UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMIE JOSLIN, et al.,

Plaintiffs,

v.

CLIF BAR & COMPANY,

Defendant.

Case No. 4:18-cv-04941-JSW

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, WITH LEAVE TO AMEND AND SETTING CASE MANAGEMENT CONFERENCE

Re: Dkt. No. 20

Now before the Court for consideration is the motion to dismiss filed by Clif Bar & Company ("Clif Bar"). The Court has considered the parties' papers, relevant legal authority, and the record in this case, the Court GRANTS Clif Bar's motion and GRANTS Plaintiffs leave to amend.

BACKGROUND

Plaintiffs, Jamie Joslin ("Ms. Joslin") and Courtney Davis ("Ms. Davis") (collectively, "Plaintiffs"), bring this putative class action on behalf of themselves and on behalf of purchasers of Clif Bar's Clif Bar® White Chocolate Macadamia Nut Bar and Luna® White Chocolate Macadamia Bar (collectively the "Products"). Plaintiffs allege the Products were "advertised and sold to mislead consumers into believing that the bars contain white chocolate, when they in fact do not." (Compl. ¶ 2.) Plaintiffs allege the Products lack the required amount of "milk fat and other dairy products" which "is so much of what gives white chocolate its value in the eyes of reasonable consumers." (*Id.*, ¶ 33.) The Products' ingredients list includes cocoa butter but does not include any of the dairy ingredients cited in regulations issued by the Food and Drug Administration ("FDA") regarding the standard of identity for white chocolate. (*See id.*, ¶ 18 &

Ex. B.)

Plaintiffs further allege they relied on Clif Bar's representations that the Products contain real white chocolate and allege they were "deceived into purchasing a more inferior product than they had bargained for." (*Id.*, ¶ 3; *see also id*., ¶ 31.) Ms. Joslin, a resident of California, alleges she purchased a Luna® White Chocolate Macadamia bar in Riverside, California on January 9, 2018. Ms. Joslin alleges that the "phrase 'White Chocolate' explicitly represents that the Product contains white chocolate, but it in fact contains inferior confectionary ingredients that are not white chocolate at all." (*Id.*, ¶ 13.) Ms. Joslin alleges she was denied the benefit of her bargain and alleges that "should [she] encounter the [Luna® White Chocolate Macadamia bar] in the future, she could not rely on the truthfulness of the packaging, absent corrective changes to the packaging." (*Id.*)

Ms. Davis, a resident of New York, alleges she purchased a Clif Bar® White Chocolate Macadamia Nut bar in Manhattan, New York, on March 29, 2018. Ms. Davis alleges that the phrase "'White Chocolate Macadamia Nut implicitly promises to consumers that the [Clif Bar® White Chocolate Macadamia Nut bar] contains white chocolate when it in fact does not," and so she "was denied the benefit of her bargain." (*Id.*, ¶ 14.) Ms. Davis, like Ms. Joslin, alleges that "[s]hould [she] encounter the [Clif Bar® White Chocolate Macadamia Nut bar] in the future, she could not rely on the truthfulness of the packaging, absent corrective changes to the packaging." (*Id.*)

Based on these and other allegations, which the Court shall address as necessary, Plaintiffs assert claims for violations of: California's Consumer Legal Remedies Act, Civil Code sections 1750, *et seq.* (the "CLRA claim"); California's False Advertising Law, Business and Professions Code sections 17500, *et seq.* (the "FAL claim"); California's Unfair Competition Law, Business and Professions Code sections 17200, *et seq.* (the "UCL claim"); New York's Deceptive and Unfair Trade Practices Act, N.Y. General Business Law ("GBL") section 349; and New York's False Advertising Law, GBL sections 350 and 350(a)(1) (collectively, the "GBL claims"). Plaintiffs also assert a claim for common law fraud.

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ANALYSIS

A. Plaintiffs Fail to Allege Article III Standing to Pursue Injunctive Relief.

1. Applicable Legal Standard.

Clif Bar argues that Plaintiffs lack Article III standing to pursue injunctive relief. Because questions of Article III standing go to a federal court's subject-matter jurisdiction, an argument that a party lacks standing is "properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), not Rule 12(b)(6)." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *see also Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (where plaintiffs lack standing, a suit should be dismissed under Rule 12(b)(1)). A motion to dismiss under Rule 12(b)(1) may be "facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where, as here, a defendant makes a facial attack on jurisdiction, factual allegations of the complaint are taken as true. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion dismiss, [courts] presume that general allegations embrace those specific facts that are necessary to support the claim.") (internal citation and quotations omitted). The plaintiff is then entitled to have those facts construed in the light most favorable to him or her. *Fed'n of African Am. Contractors*, 96 F.3d at 1207.

