dkt. 36. This is not a sufficiently clear statement to support standing for injunctive relief. It leaves unclear the products whose purchase Plaintiffs would consider. Would they be any products with accurate labels, or only those products with accurate labels and that do not contain any synthetic ingredients? "Any injunctive relief the Court could grant would pertain only to Defendant's labeling practice, and not to the ingredients that Defendant uses." *Romero*, 2015 WL 2125004, at *7. Further, it is unknown what products will be offered in the future and what will be stated in the corresponding labels, advertising or other marketing materials. Under these circumstances, there is not presently a basis for standing to pursue injunctive relief. Therefore, the Motion is **GRANTED**, without prejudice to an amendment based on new facts or circumstances with respect to the sale of products by Defendant.

3. Whether the Claims Based on the Sunscreen Are Based on Non-Actionable Representations

a) Legal Standard

As another district court explained:

> The CLRA, FAL, and UCL utilize a "reasonable consumer standard." *Freeman v. Time, Inc.,* 68 F.3d 285, 289 (9th Cir.1995). Thus, statements are only actionable under these statutes if they are likely to deceive a reasonable consumer. *Stickrath* [*v. Globalstar*]*,* 527 F.Supp.2d [992,] 998 [998 (N.D. Cal. 2007)]. Under the reasonable consumer standard, the plaintiff must "show that members of the public are likely to be deceived." *Freeman,* 68 F.3d at 289 (internal quotation marks omitted.) "Advertisements that amount to mere puffery are not actionable because no reasonable consumer relies on puffery." *Stickrath,* 527 F.Supp.2d at 998. "Factual representations, however, are actionable." *Id.*

Henderson, 2011 WL 1362188, at *10. *See also Lavie v. Procter & Gamble Co.,* 105 Cal. App. 4th 496, 506-07 (2003) ("[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer."); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002), *as modified* (May 22, 2002) ("these laws prohibit not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.") (internal citations and quotations removed)). "Statements constituting 'mere puffery' cannot support liability under a claim for breach of warranty." *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 987 (N.D. Cal. 2009) (citing *Pulvers v. Kaiser Foundation Health Plan, Inc.*, 99 Cal.App.3d 560, 565 (1979)). "The distinguishing characteristics of puffery are 'vague, highly subjective claims as opposed to specific, detailed factual assertions.'" *Id.* (quoting *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994)).

"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 v. Gerber Products Co.*, 552 F.3d 934, 938-39 (9th Cir. 2008) (citing *Linear Technology Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134-35 (2007) ("Whether 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." (quoting *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1472 (Cal. App. 2006)).

b) Application

Defendant argues that the FAC does not sufficiently allege any misrepresentations by Honest regarding the Sunscreen. Motion, Dkt. 48-1 at 9-10. Thus, it contends that "the terms 'effective' or 'highly effective' are generalized, vague, unspecific, and unmeasurable, amounting to non-actionable puffery." *Id.* at 16-17 (citing *Southland Sod Farms v. Stover Seed Co.,* 108 F.3d 1134, 1145 (9th Cir. 1997) (explaining only "misdescriptions of specific or absolute characteristics of a product are actionable"); *Shroyer v. New Cingular Wireless Serv., Inc.,* 622 F.3d 1035, 1043 (9th Cir. 2010) (affirming dismissal because the claim *"all the advantages [that] only the*

nation's largest wireless company can provide" is a vague statement, providing nothing concrete upon which the plaintiff could reasonably rely); *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 905 F. Supp. 169, 182 (S.D. N. Y. 1995) (finding advertising claiming the "the most cost-effective prices" was puffery); *CardioNet, Inc. v. LifeWatch Corp.*, No. 07C6625, 2008 WL 567031, at *3 (N.D. Ill. Feb. 27, 2008) (vague allegations that defendant's advertising *implied* that its device was superior to and/or safer than the plaintiff's device did not satisfy the requirements of Fed. R. Civ. P. 9(b)); *Glen Holly Entm't Inc. v. Tektronix, Inc.,* 352 F.3d 367, 379 (9th Cir. 2003) (the phrase "high priority" is puffery)); Reply, Dkt. 58 at 7 (citing *Coleman v. Boston Sci. Corp.*, No. 10-1968, 2011 WL 3813173, at *4 (E.D. Cal. Aug. 29, 2011) (general allegations that defendants advertised their products as safe and effective did not state a plausible breach of warranty claim)).

Defendant next contends that:

> The FAC appears to allege that the Sunscreen was not "effective" because it: (i) was formulated with 9.3% (as opposed to 20%) zinc oxide; (ii) was not superior to traditional chemical sunscreen; (iii) did not provide broad spectrum SPF 30 sun protection; (iv) was not "safe" because it did not prevent sun burn; and (v) did not provide broad spectrum or natural mineral-based sun protection. (*See* FAC, ¶¶ 10, 78- 83; 101-18.) But the FAC pleads no facts asserting that Honest ever stated that its Sunscreen would give superior protection than chemical sunscreens, or that the Company warranted to users they would never get sunburned. Likewise, the FAC pleads no facts asserting that the Sunscreen did *not* deliver SPF 30 broad spectrum protection or natural, mineral-based broad spectrum sun protection as advertised or labeled. Plaintiffs cannot plausibly claim they relied on statements or were deceived by statements never made by Honest.

Motion, Dkt. at 17-18 (citing *Corra v. Energizer Holdings, Inc.,* 962 F. Supp. 2d 1207, 1219 (E.D. Cal. 2013) (dismissing warranty claim where plaintiff alleged that the defendant claimed its sunscreen provided SPF 85 and 110 sun protection because "even assuming [the] SPF ratings constituted a warranty, nothing suggest[ed] the products failed to function in accordance with [the] claimed level of protection"); *Hall v. Sea World Entm't, Inc.,* No. 15-660, 2015 WL 9659911, at *11 (S.D. Cal. Dec. 23, 2015) (finding plaintiffs failed to plead with particularity why the statements by defendant were false)).

Plaintiffs claim that Defendant made several misrepresentations about the Sunscreen. The label of the Sunscreen states that it provides "broad-spectrum mineral-based protection" or "natural mineral based sun protection." The advertising for the product stated that it provides "broad spectrum SPF 30," is "highly effective," "super effective" and "safe." ¶¶ 79, 83. The website of Honest' states: "Protecting your skin just got easier with our non-toxic, non-nano, non-whitening sunscreen! Super safe and super effective—providing the best broad spectrum protection for your family." *Id.* ¶ 82. The website also contained that statements that the Sunscreen is:

- Naturally derived, broad-spectrum (UVA and UVB) SPF mineral sunscreen—everything you need, nothing you don't
- Easy to apply, non-greasy, non-whitening (non-nano!) zinc oxide sunscreen provides safe, effective sun protection for the entire family

. . .

- Hypoallergenic, Non-Nano, Mineral-Based, Biodegradable, Reef Friendly, Water Resistant (80 minutes), pH Balanced

Id. ¶ 82. Plaintiffs contend that "sun protection is the product's express purpose and thus any consumer would necessarily rely on such representations [regarding the product's sun protection qualities] in deciding to purchase the product." *Id.* ¶ 84. They also contend that the Sunscreen did not conform to these representations. As a result, the FAC alleges that Lung's children, Michael and Hembree, suffered severe sunburn. *Id.* ¶ 5. Plaintiffs also allege that Defendant received numerous similar complaints from other consumers. *Id.* ¶¶ 115-18, 155 (citing news stories, customer reviews on Honest's Amazon marketplace webpage, messages on Honest's Twitter and Facebook pages and consumer comments on Honest's blog). Plaintiffs rely on these allegations to support the claim in the FAC that the Sunscreen was ineffective in providing the promised protection. *Id.* ¶ 114.

