UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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ALBA MORALES and LANIE COHEN, on behalf of themselves and all others similarly situated, Plaintiffs, v. UNILEVER UNITED STATES, INC., Defendant.	CIV. NO. 2:13-2213 WBS EFB MEMORANDUM AND ORDER RE: MOTION TO DISMISS

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Plaintiffs Alba Morales and Lanie Cohen brought this putative class-action lawsuit against defendant Unilever United States, Inc., in which they allege that defendant misled them and similarly situated consumers by falsely representing that its TRESemmé Naturals line of hair care products contained no synthetic chemicals or artificial ingredients. Defendant now moves to dismiss the First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing and

Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

I. Factual & Procedural History

Defendant is a major cosmetics company that produces, among other products, the TRESemmé Naturals line of shampoos and conditioners. (FAC ¶ 1 (Docket No. 1).) Morales is a resident of South Lake Tahoe, California. (Id. ¶ 6.) Morales alleges that she purchased defendant's Nourishing Moisture shampoo, Nourishing Moisture conditioner, Vibrantly Smooth shampoo, and Vibrantly Smooth conditioner at a Safeway store in South Lake Tahoe, California in June 2012. (Id.) Cohen is a resident of Canton, Massachusetts. (Id. ¶ 7.) Cohen alleges that she purchased defendant's Radiant Volume shampoo and Vibrantly Smooth conditioner at a Target store in Stoughton, Massachusetts in April 2013. (Id.) Both plaintiffs allege that they viewed the product labels before purchasing the products and paid a premium for the products over comparable products not marketed as "natural." (Id. ¶¶ 6-7, 17.) Plaintiffs allege that defendant's representation that the products are natural is false because the products contain numerous "unnatural synthetic ingredients." (Id. ¶ 16.)

On October 22, 2013, plaintiffs brought this action on behalf of themselves, a putative class of purchasers located in twenty-one states including California and Massachusetts (the "Class"), a subclass of California purchasers (the "California subclass"), and a subclass of Massachusetts purchasers (the "Massachusetts Subclass"). Plaintiffs assert three claims: (1) a claim by Morales under the Unfair Competition Law ("UCL"), Cal.

Bus. & Prof. Code § 17200 et seq., on behalf of the California Subclass; (2) a claim by Morales under the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 et seq., and twenty other state consumer protection statutes[1] on behalf of the Class and the California Subclass; and (3) a claim by Cohen under the Massachusetts Consumer Protection Act ("MCPA"), Mass. Gen. Laws. Ann. ch. 93A, and twenty other state consumer protection statutes on behalf of the Class and the Massachusetts Subclass. Defendant now moves to dismiss the complaint pursuant to Rule 12(b)(1) for lack of standing and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

II. Standing

A. Article III and Statutory Standing

"An Article III federal court must ask whether a plaintiff has suffered sufficient injury to satisfy the 'case or controversy' requirement of Article III of the U.S. Constitution." Brazil v. Dole Food Co., 935 F. Supp. 2d 947, 960 (N.D. Cal. 2013) (citing Clapper v. Amnesty Int'l, --- U.S. ---, 133 S.Ct. 1138, 1146 (2013)). "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Clapper, 133 S.Ct. at 1147 (internal quotation marks omitted). A plaintiff invoking federal

[1] Those statutes were enacted by the District of Columbia and the following twenty states: Alaska; Arkansas; California; Connecticut; Delaware; Florida; Hawaii; Illinois; Maine; Massachusetts; Michigan; Missouri; Nebraska; New Hampshire; New Jersey; New York; Rhode Island; Vermont; Washington; and Wisconsin. Each of plaintiffs' class-wide claims arises under the same grouping of state consumer protection statutes.

jurisdiction must satisfy the standing requirements of Article III even if she asserts only state-law claims. Birdsong v. Apple, Inc., 590 F.3d 955, 960 n.4 (9th Cir. 2009).

In addition to the requirements set forth by Article III, a plaintiff asserting claims under California's consumer protection statutes must also establish statutory standing. To have standing to sue under the UCL, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as an injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322 (2011) (emphasis in original).