A party seeking to invoke a court's jurisdiction bears the burden of demonstrating standing to sue. *Lujan*, 504 U.S. at 561. To meet this burden, a party must show that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robbins*, __ U.S. __, 136 S.Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560-61). At the pleading stage, "the plaintiff must 'clearly … allege facts demonstrating' each element." *Id.* (alterations in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Additionally, a plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000); *see also Center for Biological Diversity v. Mattis*, 868 F.3d 803, 815 (9th Cir. 2017).

In order to show they have standing to seek injunctive relief, Plaintiffs must "demonstrate that [they have] suffered or [are] threatened with a 'concrete and particularized' legal harm, coupled with a 'sufficient likelihood that [they] will again be wronged in a similar way.'" *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (first quoting *Lujan*, 504 U.S. at 560; then quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). The latter inquiry turns on whether the plaintiff has a "real and immediate threat of repeated injury." *Id.* The threat of future injury cannot be "conjectural or hypothetical" but must be "certainly impending" to constitute an injury in fact for injunctive relief purposes. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018).

In *Davidson*, the Ninth Circuit held that a consumer may have standing to sue for injunctive relief based on allegedly false advertising even if they "now know[] or suspect[] that the advertising was false at the time of the original purchase[.]" 889 F.3d at 970. The *Davidson* court provided two examples of how a previously deceived plaintiff could allege standing to seek injunctive relief. In the first instance, a plaintiff may allege they would want to purchase the product but they are unable to rely on the labels and so will refrain from purchasing a product they want. *Id.* at 970-71. In the second example, a plaintiff might allege that they would purchase a product in the future, despite the fact it was once marred by false advertising or labeling, as [they] may reasonably, but incorrectly, assume the product was improved." *Id.* at 971. In either example, in addition to alleging facts that demonstrate they are unable to rely on the advertising or labelling, a plaintiff must allege they would want to or intend to purchase the product in the future.

2. Plaintiffs Do Not Allege Facts Showing a Cognizable Threat of Future Harm.

Clif Bar argues that Plaintiffs have not alleged a cognizable threat of future harm under *Davidson*. First, Clif Bar argues that because Plaintiffs do not allege that they want to or intend to purchase the Products again, they cannot show an inability to rely on the Products' labels. Second, Clif Bar argues that "Plaintiffs have several means by which to determine the existence of 'real' white chocolate in the Products in the future." (Mot. at 15:4-10.) Therefore, Clif Bar contends they can rely on the Products' labels.

In *Davidson*, the plaintiff purchased wet wipes labeled as "flushable" because she believed

they "would be better for the environment, and more sanitary, than non-flushable wipes." 889 F.3d at 961. The plaintiff also alleged she believed that such wipes would be "'*suitable* for disposal down a toilet,' not simply '*capable* of passing from a toilet to the pipes after one flushes.'" *Id.* (emphasis in original). Moreover, the plaintiff alleged that the ordinary meaning of flushable as understood by reasonable consumers is that a product breaks down within seconds or minutes of disposal. *Id.* (discussing a dictionary definition of "flushable" and statements by a "nonprofit organization of water quality professionals" to support reasonable consumer's understanding of the meaning of the word "flushable"). However, the plaintiff alleged that, contrary to the statement on the label that the wipes were "flushable," the wipes were not "suitable" for disposal down a toilet because they did not break down quickly once flushed. *Id.* at 962. Therefore, the plaintiff alleged that the wipes were not "flushable" in the way a reasonable consumer would understand the word to mean. *Id.* The plaintiff also alleged she had paid a premium for "flushable" wipes, that were not flushable at all, as compared with "non-flushable" wipes. *Id.* at 961. The plaintiff also alleged that she regularly visited stores selling the wipes in question and desired to purchase truly flushable wipes. *Id.* at 970-71.