These allegations are sufficient. They support the claim that Defendant represented that the Sunscreen would protect those who used it as directed, but that it did not. This is not one of the "the rare situation[s] in which granting a motion to dismiss is appropriate" on the question of inactionable puffery. *Williams*, 552 F.3d at 939. For the foregoing reasons, the Motion is **DENIED** as to this claim.

4. Whether the FAC Fails to State Plausible Claims under the UCL, FAL, CLRA and for Negligent Misrepresentation

a) The Positions of the Parties

(1) Defendant's Position

Defendant argues that "Plaintiffs must plead with particularity [pursuant to Fed. R. Civ. P. 9(b)] the circumstances surrounding their actual reliance on specific false or misleading representations by Honest that immediately caused their claimed injuries" and that Plaintiff has not done so. Motion, Dkt. 48-1 at 21-22. Defendants add that "[a]mbiguous claims that a product is 'natural' or 'effective' are not the type of statements it is safe to *presume* any reasonable person would rely on." *Id.* at 20. Defendant also argues that that the FAC makes allegations about advertising, but does not allege that Plaintiffs actually relied on it in connection with the decisions to purchase the products. *Id.* at 10.

Tobacco II established a limited exception to pleading reliance in the case of an extensive, decades-long advertising campaign. Defendant argues that it is not controlling here because Honest has promoted its products for only three years. *Id.* at 10, 20 (citing *Mazza v. Am. Honda Motor Co, Inc.*, 666 F.3d 581, 596 (9th Cir. 2012) (rejecting use of the *Tobacco II* exception to pleading reliance in absence of the "massive," long-term advertising campaign at issue in *Tobacco II*); *Delacruz v. Cytosport, Inc.*, No. 11–3532, 2012 WL 1215243, at *8 (N.D. Cal. Apr. 11, 2012) ("Plaintiff has failed to allege that [d]efendant's advertising. . . approached the longevity and pervasiveness of the marketing at issue in *Tobacco II*").

Defendant also contends that Plaintiff must allege six conditions to warrant the application of *Tobacco II*: (1) the plaintiff actually saw or heard the advertising campaign; (2) the campaign was sufficiently lengthy and widespread that it would be unrealistic for the plaintiff to plead each misrepresentation; (3) a "representative sample" of the advertisements at issue; (4) the alleged misrepresentations contained within the advertising campaign are similar or identical; (5) a particularized showing of when and how the plaintiff was exposed to the campaign; and (6) when purchases were made relative to the advertisements at issue. *Id.* at 20-21 (citing *Oppermann v. Path, Inc.*, 87 F. Supp. 3d 1018, 1047-51 (N.D. Cal. 2014)). Defendant argues that "Plaintiffs do not claim that they actually viewed any of the advertising or marketing cited in the FAC" and that "allegations of general exposure [to the advertising campaign] without any detail is not enough." *Id.* at 21 (citing FAC ¶ 130, Dkt. 36; *Delacruz*, 2012 WL 2563857, at *9; *Mazza,* 666 F.3d at 596 ("A presumption of reliance does not arise when class members were exposed to quite disparate information from various representatives of the defendant") (quotations omitted); *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1069 (9th Cir. 2014) (affirming dismissal of UCL claim where class members were exposed to disparate information); *Kane*, 2013 WL 5289253, at *9).

Defendant notes that, with respect to the Suncreen, the FAC alleges only that the Honest website describes the Sunscreen as "highly effective," "super safe" and "safe," (*Id.* at 22 (citing FAC ¶ 81, Dkt. 136)). It does not allege that the label included these statements. Nor does the FAC allege that Plaintiffs purchased the Sunscreen online, where the alleged representations were made. *Id.* (citing FAC ¶¶ 127-29, Dkt. 36). Defendant argues that Michael does not identify when and where he saw any alleged misrepresentation, allege that he relied on any such statement or when he purchased the Sunscreen. Similarly, it contends that Hembree alleges that she saw the Honest advertising six months before purchasing the Sunscreen, under its prior formulation, and that she pleads observing, not relying on, Honest advertising. Defendant then claims that Lung does not plead reliance on any statement by Honest in connection with the decision to purchase the Sunscreen and does not plead that she purchased the version of the Sunscreen with 9.3% zinc oxide. *Id.* at 23. Defendant argues that Plaintiffs do not claim the Sunscreen failed to provide the "Broad Spectrum SPF 30" protection that is stated on its label. Reply, Dkt. 58 at 9.

As to the Natural Products, Defendant contends that the FAC does not allege that the Diapers, Multi-Surface Product and Dish Soap are described as "natural" on their respective labels. Rather, it alleges that certain third-party websites, Honest's website and Google search results

call these products natural. Defendant contends that the FAC does not allege that Plaintiffs relied on these statements, only that they purchased the Natural Products from retailers, not online. Motion, Dkt. 48-1 at 24-25 (citing FAC ¶¶ 43-84, Dkt. 36). Defendant argues that Rubin does not allege when he allegedly viewed any advertisements or that they mentioned the Hand Soap or Dish Soap that he purchased (*Id.* at 25 (citing FAC ¶ 131, Dkt. 36) and does not allege that he relied on any label or advertisement (*Id.* (citing FAC ¶ 132-33, Dkt. 36)). Similarly, it contends that the FAC does not allege when Da Silva saw Honest's advertising, what advertising she saw, that such advertising referred to the Hand Soap or Dish Soap or that she relied on it in connection with any purchasing decision. *Id.* at 25-26 (citing FAC ¶ 134, Dkt. 36).

Based on the foregoing, Defendant argues that Plaintiffs have not "provide[d] the particulars of their own experiences in viewing and relying upon any of the representations cited." Reply, Dkt. 58 at 8-9 (quoting *Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018, 1046-47 (N.D. Cal. 2014); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-26 (9th Cir. 2009) (finding plaintiff did not adequately plead reliance where he did not identify specific advertisements or sales material he actually relied on)).

(2) Plaintiffs' Position

Plaintiffs argue that the heightened pleading standard of Fed. R. Civ. P. 9 only applies to the "fraudulent" prong of UCL claims, not to either the unlawful or the unfair prong. Opposition, Dkt. 54 at 16 (citing *Goodman v. HTC America, Inc*., 2012 WL 2412070 (W.D. Wash. Jun. 26, 2012), at *9; *In re iPhone Application Litig*., 844 F. Supp. 2d 1040, 1072-1074 (N.D. Cal. 2012)).

Plaintiffs argue that the FAC alleges that "each of the Plaintiffs actually witnessed Defendant's advertising campaign (FAC ¶ 129) and that they each relied on the representations both on the labels and in the other advertising. FAC ¶¶ 150-152." Opposition, Dkt. 54 at 17- 19 (citing the relevant representations in the FAC). Plaintiffs argue that they properly relied on the language used in the respective labels of the Hand Soap (FAC ¶ 47, Dkt. 36), Dish Soap (FAC ¶ 56, Dkt. 54) and Sunscreen. Opposition, Dkt. 54 at 19 (citing *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 326 (2011) ("Simply stated: labels matter. The marketing industry is based on the premise that labels matter, that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities they may come to associate with a particular source."); *Ries*, 287 F.R.D. at 530).