The standing requirements under the UCL are both similar to and "substantially narrower than federal standing under [A]rticle III . . . which may be predicated on a broader range of injuries." Id. at 324. The standing requirements under the UCL are also more stringent than those imposed by the CLRA, which requires only that a plaintiff have suffered "any damage" as a result of the defendant's misconduct. Cal. Civ. Code § 1780(a); see also Hinojos v. Kohl's Corp., 718 F.3d 1098, 1108 (9th Cir. 2013) ("[A]ny plaintiff who has standing under the UCL's . . . 'lost money or property' requirement will, a fortiori, have suffered 'any damage' for purposes of establishing CLRA standing." (emphasis in original)); Meyer v. Sprint Spectrum L.P., 45 Cal. 4th 634, 641-43 (2009) (discussing standing requirements under CLRA). Therefore, if plaintiffs have sufficiently alleged standing under the UCL, they have also

alleged standing under the CLRA and Article III.

1. Economic Injury

A plaintiff must establish that he suffered "some form of economic injury" in order to have standing under the UCL. Kwikset, 51 Cal. 4th at 323. "An economic injury exists where a seller misrepresents a product and, had the product been represented accurately, buyers would not have been willing to pay as much as they did, or would have refused to purchase the product altogether." Rosales v. FitFlop USA, LLC, 882 F. Supp. 2d 1168, 1174 (S.D. Cal. 2012).

Here, plaintiffs allege that they suffered economic injury because they paid a premium for TRESemmé Naturals products over comparable products that are not marketed as "natural." (FAC ¶ 17.) The "extra money paid" for these products above what plaintiffs would have paid but for defendant's allegedly deceptive representations constitutes economic injury. Kwikset, 51 Cal. 4th at 330; see also Mazza v. Am. Honda Motor Co., 666 F.3d 581, 595 (9th Cir. 2012) (holding that plaintiffs' allegations that "class members paid more . . . than they otherwise would have paid . . . because Honda made deceptive claims" sufficiently alleged economic injury). Even if plaintiffs have not alleged what they would have paid absent defendant's alleged misrepresentations that the products were free from artificial ingredients, they are not required to do so in order to allege economic injury under the UCL. See Hinojos, 718 F.3d at 1105 (noting that the UCL does not require a plaintiff "to plead how much he would have paid for the merchandise had he known its true value"). Accordingly,

plaintiffs have sufficiently alleged that they suffered economic injury as a result of defendant's misrepresentations. See Kwikset, 51 Cal. 4th at 323.

2. Causation

In order to have standing under the UCL, a plaintiff must allege not only that he suffered economic injury, but also that there was a "causal connection" between that injury and the defendant's alleged misrepresentation. Kwikset, 51 Cal. 4th at 326. Because "reliance is the causal mechanism of fraud," a plaintiff "proceeding on a claim of misrepresentation must demonstrate actual reliance on the allegedly deceptive or misleading statements" in order to have standing under the UCL. In re Tobacco II Cases, 46 Cal. 4th 298, 326 (2009).[2]

The California Supreme Court has recognized that a presumption of actual reliance arises whenever a misrepresentation is material--that is, if a reasonable person would "attach importance to its existence or nonexistence in determining his choice of action." Id. As a result, a plaintiff "need only allege a misrepresentation of a material fact" in order "[t]o satisfy the requirement of pleading actual reliance, or causation, in connection with false advertising for purposes of the UCL." Chapman v. Skype Inc., 220 Cal. App. 4th 217, 229 (2d Dist. 2013). "The materiality of a misrepresentation is generally a question of fact unless the misrepresentation was so

[2] This requirement also applies to claims brought under the "unlawful" prong of the UCL if "the predicate unlawful conduct is based on misrepresentations," as is allegedly the case here. Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1363 (4th Dist. 2010).

obviously unimportant that the trier of fact could not reasonably conclude that a reasonable person would have been influenced by it." Id.