The court found these allegations were sufficient to establish standing for injunctive relief. *Id.* at 972. In so finding, the court reasoned that if the plaintiff encountered the nominally "flushable" wipes in a store, she would have no way of knowing whether the representation "flushable" was true without first purchasing the product and testing them for herself. *Id.* at 970-72. Unlike an ingredient list that discloses the actual ingredients in a food product, for example, nothing on the packaging of the wipes would confirm or deny her suspicions that the product was still not "flushable." *Id.* Furthermore, because the plaintiff alleged that she would like to purchase truly flushable wipes, gave reasons to support her desire to purchase the wipes, and alleged she regularly visited stores carrying the wipes, her inability to rely on the truth of the packaging constituted a cognizable risk of future harm. *Id.* at 971-72.

Plaintiffs allege that if they encounter the Products in the future, they cannot rely on the truthfulness of the Products' packaging. However, Plaintiffs do not allege they want to or intend to purchase the Products in the future. Accordingly, they fail to allege facts to show they have

standing under *Davidson.* *Compare Davidson,* 889 F.3d at 791 (concluding allegations sufficient to allege standing where plaintiff's desire to purchase flushable wipes in the future were not discounted by other allegations in the complaint), *with Lanovaz v. Twinings N. Am., Inc.*, 726 Fed. App'x 590, 591 (9th Cir. 2018) (finding, on summary judgment, that where plaintiff stated at deposition that she would not purchase the products again even if misleading labels were removed, statements in interrogatories that she "would consider" buying the products were not sufficient to show likelihood of actual or imminent injury).

Clif Bar also notes Plaintiffs alleged they would not have purchased the Products if they had known they did not contain white chocolate. (*See* Compl. ¶ 31.) Clif Bar reasons that Plaintiffs cannot possibly be deceived in the future because white chocolate is not listed on the Products' ingredient list and the front of the package includes the phrase "Natural Flavor," thereby disclosing to Plaintiffs that "real" white chocolate is not an ingredient. Although some part of a product's packaging may be misleading, when another part of that product's packaging discloses the truth of the product, district courts have held that a plaintiff's knowledge of the truth forecloses the risk of future harm.

For example, in *Rahman v. Motts LLP*, the plaintiff alleged that a "No Sugar Added" label misrepresented that the apple juice product in question contained less sugar and was healthier than other apple juices, when in fact it was not. No. 13-cv-03482-SI, 2018 WL 4585024, at *3 (N.D. Cal. Sept. 25, 2018). The court concluded that the plaintiff lacked standing to seek injunctive relief because "whatever his prior state of knowledge, Rahman is now fully aware that 'No Sugar Added' simply means that no sugar was added to a product." *Id.*, 2018 WL 4585024, at *2 (internal quotation marks omitted). Therefore, even though the plaintiff alleged he intended to purchase the product in the future, the court found the plaintiff would be "able to rely on the packaging now that he understands the 'No Sugar Added' label" and, therefore, was unable to establish a future threat of cognizable harm under *Davidson*. *Id.*, 2018 WL 4585024, at *3.

Similarly, in *Cordes v. Boulder Brands USA, Inc.*, the plaintiff alleged he purchased pretzels contained in an opaque container with greater than forty percent empty space, or "slack-fill." No. CV 18-6534 PSG (JCx), 2018 WL 6714323, at *1 (C.D. Cal. Oct. 17, 2018). The

plaintiff alleged that this empty space led him to believe that the container contained more pretzels than it did. *Id.* The court distinguished the facts at issue from the facts in *Davidson* on the basis that in that case "and the other cases cited in that opinion … the plaintiff could not easily discover whether a previous misrepresentation had been cured without first buying the product at issue." *Id.*, 2018 WL 6714323, at *4. The court concluded the plaintiff lacked standing for injunctive relief because he had "not adequately explained why he will be deceived by slack-fill in the future, now that he knows that he can easily determine the number of pretzels in each package by simply reading the label," which included the net weight of the product. *Id.*

The Court concludes that the facts in the present case are more analogous to *Rahman* and *Cordes* than to *Davidson*. Unlike *Davidson*, where the plaintiff could not know without purchasing the flushable wipes whether the wipes were truly flushable, Plaintiffs do not need to purchase the Products again in order to know whether the Products contain real white chocolate. *See Davidson*, 889 F.3d at 971-72. Instead, Plaintiffs need only inspect the ingredient list to discover that the Products do not contain white chocolate. Additionally, the Products' labels contain the phrase "Natural Flavor." Plaintiffs do not address that phrase in their complaint, but that phrase may serve to show the characterizing taste of white chocolate and macadamia nut is from flavor rather than the real ingredient. *See* 21 C.F.R. § 101.22(i)(1)(i).[1]