Furthermore, Plaintiffs argue that they have adequately alleged reliance on an advertising campaign and the material representations of that campaign. Therefore, they content that the allegations of the FAC warrant an inference of reliance under *Tobacco II*. *Krueger v. Wyeth, Inc*., 2011 WL 8971449 (S.D. Cal. Mar. 30, 2011). Plaintiffs argue that *Opperman*'s six-part test for the application of *Tobacco II*, is overly restrictive. However, even under this test, Plaintiffs argue that the *Tobacco II* inference of reliance is appropriate given the four-year advertising campaign of Honest that is alleged. It included advertisements on television and the internet, social media promotions, Honest's

website, print circulars, point of sale kiosks and numerous interviews and articles. Opposition, Dkt. 54 at 20 (citing *Morgan v. AT&T Wireless Services, Inc*., 177 Cal. App. 4th 1235, 1245-46, 1258 (2009) (AT&T's statements in press releases and website advertisements over nine months actionable); *Makaeff v. Trump Univ., LLC*, 2014 WL 688164, at *13 (S.D. Cal. Feb. 21, 2014) (four years); *Opperman II*, 87 F. Supp. 3d at 979 (five years)); FAC ¶ 23-42, Dkt. 36).

Plaintiffs add that the FAC includes a representative sample of the advertisements at issue and that there was a consistent message: Honest's products are natural, honest, non-toxic and effective. Opposition, Dkt. 54 at 21 (citing FAC ¶¶ 43-84, Dkt. 36). Plaintiffs argue that the FAC also provides sufficient allegations as to when Plaintiffs were exposed to the advertising campaign, and that it is alleged that each Plaintiff saw the advertising before he or she purchased each of the products at issue. *Id.*

b) Legal Standard and Application

As another district court has observed:

> Claims sounding in fraud or mistake are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *see Kearns v. Ford Motor Co.,* 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy the heightened standard under Rule 9(b), the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner,* 780 F.2d 727, 731 (9th Cir.1985). Thus, claims sounding in fraud must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP,* 476 F.3d 756, 764 (9th Cir.2007) (per curiam) (internal quotation marks omitted). The plaintiff must set forth "what is false or misleading about a statement, and why it is false." *In re Glenfed, Inc. Sec. Litig.,* 42 F.3d 1541, 1548 (9th Cir.1994) (en banc), *superseded by statute on other grounds as stated in Ronconi v. Larkin,* 253 F.3d 423, 429 n. 6 (9th Cir.2001).

Kane v. Chobani, Inc., 973 F. Supp. 2d 1120, 1127-28 (N.D. Cal. 2014), *vacated on other grounds*, No. 14-15670, 2016 WL 1161782 (9th Cir. Mar. 24, 2016). These issues are addressed with respect to each alleged form of labelling, advertising or promotion.

(1) Product Label

Where the alleged misrepresentation appears on the label or packaging of each item sold, class-wide exposure may be inferred. *Ehret v. Uber Techs., Inc.*, No. 14-CV-00113-EMC, 2015

WL 7759464, at *8 (N.D. Cal. Dec. 2, 2015); *see also Allen v. Hyland's Inc*., 300 F.R.D. 643, 667 (C.D. Cal. 2014) ("Plaintiffs provide evidence that Defendants used similar types of representations on the packaging of each of the twelve products, and the packaging of each individual product remained uniform during the class period. Thus, the record supports a finding that all class members were exposed to the same alleged misleading statements by Defendants." (internal citation omitted)); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) ("Because the alleged misrepresentations appeared on the actual packages of the products purchased, there is no concern that the class includes individuals who were not exposed to the misrepresentation.").

Here, the FAC alleges misrepresentations on the labeling of the Hand Soap, Dish Soap and Sunscreen. It is also alleged that Plaintiffs relied on the labeling of these products. Plaintiffs' alleged reliance on such misrepresentations is accepted in connection with the present Motion. *Balser v. Hain Celestial Grp., Inc.*, No. 14-55074, 2016 WL 696507, at *1 (9th Cir. Feb. 22, 2016) ("[A]ssuming without deciding that Rule 9(b) requires specific allegations of reliance, Plaintiffs have satisfied the requirement. They alleged that they viewed the 'natural' labeling on certain Alba Botanica products and, because of that labeling, paid a premium as compared to 'products that do not purport to be natural.' Had the products not claimed to be 'natural,' Plaintiffs alleged, they would not have paid a premium price for them. These allegations are sufficient plausibly to allege reliance."); *Ehret*, 2015 WL 7759464, at *8 ("[G]iven the inherently high likelihood that in the process of buying the product, the consumer would have seen the misleading statement on the product and thus been exposed to it, exposure on a classwide basis may be deemed sufficient.").

Factual issues as to the prominence of such labeling and whether it can be inferred that there is a "high likelihood that in the process of buying the product, the consumer would have seen the misleading statement on the product and thus been exposed to it" can be determined at the class certification stage. *Ehret*, 2015 WL 7759464, at *8.

(2) Advertising Campaign

Even where each product is not sold in a package or container on which the alleged misrepresentation appears, class-wide exposure may be inferred where there is a sufficiently extensive advertising campaign that includes the alleged misrepresentation. *Ehret*, 2015 WL 7759464, at *9. The Ninth Circuit addressed this issue in *Mazza*. 666 F.3d at 595-96. The advertising campaign there highlighted the Collision Mitigation Braking System ("CMBS") of Honda. The campaign included: (i) a product brochure released in 2006, 2007 and 2008; (ii) television commercials that appeared for a one-week period in November 2005 and from February to September 2006; (iii) magazine advertisements that were published between March and September 2006; (iv) statements on Honda's website; and (v) statements in the owner's manual of the vehicle. *Id.* at 585-87.

Based on these contentions, the court concluded that the advertising of the CMBS was too limited to permit the inference that all proposed class members -- including all purchasers or

lessees of the vehicle -- had been exposed to the allegedly misleading statements. *Id.* at 595. Instead, "the limited scope" of the advertising campaign at issue made it "unreasonable to assume that all class members viewed [the alleged misrepresentations]." *Id.* at 596. The court compared the advertising campaign to the one in *Tobacco II*, in which the California Supreme Court found class-wide exposure could be presumed:

> *Tobacco II*'s holding was in the context of a "decades-long" tobacco advertising campaign where there was little doubt that almost every class member had been exposed to defendants' misleading statements, and defendants were not just denying the truth but representing the opposite. Honda's product brochures and TV commercials fall short of the "extensive and long-term [fraudulent] advertising campaign" at issue in *Tobacco II*, and this difference is meaningful.

Id. (internal citation omitted) (alteration in original).

District courts in California have applied *Mazza* in deciding whether particular advertising campaigns were sufficiently extensive to warrant an inference of class-wide exposure. *Compare In re Clorox Consumer Litig.*, 301 F.R.D. 436, 439, 444-45 (N.D. Cal. 2014) (declining to certify a class where defendant produced evidence that not many consumers saw the advertisements, the allegedly misleading statement "appeared only on the *back* of *some* [*i.e.*, not all] Fresh Step packaging during the proposed class period," and the defendant's 16-month television advertising campaign "d[id] not even approach the 'massive advertising campaign' at issue in *Tobacco II.*" (emphasis in original)), *Ehret*, 2015 WL 7759464, at *8, *12 (proposed class overbroad where the alleged misrepresentation was made primarily on defendant's website, blog and e-mail messages such that "there is insufficient evidence that all customers during the class period were likely exposed to the misrepresentation") *and In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1111 (C.D. Cal. 2015) (denying class certification of a class based on misrepresentations in advertising where plaintiffs failed to demonstrate defendant's advertising "was sufficiently pervasive to warrant a presumption" that all class members saw it), *with Makaeff*, 2014 WL 688164, at *1 (acknowledging that the advertising and promotional activities were not part of a massive advertising campaign, but concluding that "[w]hile it was not a long-term campaign as in *Tobacco II*, it was much more targeted, concentrated, and efficient than *Tobacco II*." Thus, "[t]he effect of this campaign was to make it highly likely that each member of the putative class was exposed to the same misrepresentations [, and t]here is substantial evidence that class members paid for TU seminars for reasons that track the advertising and promotional information provided in the highly orchestrated campaign.").