Here, plaintiffs allege that they "viewed the labels" and "paid a premium for those products over comparable products that do not purport to be natural." (FAC ¶¶ 6-7, 17.) Those allegations permit the reasonable inference that plaintiffs purchased the products on the basis of representations made on the label. See In Re Tobacco II Cases, 46 Cal. 4th at 326. Although defendant contends that plaintiffs have not identified the specific aspect of the product labels that influenced their decision to purchase the products, plaintiffs are not required to do so in order to establish standing.[3] See Kwikset, 51 Cal. 4th at 328 ("While a plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct, the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct."). Rather, a plaintiff need only allege that defendant's misrepresentations were a "substantial factor" in influencing her decision to purchase the product. Engalla v. Permanente Med. Grp., 15 Cal. 4th 951, 977 (1997).

[3] Defendant's contention that plaintiffs must identify the particular aspect of the labeling they relied on is particularly inappropriate where, as plaintiffs allege, the labeling of the TRESemmé Naturals products was part of a larger advertising campaign that emphasized the products' "natural" qualities. See In re Tobacco II Cases, 46 Cal. 4th at 328 ("[W]here, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements.").

Plaintiffs have alleged that defendant's representations were a substantial factor in their decision to purchase the product--so much so, in fact, that plaintiffs paid a significant premium over comparable products not marketed as natural. (See FAC ¶ 17 (comparing cost of TRESemmé Naturals products and comparable TRESemmé products on Drugstore.com).)

Even if defendant were correct that plaintiffs have not alleged that they relied upon any particular representation or aspect of the product label, plaintiffs have sufficiently alleged that the product labels contained material misrepresentations. Plaintiffs allege that consumers are "increasingly concerned" about the effects of synthetic chemicals, pay a premium for natural products, and that, as a result, the nationwide market for "natural" products exceeds $100 billion dollars. (FAC ¶ 9.) In light of these concerns, plaintiffs allege that the representation that the products contain only natural ingredients is "material to a reasonable consumer." (Id. ¶ 14.) Those allegations are sufficient to invoke a presumption of reliance.[4] See In re Tobacco II Cases, 46 Cal. 4th at 326; see also, e.g., Bruton v. Gerber Prods. Co., 961 F. Supp. 2d 1062, 1089 (N.D. Cal. 2013) (holding that plaintiff sufficiently alleged that

[4] The presumption of reliance is not merely an evidentiary presumption. In fact, courts routinely apply the presumption of reliance at the pleading stage to determine whether a plaintiff has standing under the UCL. See, e.g., Chapman, 220 Cal. App. 4th at 229; Plascencia v. Lending 1st Mortg., 259 F.R.D. 437, 448-49 (N.D. Cal. 2009) ("Just as the materiality of the interest rate and negative amortization terms permits a presumption of reliance in connection with the fraud claim, it also permits a presumption of reliance for the purposes of Proposition 64 standing.").

defendant's health claims and nutrient content claims were material based on allegations about consumer behavior and consumers' understanding of product labels).

Accordingly, because plaintiffs have sufficiently alleged economic injury and reliance, they have standing to bring this action under California's consumer protection statutes, see Kwikset, 51 Cal. 4th at 322, as well as Article III, see Clapper, 133 S.Ct. at 1147.

B. Radiant Volume Conditioner Claims

In the Ninth Circuit, there is "no controlling authority" on whether a plaintiff in a class action has standing to assert claims based on products he did not purchase. Miller v. Ghirardelli Chocolate Co., 912 F. Supp. 2d 861, 868 (N.D. Cal. 2012). However, "[t]he 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." Id. at 869; accord Wilson v. Frito-Lay N. Am., Inc., 961 F. Supp. 2d 1134, 1140-41 (N.D. Cal. 2013). "Factors that . . . 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." Id. at 1141.