If Plaintiffs do not want products that do not contain real white chocolate, the Court is hard pressed to see how Plaintiffs would be able to allege the requisite future harm. However, at this stage, the Court cannot conclude amendment would be futile. *Compare Anthony v. Pharmavite*, No. 18-cv-02636-EMC, 2019 WL 109446, at *6 (N.D. Cal. Jan. 4, 2019) (finding that plaintiffs failed to allege standing where "the import Plaintiffs' allegations is that [the defendant] can do nothing to alter its advertising or product to make biotin supplements beneficial to Plaintiffs").

For these reasons, the Court finds that Plaintiffs fail to allege facts establishing Article III standing to pursue injunctive relief, and the Court GRANTS, IN PART, Clif Bar's motion on this

[1] Plaintiffs include argument in their opposition brief about the meaning of this phrase and the manner in which it could be interpreted. However, there are no such allegations in the Complaint.

basis and GRANTS Plaintiffs leave to amend. *See, e.g.*, *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

B. Plaintiffs Fail to State Claims for Relief.

1. Applicable Legal Standards.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. A court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Pursuant to *Twombly*, a plaintiff cannot merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

As a general rule, "a district court may not consider any material beyond the pleadings in ruling on Rule 12(b)(6) motion." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citation omitted). However, documents subject to judicial notice may be considered on a motion to dismiss. *See Mack S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). In doing so, the Court does not convert a motion to dismiss to one for summary judgment. *Id.* The Court may review matters that are in the public record, including pleadings, orders, and other papers filed in court. *See id.*

Where, as here, a plaintiff asserts a claim sounding in fraud, the plaintiff must "state with

particularity the circumstances regarding fraud or mistake." Fed. R. Civ. P. 9(b) ("Rule 9(b)"). A claim sounds in fraud if the plaintiff alleges "a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). Rule 9(b)'s particularity requirement is satisfied if the complaint "identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *see also Vess*, 317 F.3d at 1106. Accordingly, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id.* at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

If the allegations are insufficient to state a claim, a court should grant leave to amend unless amendment would be futile. *See, e.g.*, *Reddy*, 912 F.3d at 296; *Cook, Perkiss & Liehe, Inc.*, 911 F.2d at 246-47.

2. The Court Dismisses the Statutory Claims, With Leave to Amend.

In order to state a claim under the FAL, CLRA, UCL, and New York's GBL, Plaintiffs must allege facts satisfying the "reasonable consumer" standard, *i.e.* that members of the public are likely to be deceived.[2] *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *see Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013) (citing *Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995)).[3]

[2] Plaintiffs UCL claim is based on the unlawful, unfair, and fraudulent prongs. In *Bruton v. Gerber Prods. Co.*, the Ninth Circuit stated that "[t]he best reading of California precedent is that the reasonable consumer test is a requirement under the UCL's unlawful prong only when it is an element of the predicate violation." 703 Fed. App'x 468, 471-72 (9th Cir. 2017). In this case, Plaintiffs' claim for violations of the unlawful prong include alleged violations of portions of the Federal Food, Drug, and Cosmetic Act that prohibit "misleading containers," which suggests that the reasonable consumer standard would apply to this aspect of Plaintiffs' claims as well. (*See* Compl. ¶ 67 (citing 21 U.S.C. § 343(d)).) Because the Court is dismissing with leave to amend, it does not reach this issue, and the parties are free to renew these arguments in subsequent motion practice.

[3] Clif Bar also argues that Plaintiffs fail to sufficiently allege reliance. To the extent Clif Bar's argument relates to Plaintiffs' ability to allege statutory standing under the UCL, the Court concludes that Plaintiffs' allegations demonstrate they altered their behavior based on the representations on the Products' labels. Whether they have stated a claim based on the reasonable consumer standard is a separate issue.

> "Likely to deceive" implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.

Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003); *accord Fink*, 714 F.3d at 741 (plaintiff must show "deceptive advertisements were likely to mislead a reasonable consumer acting reasonably under the circumstances").