The FAC does not allege a misrepresentation on the label of the Multi-Surface Cleaner. Instead, it alleges misrepresentations on Honest's website. For Plaintiff to pursue claims as to the Mutli-Surface Cleaner, as well as those based on representations regarding the remaining Natural Products and the Sunscreen that were not on the corresponding product labels, Plaintiff must allege that Honest's campaign was broad and widely disseminated. Plaintiff has not done so.

Nor does the FAC adequately allege that Plaintiffs were otherwise exposed to and relied on these representations before purchasing the products at issue. *Mazza*, 666 F. 3d at 596. Without such allegations, Plaintiffs may have "never [been] exposed to the allegedly misleading advertisements, insofar as advertising of the challenged system was very limited." *Mazza*, 666 F.3d at 595 (citing *Davis–Miller v. Automobile Club of Southern California*, 201 Cal. App. 4th 106, 125 (2011) ("An inference of classwide reliance cannot be made where there is no evidence that the allegedly false representations were uniformly made to all members of the proposed class."); *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009) ("[California law does not] authorize an award . . . on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice.")); *Ehret*, 2015 WL 7759464, at *12 ("[T]here is no evidence that it was 'highly likely' all members of the proposed class saw the allegedly misleading statements made in the advertisements. This is especially true here, where individuals may have downloaded the Uber app based on word of mouth, or used the uberTAXI service because they were previous Uber users who saw that there was a new option on the Uber app and thus never visited the Uber website or blog posts . . . . Just because the information was available on the website does not necessarily imply that visitors would likely have seen it….").

5. Whether Plaintiffs Claims Regarding the Natural Products Fail Because "Natural" Has No Legal Meaning

a) Legal Standard

Once again, the comments of another district court are helpful:

> The CLRA, FAL, and UCL utilize a "reasonable consumer standard." *Freeman v. Time, Inc.,* 68 F.3d 285, 289 (9th Cir.1995). Thus, statements are only actionable under these statutes if they are likely to deceive a reasonable consumer. *Stickrath* [*v. Globalstar*], 527 F.Supp.2d [992,] 998 [998 (N.D. Cal. 2007)]. Under the reasonable consumer standard, the plaintiff must "show that members of the public are likely to be deceived." *Freeman,* 68 F.3d at 289 (internal quotation marks omitted.) "Advertisements that amount to mere puffery are not actionable because no reasonable consumer relies on puffery." *Stickrath,* 527 F.Supp.2d at 998. "Factual representations, however, are actionable." *Id.*

Henderson, 2011 WL 1362188, at *10. *See also Lavie* , 105 Cal. App. 4th at 506–07 ("[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer."); *Kasky*, 27 Cal. 4th at 951 ("these laws prohibit not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.") (internal citations and quotations removed)). "Statements constituting

'mere puffery' cannot support liability under a claim for breach of warranty." *Sanders*, 672 F. Supp. 2d at 987 (citing, 99 Cal. App. 3d at 565). "The distinguishing characteristics of puffery are 'vague, highly subjective claims as opposed to specific, detailed factual assertions.'" *Id.* (quoting *Haskell*, 857 F.Supp. at 1399).

"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 Technology Corp.*, 152 Cal. App. 4th at 134–35 ("Whether 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." (quoting *McKell*, 142 Cal. App. 4th at 1472).

b) Application

Defendant argues that the term "natural" is "vague and ambiguous with no recognized meaning in the law" and that Plaintiffs do not plead a basis to their claim that "natural" means that a product contains no synthetic ingredients. Motion, Dkt. 48-1 at 10, 26 (citing *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 978 (C.D. Cal. 2013) (granting motion to dismiss because "all natural" pastas must be processed and there was no plausible, objective definition of "natural")). Furthermore, Defendant argues that it disclosed its ingredients and explained the use of the challenged ingredients to consumers. *Id.* at 26- 27 (citing FAC ¶¶ 95-96, Dkt. 36; *Pelayo*, 989 F. Supp. 2d at 980 ("any ambiguity regarding the definition of 'All Natural' [was] clarified by the detailed. . . ingredient list."); *cf. Williams*, 552 F. 3d at 939 (finding where a product's packaging had many potentially deceptive features, a small ingredient list did not establish that a reasonable consumer could not be deceived)).

Plaintiffs respond that *Balser v. Hain Celestial Group., Inc*., No. 14-55074, 2016 WL 696507 (9th Cir. Feb. 22, 2016) (unpublished), held that "natural" is a type of representation that can support false advertising claims under California law. Opposition, Dkt. 54 at 8. The plaintiffs there

> provided a definition of "natural," and explained that "natural" means free of synthetic ingredients. Plaintiffs also alleged Hain used the phrase "100% Vegetarian" on the back of the products' packaging, which, the complaint avers, means products derived from plants. These allegations are sufficient plausibly to allege a reasonable consumer's understanding of "natural" as used on Hain's packaging, and so are adequate under California law.

Balser, 2016 WL 696507 at *1. *See also Brazil v. Dole Packaged Foods, LLC*, No. 14-17480, 2016 WL 5539863, at *1-2 (9th Cir. Sept. 30, 2016) ("Taken together, this evidence could allow a trier of fact to conclude that Dole's description of its products as 'All Natural Fruit' is misleading to a reasonable consumer. The evidence here . . . could also allow a trier of fact to find that the synthetic citric and ascorbic acids in Dole's products were not 'natural.' Summary

judgment was therefore granted in error."); *Fagan v. Neutrogena Corp*., 2014 WL 92255, at *2 (C.D. Cal. Jan. 8, 2014) ("[t]he phrases '100% naturally sourced sunscreens,' '100% naturally sourced sunscreen ingredients' and 'naturally-sourced sunscreen ingredients' . . . are misleading to a reasonable consumer because the Products actually contain numerous unnatural synthetic ingredients."); *Morales v. Unilever U.S., Inc.*, 2014 WL 1389613, at *7 (E.D. Cal. Apr. 9, 2014) ("Even if defendant were correct that a cosmetic product cannot be 'natural,' it does not follow that labeling cosmetic products as natural is per se not misleading."); *Brown v. Hain Celestial Grp*., 913 F. Supp. 2d 881, 899 (N.D. Cal. 2012); *Vicuna v. Alexia Foods, Inc.*, 2012 WL 1497507, at *2 (N.D. Cal. Apr. 27, 2012) (holding that "the question whether a reasonable consumer would likely be deceived by the designation 'All Natural' is a factual dispute [that] cannot be resolved" on a motion to dismiss); *Parker v. J.M. Smucker Co.*, 2013 WL 4516156, at *6 (N.D. Cal. Aug. 23, 2013) (holding that the plaintiff's allegations that a reasonable consumer would believe that a product labeled as "all natural" contained no bioengineered or chemically altered ingredients "cannot be resolved as a matter of law")).

Furthermore, Plaintiffs argue that a manufacturer cannot use an ingredient list to disclaim representations made on its label:

> [R]easonable consumers cannot necessarily "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. The ingredient list on the side of the box appears to comply with FDA regulations and certainly serves some purpose. We 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."

Fagan, 2014 WL 92255, at *2 (quoting *Williams*, 552 F.3d at 939-40); *see also Astiana*, 2012 WL 2990766 at *10.

The FAC alleges that "'[n]atural' in the context of Defendant's products means each product contains no artificial ingredients." FAC ¶ 87, Dkt. 36. It then alleges that the Natural Products contain the following artificial ingredients:

- Honest Dish Soap: *Methylisothiazolinone* (a synthetic preservative), *Cocamidopropyl Betaine* (a synthetic surfactant), *Phenoxyethanol* (a synthetic preservative)
- Honest Hand Soap: *Phenoxyethanol*
- Honest Multi-Surface Cleaner: *Methylisothiazolinone*

- Honest Diapers: *Sodium Polycrylate* (a petrochemical-based additive)

Id. ¶ 90.