Although plaintiffs allege that they purchased five other products from the TRESemmé Naturals line, neither plaintiff alleges that she purchased defendant's Radiant Volume conditioner. (See FAC ¶¶ 6-7.) However, the packaging of the

Radiant Volume conditioner is strikingly similar to the five products that plaintiffs purchased: it contains the same "Naturals" label and prominent green leaf as the other five products and makes the same claim of "silicone free conditioning" as the two conditioners that plaintiffs purchased. (Id. ¶ 11.) Plaintiffs have therefore alleged that the mislabeling of the Radiant Volume conditioner misled other purchasers in the same way that the mislabeling of defendant's other five products misled them. See, e.g., Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 378 (N.D. Cal. 2010) (holding that, "[a]lthough plaintiff did not purchase each type of beverage carrying the misleading label, his claims are reasonably coextensive with those of absent class members").

Accordingly, because the Radiant Volume conditioner is "substantially similar" to products that plaintiffs purchased, Miller, 912 F. Supp. 2d at 869, plaintiffs have standing to bring claims on behalf of putative class members alleging that the Radiant Volume conditioner was mislabeled.

C. Claims Based On Other States' Consumer Protection Laws

In a class action, "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Lewis v. Casey, 518 U.S. 343, 347 (1996). "At least one named plaintiff must have standing with respect to each claim the class representatives seek to bring." In re Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1107 (N.D. Cal. 2007). Therefore, when "a representative plaintiff is lacking for a

particular state, all claims based on that state's laws are subject to dismissal." In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009) (citing Ditropan, 529 F. Supp. 2d at 1106-07) (alteration in original).

Here, although Morales only alleges that she purchased TRESemmé Naturals products in California, (see FAC ¶ 6), she asserts claims under the consumer protection laws of twenty-one different states, (see id. ¶ 52). Likewise, although Cohen only alleges that she purchased TRESemmé Naturals products in Massachusetts, (see FAC ¶ 7), she asserts claims under the consumer protection laws of those states, (see id. ¶ 60). Because neither Morales nor Cohen is a resident of any state other than California or Massachusetts, respectively, and did not purchase defendant's products in any state but her own, plaintiffs do "not have standing to assert a claim under the consumer protection laws of the other states named in the Complaint." Pardini v. Unilever U.S., Inc., 961 F. Supp. 2d 1048, 1061 (N.D. Cal. 2013); see also, e.g., In re Apple & AT&TM Antitrust Litig., 596 F. Supp. 2d 1288, 1309 (N.D. Cal. 2008) ("Plaintiffs lack standing to bring consumer protection claims in the forty states where no named Plaintiff resides.").

Plaintiffs contend that the court should resolve this question at class certification, rather than on a motion to dismiss. However, the Ninth Circuit has emphasized that, with narrow exceptions not relevant here, a district court should "addresss[] the issue of standing before it addresse[s] the issue

of class certification."[5] Easter v. Am. W. Fin., 381 F.3d 948, 962 (9th Cir. 2004); see also Lee v. Oregon, 107 F.3d 1382, 1390 (9th Cir. 1997) ("Standing is a jurisdictional element that must be satisfied prior to class certification." (citations and internal quotation marks omitted)). Because plaintiffs' lack of standing is "plain enough from the pleadings," it is an appropriate basis for dismissal even if it overlaps with issues typically raised at class certification. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982).

Plaintiffs also argue that even if this question is appropriate for resolution on a motion to dismiss, plaintiffs have standing to bring claims on behalf of purchasers in other states so long as the consumer protection laws of those states are materially identical to the CLRA or the MCPA. This argument conflates the inquiry required under Rule 23[6] with the inquiry

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[5] Plaintiffs rely principally on In re Hydroxycut Marketing & Sales Practices Litig., 801 F. Supp. 2d 993, 1004-05 (S.D. Cal. 2011), as well as several district court decisions from the Second and Third Circuits, in support of the proposition that the court should determine plaintiffs' standing to bring class-wide claims at class certification rather than on a motion to dismiss. Hydroxycut's suggestion that courts should defer questions of standing for class certification is inconsistent with controlling Ninth Circuit precedent. See Easter, 381 F.3d at 962. That suggestion is also at odds with Hydroxycut's observation that "the issue of individual standing is separate and distinct from the inquiry of whether named plaintiffs can meet the requirements to certify a class under Rule 23." 801 F. Supp. 2d at 1005.