Whether a business practice is deceptive is an issue of fact not generally appropriate for decision on a motion to dismiss. *See, e.g.*, *Williams*, 552 F.3d at 938-39 (citing *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134-35 (2007)). However, courts have granted motions to dismiss under the UCL and similar statutes on the basis that the alleged misrepresentations were not false, misleading, or deceptive as a matter of law. *See, e.g.*, *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 989 (S.D. Cal. 2014); *Freeman v. Time, Inc.*, 68 F.3d 285, 290 (9th Cir. 1995) (holding that reading flyer as a whole dispelled plaintiff's allegation that a particular statement was deceptive). Clif Bar argues that this is such a case, while Plaintiffs argue it is not.

Clif Bar notes that Plaintiffs allege that reasonable consumers rely on the FDA's regulations regarding the standard of identity for white chocolate "to assure they are purchasing what they are led to believe they are purchasing." (Compl. ¶ 29.) It contends that if reasonable consumers are aware of and rely on such regulations, they would also rely on FDA regulations that address what must be included on a label if a label makes a "direct or indirect representation[]" of a characterizing taste and the product does not contain artificial flavoring. In those situations, the presence of natural flavor must be indicated according to FDA regulations. *See* 21 C.F.R. § 101.22(i), (i)(1).[4]

[4] "If the food is one that is commonly expected to contain a characterizing food ingredient, e.g., strawberries in 'strawberry shortcake' . . . the name of the characterizing flavor may be immediately preceded by the word "natural" and shall be immediately followed by the word 'flavored' in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., 'natural strawberry flavored shortcake,' or 'strawberry flavored shortcake'."

From there, Clif Bar argues that no reasonable consumer could be deceived into believing the Products contain real white chocolate because the Products' labels include the phrase "Natural Flavor" and because there is no reference to white chocolate in the ingredients list. To support its argument, Clif Bar principally relies on two cases, *Videtto v. Kellogg USA*, No. 2:08-cv-01324-MCE-DAD, 2009 WL 1439086 (E.D. Cal. May 21, 2009), and *McKinnis v. Sunny Delight Bevs. Co.*, No. CV 07-02034-RGK (JCx), 2007 WL 4766525 (C.D. Cal. Sept. 4, 2007) ("*Sunny Delight*").

In *Sunny Delight*, the court found, as a matter of law, that the labeling on a fruit flavored beverage was not misleading. 2007 WL 4766525, at *4-5. There, the plaintiff alleged that the label was misleading because small images of fruit and names based on fruit (*e.g.*, "Orange Fused Pineapple," "Orange Fused Peach") implied that the fruit flavored beverage contained substantial amounts of fruit, when in fact it was "little more than sugar water with negligible amounts of juice." *Id.,* 2007 WL 4766525, at *1, *3. Further, the plaintiff alleged that the "placement of [the beverages] alongside 'real' fruit beverages in retail establishments create[d] confusion and misrepresent[ed] the content and nutritional value of [the beverages]." *Id.*, 2007 WL 4766525, at *1. The court, however, noted the label's absence of the words "fruit juice" and the presence, instead, of the words "ORANGE FLAVORED CITRUS PUNCH." *Id.*, 2007 WL 4766525, at *4. The labels also disclosed the presence of only two percent or less real juice. *Id.* Given these facts, the court concluded that a consumer "who makes even a cursory review of the product labels at issue here would find not only the precise fruit content of [the beverages], but also that [the beverages] are fruit 'flavored' and contain minimal quantities of concentrated fruit juice." *Id.*

In *Videtto*, the court found, as a matter of law, that the labeling of the cereal Froot Loops was not misleading. 2009 WL 1439086, at *3. There, the plaintiff alleged that the Froot Loops label was misleading because of the presence of the word "Froot" in the name, pictures of cereal "made to resemble fruit," and small images of real fruit on the front label that led him to believe the cereal contained "real, nutritious fruit." *Id.*, 2009 WL 1439086, at *1. The plaintiff further alleged that the defendant's "long history of producing wholesome breakfast cereals" induced his reliance on the Froot Loops labeling. *Id.* The court in *Videtto* found it implausible that members

of the public would be deceived. *Id.*, 2009 WL 1439086, at *3. In granting the motion to dismiss, the court emphasized the presence of the words "natural fruit flavors" on the front label, which, in accordance with 21 C.F.R. section 101.22(i)(1)(i), explicitly disclosed the presence of fruit flavors rather than real fruit. *Id.* The court discussed other factors that influenced its decision to conclude as a matter of law that the labels were not misleading.