Whether Defendant's alleged statements that the Natural Products were "natural" constitute misleading statements sufficient to support liability cannot be decided in this action pursuant to the Motion. The allegations of the FAC are sufficient to state a claim. *See Williams*, 552 F.3d at 939 ("The facts of this case, on the other hand, do not amount to the rare situation in which granting a motion to dismiss is appropriate . . . . [T]he statement that Fruit Juice Snacks was made with 'fruit juice and other all natural ingredients' could easily be interpreted by consumers as a claim that all the ingredients in the product were natural, which appears to be false."). *See also Balser*, 2016 WL 696507, at *1 ("Plaintiffs . . . provided a definition of 'natural,' and explained that 'natural' means free of synthetic ingredients. Plaintiffs also alleged Hain used the phrase '100% Vegetarian' on the back of the products' packaging, which, the complaint avers, means products derived from plants. These allegations are sufficient plausibly to allege a reasonable consumer's understanding of 'natural' as used on Hain's packaging, and so are adequate under California law. Additionally, the complaint gives rise to the reasonable inference that Plaintiffs themselves believed the proffered definition of 'natural.'") (internal citations removed).

This determination is similar to those made by other district courts. *Vicuna*, 2012 WL 1497507, at *2 ("Because the question whether a reasonable consumer would likely be deceived by the designation 'All Natural' is a factual dispute, the court finds that these claims cannot be resolved at this stage of the litigation."); *Parker*, 2013 WL 4516156, at *6 ("While Defendant is right that this Court and others have dismissed claims like these at the pleading stage for not being plausibly misleading to a reasonable consumer . . . the Court cannot as a matter of law conclude … that reasonable consumers would all understand that packaged, non-organic foods may contain bioengineered ingredients and that the only way to avoid such ingredients completely is to buy only certified organic products . . . . Plaintiff has alleged that a reasonable consumer would read the 'All Natural' label, assume that such a product contains no bioengineered or chemically altered ingredients, and would then be misled if the product did in fact contain such things.") (internal citations removed); *Henderson*, 2011 WL 1362188, at *11 ("Here, Defendant's products allegedly contain artificial trans fats. Construing the complaint in the light most favorable to the Plaintiffs, as the Court is obligated to do, these products could be found to be "unnatural."); *Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066, 1080 (E.D. Cal. 2010) ("[P]laintiffs allege that they were deceived by the labeling of defendant's drink products as 'All Natural' because they did not believe that the products would contain [high fructose corn syrup]. Reading the allegations in the complaint in the light most favorable to the plaintiffs and drawing all reasonable inferences therefrom, plaintiffs have stated a plausible claim that a reasonable consumer would be deceived by defendant's labeling."); *Hitt v. Ariz. Beverage Co.,* LLC, No. 08–cv–809, 2009 WL 449190 (S.D. Cal. Feb.4, 2009) (same).

The outcome is not changed because the list of ingredients on the Natural Products includes those that form the basis for the present claims. *Williams*, 552 F.3d at 939-40 ("We disagree 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. The ingredient list on the side of the box appears to comply with FDA regulations and certainly serves some purpose. We 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.").

For the foregoing reasons, the FAC adequately alleges misrepresentation. The corresponding factual issues cannot be addressed on the Motion. Therefore, it is **DENIED** on this issue.

6. Whether the Negligent Misrepresentation Cause of Action Fails Because of the Economic Loss Doctrine

a) Legal Standard

"The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988, 102 P.3d 268, 272 (2004). *See also Kalitta Air, L.L.C. v. Cent. Texas Airborne Sys., Inc.*, 315 F. App'x 603, 605 (9th Cir. 2008) ("In the absence of (1) personal injury, (2) physical damage to property, (3) a 'special relationship' existing between the parties, or (4) some other common law exception to the rule, recovery of purely economic loss is foreclosed.") (citing *J'Aire Corp. v. Gregory*, 24 Cal.3d 799 (1979)). "Economic loss consists of damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to . . . property [other than the product itself]." *Robinson Helicopter Co.*, 34 Cal.4th at 988. "Put simply, the economic loss doctrine was created to prevent 'the law of contract and the law of tort from dissolving one into the other.'" *In re Sony Gaming Networks & Customer Data Sec. Breach Litig*., 996 F. Supp. 2d 942, 967 (S.D. Cal. 2014) (quoting *Robinson Helicopter Co.,* 34 Cal.4th at 988 (internal quotations omitted)). Furthermore,

> [u]nder *J'Aire* special relationship exception to the economic loss doctrine, the existence of a "special relationship" is based on a determination of the following six factors: "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm." *J'Aire,* 157

> Cal. Rptr. 407. All six factors must be considered by the court and the presence or absence of one factor is not decisive. *Kalitta Air*, 315 Fed. Appx. at 605–06.

In re Sony Gaming, 996 F. Supp. 2d at 968.

b) Application

Defendant argues that this claim is barred because the FAC pleads only economic harm. The FAC does not plead that Plaintiffs suffered any personal injury or property damage. As the FAC alleges, "Had Plaintiffs . . . been aware of the true nature and quality of the Honest Sunscreen, they would not have purchased the product," and they "have suffered and will continue to suffer damages. . . ." FAC ¶¶ 249-50, Dkt. 36. Defendant relies on *Foster Poultry Farms, v. Alkar-Rapidpak-MP Equip. Inc*., 868 F. Supp. 2d 983, 991 (E.D. Cal. 2012); *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007) and *UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc.*, 117 F. Supp. 3d 1092 (C.D. Cal. 2015) in support of its position.

Defendant also argues that no Plaintiff could show a special relationship with Honest, as "everyday consumer transactions cannot create a 'special relationship . . . .'" Reply, Dkt. 58 at 12 (citing *In re Sony Gaming*, 996 F. Supp. 2d at 969 (in a putative class action brought against a manufacturer of an online gaming system plaintiffs failed to allege a "special relationship" that would allow recovery of purely economic losses); *Greystone Homes, Inc. v. Midtec, Inc*., 168 Cal. App. 4th 1194, 1231 (2008) (as a matter of law manufacturer did not have a special relationship with plaintiff sufficient to support a negligence cause of action for economic losses)).

Plaintiffs argue that the FAC adequately alleges a special relationship between them and Defendant. Opposition, Dkt. 54 at 9, 26 (citing *Corona v. Sony Pictures Entm't, Inc.*, 2015 WL 3916744, at *5 (C.D. Cal. June 15, 2015)). Applying the *J'Aire* factors, Plaintiffs argue that Defendant controlled the sunscreen's design, manufacture and marketing and made the alleged misrepresentation with the "intention of inducing Plaintiffs and the Honest Sunscreen Class Members to purchase the Honest Sunscreen." *Id.* at 25 (citing FAC ¶¶ 245-48, Dkt. 36). Plaintiffs then argue that Defendant knew the statements were false and that the harm suffered by Plaintiffs and the Sunscreen Class is a direct result of Defendant's alleged misstatements about the Sunscreen. *Id.* (citing FAC ¶¶ 139-48, 247, Dkt. 36). Plaintiffs add that Defendant's actions are morally blameworthy because Defendant acted at least negligently in concealing the true nature of the Sunscreen, causing consumers to suffer severe sunburn and potential increased risk of skin cancer, and in misrepresenting the Natural Products "to people who, for example, care deeply about only using natural products for their babies." *Id.* Finally, Plaintiffs argue that "Defendant should be held accountable to ensure that it and other companies provide truthful and complete representations to consumers." *Id.* (citing *In re Sony Gaming*, 996 F. Supp. 2d at 968-69 ("holding Sony accountable will require Sony and other companies to provide reasonable, adequate, and industry standard security measures.")).