[6] Federal Rule of Civil Procedure 23 describes the requirements for class certification. See Fed. R. Civ. P. 23. "To be certified, the putative class and sub-classes must meet the four threshold requirements of Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation. Moreover, the proposed class must satisfy the requirements of Rule 23(b), which defines three

into whether Morales has standing to assert those claims in the first instance. See In re Genentech, Inc. Sec. Litig., Civ. No. 88-4038 DLJ, 1990 WL 120641, at *6 n.4 (N.D. Cal. June 6, 1990) ("The requirements for individual standing represent a threshold inquiry that must be analyzed separate and apart from Rule 23. If the named plaintiffs for the proposed . . . class in this action do not have standing, the necessary consequence is dismissal . . . of the claim, not denial of class certification."

The cases that plaintiffs cite in support of this argument do not even discuss standing; rather, those cases address whether differences in state law undermine commonality, see, e.g., In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Marketing Litig., 270 F.R.D. 521, 529 (N.D. Cal. 2010), or predominance, see, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022-23 (9th Cir. 1998). Plaintiffs have not cited, and the court cannot identify, any case holding that a plaintiff may assert class-wide claims that no named plaintiff has standing to bring. By contrast, numerous cases make clear that a plaintiff may not do so. See, e.g., Ditropan, 529 F. Supp. 2d at 1107.

Accordingly, because neither plaintiff has standing to sue under the laws of any state but her own, the court must grant defendant's motion to dismiss plaintiffs' claims on behalf of the Class to the extent they arise under the laws of states other than California and Massachusetts.

III. Motion to Dismiss

On a motion to dismiss under Rule 12(b)(6), the court

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different types of classes." Leyva v. Medline Indus. Inc., 716 F.3d 510, 512 (9th Cir. 2013) (citations omitted).

must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a complaint pleads facts that are "merely consistent with a defendant's liability," it "stops short of the line between possibility and plausibility." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

A. Reasonable Consumer Test

California's UCL prohibits "any unlawful, unfair, or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200; see Cel-Tech Comm'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999) (describing application of UCL). California's CRLA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770; see Meyer, 45 Cal. 4th at 639 (describing application of CLRA). "The standard for California's UCL, FAL, and CLRA is the 'reasonable consumer' test, which requires a plaintiff to show that members of the public are likely to be deceived by the business practice or advertising at issue." Brazil, 935 F. Supp. 2d at 962-63 (N.D. Cal. 2013) (citing Williams v. Gerber Prods., 552 F.3d 934, 938 (9th Cir. 2008)).

Massachusetts's MCPA prohibits "unfair method[s] of

competition" or "unfair or deceptive acts or practices" when used "in the conduct of any trade or commerce." Mass. Gen. Laws. ch. 93A § 11; see Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d 47, 55-56 (1st Cir. 1998) (analyzing case law defining "unfair or deceptive acts or practices"). The MCPA likewise incorporates a "reasonable consumer" test. See Aspinall v. Philip Morris Cos., 442 Mass. 381, 397 (2004) (holding that an advertisement is deceptive only "when it has the capacity . . . to entice a reasonable consumer to purchase the product").

As a general rule, whether a business practice is likely to deceive a reasonable consumer is a "question of fact" that cannot be resolved on a motion to dismiss. Williams, 552 F.3d at 938; see also, e.g., Von Koenig v. Snapple Beverage Corp., 713 F. Supp. 2d 1066, 1079 (E.D. Cal. 2010) (Damrell, J.); Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 134-35 (6th Dist. 2007) (noting that this inquiry is a "question of fact which requires consideration and weighing of evidence from both sides"). Dismissal is appropriate only in the "rare situation" where "the advertisement itself made it impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived." Williams, 552 F.3d at 939.