For example, the court deemed the word "Froot" to be a "fanciful use of a nonsensical word" that could not reasonably be understood to indicate the presence of actual fruit. *Id.* Further, the court took note that, far from resembling fruit, the small images of the cereal on the box were merely multi-colored rings which were not made to resemble fruit. *Id.* The court also addressed the significance of the phrase "sweetened multi-grain cereal" on the label and cited *McKinnis v. Kellogg USA*, a case decided just two years prior by the Central District of California in which the court "rejected materially identical claims." Therefore, it determined the plaintiffs' UCL, FAL, and CLRA claims failed as a matter of law. *See id.* (citing *McKinnis v. Kellogg USA*, No. CV 07-2611, 2007 WL 4766060, at *4 (C.D. Cal. Sept. 19, 2007)).

In the *McKinnis v. Kellogg* case, the court pointed out that the phrase "sweetened multi-grain cereal" does not imply that the product is "any sort of fruit-based cereal," and in fact the ingredient list on the side panel disclosed the absence of fruit in the product. *McKinnis v. Kellogg*, 2007 WL 4766060, at *4. For these reasons, the court determined, as a matter of law, that no reasonable consumer would be misled. *Id.*

In an attempt to further bolster the position that an accurate ingredient list paired with a "natural flavor" derivative qualifier discloses the presence of flavor, rather than a particular ingredient, Clif Bar also relies on *Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 881-82 (N.D. Cal. 2013). In that case, the plaintiff alleged the phrase "all natural flavors" on the defendants' soda cans was false and misleading because the sodas contained synthetic ingredients. The defendant moved to dismiss on the basis that the claims were preempted, and the court granted the motion on that basis. Clif Bar relies on a footnote in which the court stated that if it considered "the merits of the claims, dismissal would be appropriate." 944 F. Supp. 2d at 892 n.38.

To support that conclusion, the *Viggiano* court reasoned that the labels were consistent with the ingredient list because the term "all natural" modified flavors, which it determined were distinct from ingredients. Because the plaintiff did not assert the sodas contained artificial flavors, the court determined the label was accurate and consistent with the statement of the ingredients. Therefore, the court determined "no reasonable consumer could be misled by the label, because a review of the statement of ingredients makes the composition" of the sodas clear. *Id.*

In essence, Clif Bar argues that the front of the Products' container is accurate because it includes the phrase "Natural Flavor". The ingredients list does not include white chocolate, and, therefore, no reasonable consumer could be deceived because "a review of the statement of ingredients makes the composition of" the Products clear. (Mot. at 9:14-20, quoting *Viggiano*, 944 F. Supp. 2d at 892 n.38.) Plaintiffs do not contend the Products contain synthetic flavors. In that sense, the phrase "Natural Flavor" on the Products' label is accurate.

Plaintiffs argue that that size and location of the phrase do not conform with the FDA regulations. Like the defendant in the *Sunny Delight*, which used the phrase "ORANGE FLAVORED CITRUS PUNCH" to describe the product, Clif Bar used a derivative of the term "natural flavor" to indicate the presence of flavor, not any other ingredient. However, whereas "ORANGE FLAVORED CITRUS PUNCH" conformed exactly to the requirements of 21 C.F.R. section 101.22(i)(1)(i), the qualifying term "Natural Flavor" does not. *See* 21 C.F.R. § 101.22(i)(1)(i) (giving "natural strawberry flavored shortcake" or "strawberry flavored shortcake" as examples of proper qualifiers for the presence of natural flavor). Plaintiffs argue that because of the smaller font and because of where it is placed on the label, a reasonable consumer would not interpret the phrase "Natural Flavor" to be part of the Products' name. Instead, they would view it as an "independent marketing statement about the positive qualifies of the Products' taste – *i.e.*, that [the taste] is 'authentic,' not artificial or synthetic." (Opp. Br. at 4:13-23.) Plaintiffs attach the Products' labels as exhibits to the Complaint. (Compl., Exs. A-B.) Therefore, the Court can consider the fact that font size of that phrase is smaller than the font used for "White Chocolate" and also can consider its location. However, to the extent Plaintiffs make factual assertions about what a reasonable consumer would understand from the size and placement of the

phrase, those facts are not included in the Complaint. Therefore, the Court considers solely to determine whether it would be futile to grant Plaintiffs leave to amend.