The FAC does not adequately plead any exception to the economic loss doctrine. It does not allege more than a relationship between Plaintiffs and Defendant that is an "everyday consumer transaction." Therefore, the Motion is **GRANTED**, without prejudice as to this issue.

7. Whether the Breach of Express and Implied Warranty Claims Fail Because Plaintiffs Are Not in Privity with Defendant

a) Legal Standard

"Strict adherence to privity rules for express warranty causes of action has not been required in the products liability context." *Dagher v. Ford Motor Co.*, 238 Cal. App. 4th 905, 927 (2015) (citing *Seely v. White Motor Co.*, 63 Cal.2d 9, 14 (1965) ("Since there was an express warranty to plaintiff in the purchase order, no privity of contract was required."); *Hauter v. Zogarts*, 14 Cal.3d 104, 115, n.8 (1975) ("The fact that [plaintiff] is not in privity with defendants does not bar recovery. Privity is not required for an action based upon an express warranty."); *Cardinal Health 301, Inc. v. Tyco Electronics Corp.*, 169 Cal. App. 4th 116, 143-44 (2008) (no privity requirement for liability on an *express* warranty "because it is deemed fair to impose responsibility on one who makes affirmative claims as to the merits of the product, upon which the remote consumer presumably relies.").

However,

> [u]nder California law, a party raising claims for breach of implied warranty must establish that "vertical contractual privity" exists between plaintiff and defendant. *Clemens v. Daimler Chrysler Corp.,* 534 F.3d 1017, 1023 (9th Cir.2008) ("A lack of vertical privity requires the dismissal of [plaintiff's] implied warranty claims."); *All West Electronics, Inc. v. M–BW, Inc.,* 64 Cal.App. 4th 717, 725 (1998) ("Privity of contract is a prerequisite in California for recovery on a theory of breach of implied warranties of fitness and merchantability."). Privity exists only where the plaintiff and defendant are in "adjoining links of the distribution chain." *Osborne v. Subaru of Am. Inc.,* 198 Cal.App.3d 646, 656 n. 6 (1988). An end consumer who purchases a product from a retailer is not in privity with a manufacturer. *Id.*

Roberts v. Electrolux Home Products, Inc., No. CV 12-1644 CAS VBKX, 2013 WL 7753579, at *9 (C.D. Cal. Mar. 4, 2013).

California appellate courts have not specifically addressed the question "whether California's privity requirement bars a consumer from asserting an implied warranty claim against a manufacturer when the claim arises out of a product purchased from a retailer," and federal courts have reached different outcomes:

> Some courts have found that consumers can assert implied warranty claims in this factual context as third-party beneficiaries of agreements between the manufacturer and retailer. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.,* 754 F.Supp.2d 1145, 1184—85 (C.D.Cal.2010); *Keegan v. American Honda Motor Co., Inc.,* 838 F.Supp.2d 929, 947 (C.D.Cal.2012) (following *Toyota*). The basis of this third-party beneficiary exception is the California court of appeals decision *Gilbert Financial Corp. v. Steelform Contracting Co.,* 82 Cal.App.3d 65, 69 (1978), which held that a plaintiff homeowner could assert an implied warranty claim against a subcontractor as a third party beneficiary of the agreement between the contractor and subcontractor. *Id., see also Cartwright v. Viking Industries,* Inc., 249 F.R.D. 351, 356 (E.D.Cal.2008) (discussing *Gilbert); In re Toyota,* 754 F.Supp.2d at 1184 (discussing *Gilbert*). Applying the holding of *Gilbert*, these decisions reason that "where a plaintiff pleads that he or she is a third-party beneficiary to a contract that gives rise to the implied warranty of merchantability, he or she may assert a claim for the implied warranty's breach." *In re Toyota,* 754 F.Supp.2d at 1185.
>
> Other courts have disagreed. In *Xavier v. Philip Morris USA Inc.,* 787 F.Supp.2d 1075 (N.D.Cal.2011), the plaintiffs urged the district court to find an exception to the privity requirement when an implied warranty claim is brought by an injured consumer who is the intended user of a product. *Id.* at 1083. The court rejected this argument and disagreed with the decisions discussed directly above, reasoning that "[n]o reported California decision has held that the purchaser of a consumer product may dodge the privity rule by asserting that he or she is a third-party beneficiary of the distribution agreements linking the manufacturer to the retailer who ultimately made the sale." *Id.* In the absence of such a decision, the court reasoned that it could not recognize a third-party beneficiary exception to the privity requirement, even if it were necessary to allow the intended consumers of a product to bring an implied warranty claim. *Id.* ("California courts have painstakingly established the scope of the privity requirement under California Commercial Code section 2314, and a federal court sitting in diversity is not free to create new exceptions to it.") (quoting *Clemens v. Daimler Chrysler Corp.,* 534 F.3d at 1023—24). While the court recognized that *Gilbert* allowed a third-party beneficiary of a contract to assert an implied warranty claim despite a lack of privity, it reasoned that *Gilbert* was not subject to the broad interpretation it had been given by other federal courts, even though the court agreed a broad third-party beneficiary exception had "logical and equitable appeal." *Id.*

Roberts, 2013 WL 7753579, at *9-10 ("*Gilbert* is best interpreted to establish an exception to the privity requirement that applies when a plaintiff is the intended beneficiary of implied warranties in agreements linking a retailer and a manufacturer, and therefore lack of privity does not bar plaintiffs' implied warranty claims.").

b) Application

Defendant argues that, because Plaintiffs purchased the products from retailers, there was no privity between the parties to this action. Motion, Dkt. 48-1 at 10, 29 (citing *Long v. Graco Children's Prods. Inc.,* No. 13-1257, 2013 WL 4655763, at *12 (N.D. Cal. Aug. 26, 2013) (dismissing breach of warranty cause of action where the alleged purchase by plaintiff was from a retailer, not defendants); *Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 980 (C.D. Cal. 2014) (no viable breach of warranty claim because plaintiffs did not purchase vehicles directly from defendant).

Defendants argue that, although *Clemens* identified two exceptions to the privity requirement, neither applies here. *Id. See also Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1083 (N.D. Cal. 2011) ("no reported California decision has held that the purchaser of a consumer product may dodge the privity rule by asserting that he or she is a third-party beneficiary of the distribution agreements linking the manufacturer to the retailer who ultimately made the sale").

Plaintiffs argue that, because Plaintiffs are the intended beneficiaries of the products, their warranty claims do not require privity. Opposition, Dkt. 54 at 9. Plaintiffs also rely on certain exceptions to the privity requirements. *Id.* (citing *Cardinal Health*, 169 Cal. App. 4th at 143-44 ("[p]rivity is generally not required for liability on an express warranty because it is deemed fair to impose responsibility on one who makes affirmative claims as to the merits of the product, upon which the remote consumer presumably relies"); *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 983-85 (N.D. Cal. 2014) (third-party beneficiary exception remains viable in California); *Roberts*, 2013 WL 7753579, at *10 (recognizing third party beneficiary exception as to breach of implied warranty claims); *Clemens v. Daimler Chrysler Corp.,* 534 F.3d 1017, 1023 (9th Cir. 2008) (an exception to privity exists "…when the plaintiff relies on written labels or advertisements of a manufacturer.").

Plaintiffs argue that the FAC alleges that "(1) Defendant knew Plaintiffs and the proposed Class were the ultimate users of the products and the targets of its false advertising; (2) Defendant intended its statements and representations [to] be considered by the end-users of its products, including Plaintiffs and the proposed Class; (3) Defendant directly marketed to Plaintiffs through its statements on its websites and packaging; and (4) Plaintiffs were the intended beneficiaries of the express and implied warranties." *Id.* at 26-27 (citing FAC ¶¶ 158-161, Dkt. 36; *Roberts,* 2013 WL 7753579 at *10). Plaintiffs also argue that the FAC alleges that they relied on Defendant's labeling and advertising and that Defendant intended for consumers to do so. *Id.* at 27 (citing FAC ¶¶ 84, 149-50, 184-85, 201, Dkt. 36).