Here, plaintiffs allege that several aspects of the product labels are misleading: the use of the term "Naturals," the green leaf that is prominently displayed on the bottle, and the claims that the product is "silicone free" or "lower in sulfates." (FAC ¶ 11.) Plaintiffs allege that a reasonable consumer would take these representations to indicate that defendant's products are "natural" and free of "synthetic

ingredients." (Id. ¶ 2.) Defendant argues that reasonable consumers would not be misled by those product labels because they understand that cosmetics are not natural--that "there are neither shampoo trees nor conditioner streams." (Def.'s Mem. at 12:2-3 (citing Balser v. Hain Celestial Grp., Inc., Civ. No. 13-5604 R, 2013 WL 6673617, at *2 (C.D. Cal. Dec. 18, 2013).) In support of this contention, defendant points to numerous FDA regulations referring to the "manufacture" of cosmetic products and argues that those regulations foreclose the possibility that cosmetics can be "natural." (Id. at 11-12 (citing 21 C.F.R. § 700.3(b)-(k)).)

Despite defendant's contention that a cosmetic product cannot be natural, numerous courts have denied motions to dismiss claims alleging that cosmetic products were falsely labeled as "natural". See, e.g., Brown v. Hain Celestial Grp., 913 F. Supp. 2d 881, 898 (N.D. Cal. 2012) (denying motion to dismiss when defendant claimed that various cosmetic products were "pure, natural, and organic"); Fagan v. Neutrogena Corp., Civ. No. 5:13-1316 SVV OP, 2014 WL 92255, at *2 (C.D. Cal. Jan. 8, 2014) (denying motion to dismiss when defendant claimed that its sunscreen was "100% naturally sourced"). 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. Defendant's argument leads to the opposite conclusion--namely, that labeling cosmetic products manufactured from artificial ingredients as "natural" is misleading.

Defendant then argues that the term "natural" is not misleading because that term is "vague and ambiguous" and "lacks

an objective meaning." (Def.'s Mem. at 11:1-8 (citing Balser, 2013 WL 6673617, at *1).) Although the FDA has not defined the term "natural" in the context of cosmetics labeling, see Astiana v. Hain Celestial Grp., 905 F. Supp. 2d 1013, 1016 (N.D. Cal. 2012), plaintiffs allege that their understanding of the term "natural" reflects the dictionary definition of the term--that is, that the products' ingredients are "existing in or produced by nature" and are "not artificial." (FAC ¶ 2 n.1 (citing Merriam-Webster Dictionary, www.merriam-webster.com/dictionary).)

Even if plaintiffs had not proffered an "objective meaning" of the term "natural," they need not do so; the relevant question is the meaning that consumers would attach to the term. As many courts have observed, this is generally not a question that can be resolved on a motion to dismiss. See, e.g., Brown, 913 F. Supp. 2d at 899; Vicuna v. Alexia Foods, Inc., Civ. No. 11-6119 PJH, 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., Civ. No. 13-690 SC, 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"). The court therefore cannot conclude at this stage of the litigation that a reasonable consumer would not be misled by the

term "natural" or "Naturals."[7]

Finally, defendant argues that its labels were not misleading because the label on the back of each bottle accurately lists the ingredients contained in the product. (Def.'s Mem. at 8-9.) The Ninth Circuit has explicitly foreclosed the use of this argument:

> 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.

Williams, 552 F.3d at 939-40; see also Lam v. Gen. Mills, Inc., 859 F. Supp. 2d 1097, 1105 (N.D. Cal. 2012) (citing Williams and holding that the "ingredients list cannot be used to correct the message that reasonable consumers may take from the rest of the

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[7] Defendant argues that even if the term "natural" may be misleading, the term "TRESemmé Naturals" is not. This argument is meritless. The term "Naturals" is a derivative of "natural" and plaintiffs allege that it connotes the same meaning--namely, that the products are free of synthetic ingredients. (FAC ¶ 2.) Courts have specifically held that a defendant cannot insulate itself from liability for a misleading term by adding an "s" to the end of it. See, e.g., Brown, 913 F. Supp. 2d at 898 (denying motion to dismiss a claim alleging that the "Avalon Organics" brand name was misleading).