Plaintiffs also argue that unlike the facts in *McKinnis v. Kellogg*, where a sweetened cereal would not be expected to have real fruit, "energy bars like the Products routinely contain various kinds of chocolate as actual ingredients." (Opp. at 10:11-20.) According to Plaintiffs, that would a reasonable consumer would expect real white chocolate to be in the Products. However, Plaintiffs do not allege in their complaint that "whole nutrition bars" or "energy bars made with organic rolled oats" often contain real chocolate. Thus, as with their argument about the size and location of the phrase "Natural Flavor, the Court considers those facts solely to determine whether it would be futile to grant them leave to amend.

To support their argument that the labels are misleading, Plaintiffs rely on *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861 (N.D. Cal. 2012). In *Miller*, the plaintiff alleged the label on the defendant's "Premium Baking Chips – Classic White" misrepresented that the chips contained white chocolate. *Miller*, 912 F. Supp. 2d at 863. The defendant moved to dismiss, in part, on the basis that the allegations were not sufficient to satisfy the "reasonable consumer standard." The court denied the motion. *Id.* at 874-75. The court reasoned that the labels included "romance language" that implied the baking chips were "award-winning chocolate" and offered the "ultimate chocolate indulgence" from the "world's finest cocoa beans," which set up a connection between baking chocolate and the "Classic White Baking Chips." *Id.* at 865, 871, 874.

The court also reasoned that the allegations of "side-by-side marketing" with products that contained real white chocolate established a connection between the labels and the presence of white chocolate. *Id.* at 874. The court considered the defendant's argument that the ingredients list disclosed the fact that the product contained no white chocolate. However, it determined that "[r]eading this label as a whole and in context with the allegations about the marketing, the court cannot say, as a matter of law, that no reasonable consumer would be deceived by the baking chips label." *Id.*

Here, Plaintiffs argue that because the Products' labels includes the words "White

Chocolate," they are more misleading than the labels at issue in *Miller*, where "White Chocolate" did not appear in the baking chips' name. However, the facts in *Miller* with regard to the "romance language" gave rise to a reasonable inference that the packaging was not "accurate." The court also noted the label *and* the fact that the products were placed next to products that did contain white chocolate supported that inference. Plaintiffs do not include similar allegations here.

Accepting Plaintiffs' allegations as true, and drawing all reasonable inferences in favor of Plaintiffs, the Court concludes Plaintiffs' allegations are not sufficient to show members of the public are likely to be deceived. Accordingly, the Court GRANTS the motion to dismiss on this basis. Because the Court is not convinced at this stage that amendment would be futile, the Court GRANTS Plaintiffs leave to amend their complaint.

3. The Court Dismisses the Common Law Fraud Claim, with Leave to Amend.

Clif Bar moves to dismiss Plaintiffs' common law fraud claim on the basis that they have failed to allege an affirmative misrepresentation or a material omission.[5] In order to state a claim for fraud, a plaintiff must show "1) [a] defendant made a false representation as to a past or existing material fact; (2) [that] defendant knew the representation was false at the time it was made; (3) in making the representation, [that] defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages." *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 78 (2013) (citing *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)); *accord Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 462 (S.D.N.Y. 2009).

The Court concludes that accepting Plaintiffs' allegations as true, they have sufficiently alleged the label contains a misrepresentation. However, for the reasons set forth above, the Court concludes the allegations are not sufficient to show that reliance on that representation was reasonable or justifiable.

[5] Although Clif Bar raises this argument in connection with "Plaintiffs' claims sounding in fraud," it focuses on the elements of a claim for common law fraud.

CONCLUSION

For the foregoing reasons, the Court GRANTS Clif Bar's motion to dismiss and GRANTS Plaintiffs leave to amend. Plaintiffs shall file an amended complaint, if any, on September 9, 2019. If Plaintiffs file a first amended complaint in accordance with this Order, Clif Bar answer or otherwise respond by September 30, 2019. The parties shall appear for an initial case management conference on November 8, 2019 at 11:00 a.m. and shall submit a joint case management statement by November 1, 2019.

IT IS SO ORDERED.

Dated: August 26, 2019

JEFFREY S. WHITE
United States District Judge

United States District Court
Northern District of California