Plaintiffs' express warranty claim is sufficiently alleged because vertical privity is not required for such claims. Their implied warranty claim is also sufficient because it is consistent with *Gilbert.* As *Roberts* explained:

> *Gilbert* arose in a distinct factual context from the instant action, and . . . federal courts sitting in diversity should not create new exceptions to California legal rules, . . . the principle adopted in *Gilbert* is applicable here. The court's reasoning in *Gilbert* did not rely on facts unique to that case, but instead reasoned broadly that "[plaintiff] is a third-party beneficiary of the contract ... and therefore can sue for breach of the implied warranty of fitness." *Gilbert,* 82 Cal.App.3d at 69. Consequently, *Gilbert* is best interpreted to establish an exception to the privity requirement that applies when a plaintiff is the intended beneficiary of implied warranties in agreements linking a retailer and a manufacturer, and therefore lack of privity does not bar plaintiffs' implied warranty claims.

Roberts, 2013 WL 7753579, at *10. *See also Precht v. Kia Motors Am., Inc*., No. SA-CV-141148-DOC-MANX, 2014 WL 10988343, at *10 (C.D. Cal. Dec. 29, 2014) ("Thus, vertical contractual privity is not needed to assert a claim for breach of implied warranty when plaintiff is a third-party beneficiary of a contract between other parties which does create an implied warranty.").

For the foregoing reasons, the Motion is **DENIED** as to this claim.

8. Whether the Breach of Express and Implied Warranty Claims Fail Because Plaintiffs Failed to Give Honest Pre-Suit Notice

a) Legal Standards

Cal. Com. Code § 2607 (3(A) provides: "Where a tender has been accepted: The buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." "To avoid dismissal of a breach of contract or breach of warranty claim in California, '[a] buyer must plead that notice of the alleged breach was provided to the seller within a reasonable time after discovery of the breach.'" *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011) (quoting *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010)). "A buyer's failure to comply with the notice requirement results being barred from any remedy." *In re iPhone 4S Consumer Litig.*, No. C 12-1127 CW, 2013 WL 3829653, at *14 (N.D. Cal. July 23, 2013).

"The purpose of giving notice of breach is to allow the breaching party to cure the breach and thereby avoid the necessity of litigating the matter in court." *Alvarez*, 656 F.3d at 932 (citing *Cardinal Health*, 169 Cal. App. 4th at 135). This notice "also informs the seller of the need to preserve evidence and to be prepared to defend against the suit, and protects against stale claims." *Cardinal Health*, 169 Cal. App. 4th at 135. "To comport with the objectives of the notice requirement, the notice must be served prior to service of the complaint and not simultaneously with it." *In re iPhone 4S Consumer Litig.*, 2013 WL 3829653, at *14 (citing Alvarez, 656 F.3d at 932-33). The buyer has the burden of proving reasonable notice. *Cardinal Health*, 169 Cal. App. 4th at 136.

"California case law holds that, in actions 'by injured consumers against manufacturers with whom they have not dealt,' 'even if plaintiff did not give timely notice of breach of warranty to the manufacturer, his cause of action based on the representations contained in the brochure was not barred.'" *Precht v. Kia Motors Am., Inc.*, No. SACV141148DOCMANX, 2014 WL 10988343, at *9 (C.D. Cal. Dec. 29, 2014) (citing *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 61-62 (1963)). Although the Ninth Circuit has not addressed this issue post-*Alvarez*, courts since that time have found that where a plaintiff purchases a product from a retailer, "*Greenman* applies, excusing consumers from notifying the manufacturer of the problem prior to bringing a breach of express warranty claim." *Precht,* 2014 WL 10988343, at *9 (citing *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 994–95 (N.D. Cal.2013); *Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 949-51 (C.D. Cal. 2012); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig*., 754 F. Supp. 2d 1145, 1180 (C.D. Cal. 2010); *Aaronson v. Vital Pharmaceuticals, Inc.*, No. 09–CV–1333 W(CAB), 2010 WL 625337, at *5 (S.D. Cal. Feb. 17, 2010) (denying motion to dismiss for failure to give § 2607(3)(A) notice)).

b) Application

Defendant argues Plaintiffs failed to provide the required notice prior to filing this action. Motion, Dkt. 48-1 at 10. It notes that alleged customer inquiries do not constitute reasonable notice of the claimed breach of warranties, and that Plaintiffs' two CLRA notices were not sent prior to the filing of these actions. Rubin sent his letter on September 3, 2015, the same day he filed his complaint, and Michael sent his on September 24, 2015, more than two weeks after he filed his complaint. *Id.* at 30. Defendant argues that notice given simultaneous with the filing of a complaint does not satisfy the statutory notice requirement. *Id.* (citing *Alvarez*, 656 F.3d at 932 (affirming dismissal of warranty claims where plaintiffs sent a letter giving notice concurrently with filing a complaint)).

Plaintiffs argue that pre-suit notice is not required where the action is brought by consumers who did not buy directly from the manufacturer and the manufacturer had knowledge of the breach. They then contend that the FAC alleges that Honest knew about the breach from numerous media reports of customer complaints. Opposition, Dkt. 54 at 9, 28- 29 (citing *Sanders*, 672 F. Supp. 2d at 989 ("[T]imely notice of a breach of an express warranty is not required where the action is against a manufacturer and is brought 'by injured consumers against manufacturers with whom they have not dealt.'"); *Metowski v. Traid Corp.*, 28 Cal. App. 3d 332, 339 (1972) ("Where the merchandise was sold under circumstances which indicate that the seller . . . was aware of the breach at the time of the sale, demand for notice of the breach from each and every member of the class may be a meaningless ritual."); *Aaronson*, 2010 WL 625337, *5 (citing *Greenman* for the proposition that "[i]n claims against a manufacturer of goods, however, California law does not require notice"); *Keegan,* 838 F. Supp. 2d at 949-51 ("Consequently, the court follows *Greenman, Sanders, Toyota,* and *Aaronson* (citations omitted) in concluding that under California law, a consumer need not provide notice to a manufacturer before filing suit

against them."); *Cartwright v. Viking Indus., Inc.*, 2009 WL 2982887, at *9 (E.D. Cal. Sept. 14, 2009) ("[] notice may be given after commencement of suit…").

Plaintiffs also contend that consumer complaints, including those made online, may be considered as pre-suit notice or knowledge by a defendant. *Id.* at 30 (citing *Duttweiler v. Triumph Motorcycles Am. Ltd.*, 2015 WL 4941780, *6 (N.D. Cal. Aug. 19, 2015) ("The inference of pre-purchase knowledge is further supported by the detailed complaints made by customers to Triumph around the time of Duttweiler's purchase concerning identical failures of the exact same part at issue in this case."); *Martin v. Ford Motor Co.*, 765 F. Supp. 2d 673, 683 (E.D. Pa. 2011) (finding notice requirement met where defendant was aware of defect due to widespread online complaints and elsewhere and complaints by plaintiffs directly to defendant.)).

Plaintiffs argue that Defendant's Motion fails as to Plaintiffs Lung, Da Silva and Hembree, who were added for the first time in the FAC. By that time Honest was on notice as a result of the actions brought by Rubin and Michael. *Id.*

Greenman, *Aaronson*, *Precht*, *Mui Ho*, *Keegan* and *Toyota*, support the conclusion that the pre-suit notice requirement is not a bar to the breach of warranty claims. Therefore, the Motion is **DENIED** on this ground.

9. Whether Plaintiffs Fail to Sufficiently Plead a Quasi-Contract Claim (Money Had and Received)

a) Legal Standard

> The elements of a claim for money had and received are: "(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment." *Farmers Ins. Exch. v. Zerin,* 53 Cal.App. 4th 445, 459 (1997). "[I]n order for plaintiff to recover in such action she must show that definite sum, to which she is justly entitled, has been received by defendants." *Walter v. Hughes Commc'ns, Inc.,* 682 F.Supp.2d 1031, 1047 (N.D.Cal.2010). A plaintiff must prove that the defendant received "money that was intended to be used for the benefit of" the plaintiff. Judicial Council of California Civil Jury Instruction 370.

Shen v. Gotham Corp. Grp., Inc., No. CV1407870SJOAJWX, 2015 WL 4517146, at *8 (C.D. Cal. July 21, 2015). *See also Farmers Ins. Exch. v. Zerin*, 53 Cal. App. 4th 445, 460 (1997) ("A cause of action for money had and received is stated if it is alleged the defendant is indebted to the plaintiff in a certain sum for money had and received by the defendant for the use of the plaintiff.") (internal citations and quotations removed).

b) Application

Defendant argues that Plaintiffs cannot seek restitution because there is no underlying wrong, and the claim and associated remedy is redundant given the other claims that have been made. Motion, Dkt. 48-1 at 10. Defendant argues that Plaintiffs are not permitted restitution merely because Honest allegedly sold products by making alleged misstatements about them. *Id.* at 30-31 (citing FAC ¶¶ 251-56, Dkt. 36; *Leonhart*, 2014 WL 6657809, at *7 (N.D. Cal. Nov. 21, 2014) (allegations that defendant sold misbranded food products did not state a claim for money had and received)). Defendant challenges the sufficiency of the allegation that Honest "unjustly retained a benefit at the expense of Plaintiffs" (FAC ¶ 252, Dkt. 58) as a basis for a quasi-contract claim. Reply, Dkt. 58 at 14 (citing *Marina Tenants Ass'n v. Deauville Marina Dev. Co.*, 181 Cal App. 3d 122, 134 (1986) ("[t]he 'mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor'") (citation omitted)). Plaintiffs respond that this claim seeks an available remedy. The return of a benefit unjustly conferred through fraud. Opposition, Dkt. 54 at 9, 30 (citing *Astiana v. Hain Celestial Groups, Inc.*, 783 F.3d 753, 762 (9th Cir. 2015)).

Here, as in *Leonhart v. Nature's Path Foods, Inc*, the FAC fails to allege any of the elements of this claim. In *Leonhart* a money had and received claim was dismissed where the only supporting allegation was "that because Defendant sold 'misbranded' food products, Plaintiff is entitled to recover damages." No. 13-CV-00492-BLF, 2014 WL 6657809, at *7 (N.D. Cal. Nov. 21, 2014). The same outcome is warranted here. The elements of money had and received claim have not been alleged. Therefore, the Motion is **GRANTED** without prejudice with respect to this claim.

C. Legal Standard for Fed. R. Civ. P. 12(f)

Pursuant to Fed. R. Civ. P. 12(f), a court may strike "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

> The grounds for a motion to strike must appear on the face of the pleading under attack, or from matters which the Court may take judicial notice. *SEC v. Sands,* 902 F.Supp. 1149, 1165 (C.D.Cal.1995). The essential function of a Rule 12(f) motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v. Fogerty,* 984 F.2d 1524, 1527 (9th Cir.1993); *Sidney–Vinstein v. A.H. Robins Co.,* 697 F.2d 880, 885 (9th Cir.1983). An "immaterial" matter has no essential or important relationship to the claim for relief or defenses pleaded. *Fantasy, Inc.,* 984 F.2d at 1527. An "impertinent" matter consists of statements that do not pertain and are unnecessary to the issues in question. *Id.*

Belle v. Chrysler Grp., LLC, No. SACV 12-00936 JVS, 2013 WL 949484, at *8 (C.D. Cal. Jan. 29, 2013).

D. Application

Defendant moves to strike references in the FAC to commentary on the Internet about purported customer grievances. It states that they are "unsubstantiated hearsay with no indicia of reliability, and are not 'factual contentions' with evidentiary support under Rule 11." Motion, Dkt. 48-1 at 32 (citing *Nordstrom, Inc. v. NoMoreRack Retail Grp., Inc.*, No. 12-1853, 2013 WL 1196948, at *13 (W.D. Wash. Mar. 25, 2013) ("The majority of complaints are from anonymous Internet users that have posted on various blogs and forums online. . . designed to facilitate negative feedback from disgruntled customers or even competitors, who can write multiple reviews across multiple forums. . . [this] evidence is not persuasive); *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999) ("evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules" because the Internet is "one large catalyst for rumor, innuendo, and misinformation," with "no way of verifying authenticity of alleged contentions" because "[a]nyone can put anything on the Internet. . .[n]o web-site is monitored for accuracy[,] *nothing* contained therein is under oath or even subject to independent verification. . . [and] hackers can adulterate the content on *any* web-site from *any* location at *any* time.") (emphasis in original); *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1168 (S.D. Cal. 2010) (noting information from the Internet does not "bear an indicia of reliability" and must therefore be authenticated by affidavit) (citations omitted)).

Defendant argues that "[f]orcing Honest to answer and litigate these immaterial allegations would only impose delay, drive up unnecessary costs, and create serious risk of prejudice to Honest." *Id.* at 32-33 (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (upholding the striking of immaterial allegations that created risk of delay, confusion and the possibility of unwarranted and prejudicial inferences) *rev'd on other grounds in* 510 U.S. 517 (1994); *State of Cal. ex rel. State Lands Comm'n v. United States*, 512 F. Supp. 36, 38 (N.D. Cal. 1981) (motions to strike are often disfavored, but where granting the motion may make trial less complicated, or otherwise streamline the ultimate resolution of the action, the motion is well taken); *Fantasy*, 984 F.2d 1527 ("The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial") (citations omitted)).

Plaintiffs argue that hearsay is not a proper ground to strike allegations from a complaint, and that the comments are relevant to the ineffectiveness of the sunscreen and notice of the warranty breaches. Opposition, Dkt. 54 at 9, 31 (citing *Belle*, 2013 WL 949484, at *9 (refusing to strike allegations referencing consumer complaints made to unidentified consumer websites and stating ""[t]hat an allegation is hearsay is not a basis for striking pursuant to Rule 12(f).")). Plaintiffs distinguish the cases that Defendant cites because they did not relate to striking information from pleadings on the basis of Fed. R. Civ. P. 12(f). *Id.* at 30-31.

The Motion to strike is **DENIED**, without prejudice to making appropriate evidentiary objections if this or similar material is offered as evidence. "That an allegation is hearsay is not a basis for striking pursuant to Rule 12(f). Allegations need not themselves be admissible evidence." *Belle*, 2013

WL 949484, at *9. Moreover, the topic of the challenged statements is not immaterial. The FAC has allegations about the injury that resulted from the use of the Sunscreen. The allegations at issue concern other consumers, who may be putative class members, who supposedly had similar experiences.

IV. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED IN PART AND DENIED IN PART.** The Motion is granted as to injunctive relief, the quasi-contract (money had and received) claim, and the negligent misrepresentation claim with leave to amend. The Motion is denied as to the remaining claims. Any amended complaint shall be filed on or before December 21, 2016.

In light of the time that this matter has been under submission, a revised schedule of dates is necessary. Accordingly, a Scheduling Conference is set for February 6, 2017 at 1:30 p.m. The parties shall submit a Joint Statement by January 27, 2017, which shall include their respective and/or collective views on proposed, revised dates, together with a completed copy of Exhibit A to the Scheduling Order that is part of the Standing Orders.

IT IS SO ORDERED.

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