To the extent that defendant claims the term "Naturals" cannot be misleading because it is part of a brand name, that argument is also incorrect. See, e.g., id. (holding that the "Avalon Organics" brand name could mislead reasonable consumers because it "could reasonably be interpreted to mean that the product is being sold as organic or that it otherwise meets a compositional standard for the term 'organic'"); Bronco Wine Co. v. Jolly, 129 Cal. App. 4th 988, 1006 (3d Dist. 2005) (holding that geographic brand names containing the term "Napa" may be "inherently misleading" to the extent they are "suggestive of a false or misleading source of the grapes used in making the wine").

packaging").

To the extent that the cases defendant cites suggest otherwise, those cases are either inconsistent with Williams or are distinguishable because the ingredient list merely confirmed the representation on the front of the package. See, e.g., Viggiano v. Hansen Natural Corp., 944 F. Supp. 2d 877, 892 (C.D. Cal. 2013) (holding that soda labels advertising "all natural flavors" were not misleading where the "natural fruit from which the characterizing flavor is derived is listed on the statement of ingredients"). Here, by contrast, plaintiffs allege that defendant's product labels and use of the term "Naturals" were misleading because the products contain chemicals and other synthetic ingredients. Even if defendant disclosed those ingredients on the back label, it is settled law that it may not "rely on the ingredient list" to correct misleading labels. Williams, 552 F.3d at 939. Accordingly, because plaintiffs have adequately alleged that defendant's labels were likely to mislead a reasonable consumer, see id. at 938, the court must deny defendant's motion to dismiss plaintiffs' UCL, CLRA, and MCPA claims.

B. Rule 9(b)

Although none of the consumer protection statutes at issue in this action require a showing of fraud, a plaintiff bringing a claim under these statutes must satisfy Federal Rule of Civil Procedure 9(b) if her claim alleges a course of fraudulent conduct.[8] Kearns v. Ford Motor Co., 567 F.3d 1120,

[8] The Ninth Circuit has emphasized that Rule 9(b) applies to state-law claims brought in federal court. Vess, 317 F.3d at

1125 (9th Cir. 2009); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003). Rule 9(b) requires a plaintiff whose claim "sounds in fraud" to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Under Rule 9(b), "[a]verments of fraud must be accompanied by the 'who, what, where, when, and how' of the misconduct charged." Vess, 317 F.3d at 1106 (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)). In addition to identifying the particulars of the alleged fraud, Rule 9(b) requires that a plaintiff "must 'set forth what is false or misleading about a statement, and why it is false.'" Rubke v. Capitol Bancorp Ltd., 551 F.3d 1156, 1161 (9th Cir. 2009) (quoting Yourish v. Cal. Amplifier, 191 F.3d 983, 993 (9th Cir. 1999)).

"In a deceptive advertising case, Rule 9(b) requires that the plaintiff(s) identify specific advertisements and promotional materials; allege when the plaintiff(s) were exposed to the materials; and explain how such materials were false or misleading." Janney v. Mills, 944 F. Supp. 2d 806, 818 (N.D. Cal. 2013). Here, plaintiffs provide a copy of each of the allegedly misleading product labels and identify several features that they contend are misleading: the term "naturals," the use of a green leaf, and the claim that the product is "silicone free" or contains "lower sulfates." (FAC ¶ 11.) Plaintiffs also identify the locations of the stores where they purchased defendant's products after viewing the product labels and the

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1102. Rule 9(b) specifically applies to claims brought under the UCL and CLRA, see Kearns, 567 F.3d at 1125, and the MCPA, see First Choice Armor & Equip. Co. v. Toyobo Am., Inc., 717 F. Supp. 2d 156, 163 (D. Mass. 2010).

dates on which they made those purchases. (Id. ¶¶ 6-7.) Finally, plaintiffs allege that the product labels are misleading because each product contains three to twelve artificial and unnatural ingredients, all of which are identified in the Complaint. (Id. ¶¶ 2, 16.)

District courts in California have found that similar allegations are sufficient to satisfy Rule 9(b). For instance, one court held that plaintiffs who provided labels from cooking oils marketed as "100% natural," that they viewed those labels throughout the class period, and that the labels were false because the oils were made from genetically modified crops satisfied Rule 9(b), even though plaintiffs failed to specify the specific dates on which they viewed the product labels. In re ConAgra Foods Inc., 908 F. Supp. 2d 1090, 1100-01 (C.D. Cal. 2010). Another judge in this district held that a plaintiff who submitted copies of Snapple labels containing the term "all natural" and alleged that the labels were false because Snapple contained high-fructose corn syrup satisfied Rule 9(b). Von Koenig, 713 F. Supp. 2d at 1077. Plaintiff's allegations are at least as detailed as the allegations in ConAgra and Von Koenig and are therefore sufficient to satisfy Rule 9(b). See Janney, 944 F. Supp. 2d at 818.

Defendant contends that even if plaintiffs have described the alleged misrepresentations with adequate specificity, they have not satisfied Rule 9(b) because they have not adequately alleged reliance. As a preliminary matter, it is not clear whether allegations of reliance are subject to Rule 9(b)'s heightened pleading requirement. Compare Andrews Farms v.

Calcot, Ltd., 527 F. Supp. 2d 1239, 1252 (E.D. Cal. 2007) (O'Neill, J.) (holding that Rule 9(b) does not "require[] more particular pleading for the element of reliance"), and Anthony v. Yahoo Inc., 421 F. Supp. 2d 1257, 1264 (N.D. Cal. 2006) (holding that the "heightened standards" of Rule 9(b) do not apply to allegations of reliance), with Kane v. Chobani, Inc., --- F. Supp. 2d ----, Civ. No. 12-2425 LHK, 2014 WL 657300, at *10 (N.D. Cal. Feb. 20, 2014) (holding that the plaintiffs' allegations of reliance "fail[] to meet the heightened pleading requirement under Rule 9(b)"), and In re Countrywide Fin. Corp. Sec. Litig., 588 F. Supp. 2d 1132, 1198 (C.D. Cal. 2008) (holding that "[t]he reliance element is subject to the pleading requirements of Rule 9(b) because it is one of the 'circumstances constituting fraud'").

The court need not resolve this question, however, because plaintiffs have adequately pled reliance even under Rule 9(b). Plaintiffs allege that they understood the product labels to mean that the products were free of artificial or unnatural ingredients and that they paid a premium for those products as a result. Those allegations are sufficiently particular to satisfy Rule 9(b). See, e.g., ConAgra, 908 F. Supp. 2d at 1100-1101 (holding that the plaintiffs satisfied Rule 9(b) when they "alleged that the phrase '100% natural' meant that Wesson Oil was not made from genetically modified organisms, and that they purchased the product based on this understanding"); In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Prods. Liability Litig., 754 F. Supp. 2d 1145, 1172 n.18 (C.D. Cal. 2010) ("Allegations of representations from product labels

and statements that, had consumers not been deceived by the labels, they would not have purchased the product, are sufficient to plead under Rule 9(b)."); Werdebaugh v. Blue Diamond Growers, Civ. No. 12-2724 LHK, 2013 WL 5487236, at *14 (N.D. Cal. Oct. 2, 2013) (holding that a plaintiff sufficiently alleges reliance under Rule 9(b) when she states "why a reasonable consumer would be misled" by allegedly misleading food labels).

Accordingly, because plaintiffs have alleged the "circumstances constituting fraud" with sufficient particularity, see Fed. R. Civ. P. 9(b), the court must deny defendant's motion to dismiss on this basis.

IT IS THEREFORE ORDERED that defendant's motion to dismiss be, and the same hereby is, GRANTED with respect to plaintiffs' claims on behalf of similarly situated purchasers to the extent that they arise under the laws of states other than California and Massachusetts, and DENIED in all other respects.

Plaintiffs have twenty days from the day this Order is signed to file an amended Complaint, if they can do so consistent with this Order.

Dated: April 9, 2014

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE