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AMY'S KITCHEN, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROBERT E. FIGY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

AMY'S KITCHEN, INC.

Defendant.

Case No. CV 13-03816 SI

DEFENDANT AMY'S KITCHEN, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

[Filed concurrently with Request for Judicial Notice]

Date: March 21, 2014
Time: 9 a.m.
Dept.: Courtroom 10

Action Filed: August 16, 2013

NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on March 21, 2014 at 9:00 a.m., or as soon thereafter as this may be heard, in Courtroom 10 of this Court, located at 19th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable Susan Y. Illston, defendant Amy's Kitchen, Inc. ("Amy's") will and hereby does move the Court for an order dismissing the First Amended Complaint (the "FAC") and each claim therein filed by plaintiff Robert E. Figy ("plaintiff").

This motion is made pursuant to Federal Rules of Civil Procedure 8, 9(b), 12(b)(1) and 12(b)(6), and is based on the following grounds:

1. It is not plausible that *plaintiff* was deceived by the alleged product labeling, and therefore the FAC has not adequately alleged reliance, causation, and injury as required for plaintiff to have standing.

2. It is not plausible that a *reasonable consumer* would be deceived by the alleged product labeling and therefore the FAC has not adequately alleged reliance, causation, and injury.

3. Plaintiff's claims should be dismissed under the primary jurisdiction doctrine.

4. Because his claims are not supported by plausible allegations of deception, plaintiff is forced to rest his case entirely on alleged technical violations of provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* ("FDCA") that have been incorporated into California's Sherman Food, Drug, and Cosmetic Law, Cal. Health & Safety Code §§ 109875 *et seq.* ("Sherman Law"). But plaintiff has no private right of action to enforce compliance with the FDCA or the Sherman Law and, in any event, a violation of a labeling regulation is not synonymous with false advertising.

5. Plaintiff's state law claims are impliedly and expressly preempted by uniform federal labeling law promulgated by Congress and the Food and Drug Administration ("FDA").

6. Plaintiff lacks standing to pursue claims relating to products he never purchased.

7. The FAC fails to plead with particularity the claims against Amy's, as required by

Rule 9(b).

8. The presumption against extraterritorial application of California's laws bars plaintiff's claims for sales made outside of California.

9. Plaintiff's warranty, negligence, unjust enrichment, money had and received, and declaratory judgment claims fail on numerous independent grounds, including that (a) plaintiff has not adequately alleged the required elements, and (b) unjust enrichment and money had and received are not independent causes of action in California and, in any event, are duplicative of plaintiff's other deficient claims.

10. Plaintiff's Cal. Bus. & Prof. Code §§ 17500 *et seq.* ("FAL") and §§ 1750 *et seq.* ("CLRA"), implied warranty, negligent misrepresentation, and negligence claims are, in part, time-barred.

This motion is based on this notice of motion, the accompanying statement of issues to be decided, the accompanying memorandum of points and authorities, the request for judicial notice being filed concurrently herewith, all pleadings and documents on file in this case, and on such other written and oral argument as may be presented to the Court.

DATED: January 29, 2014

MAYER BROWN LLP
Dale J. Giali
Michael L. Resch
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By: /s/ *Michael L. Resch*
Michael L. Resch

Attorneys for Defendant
AMY'S KITCHEN, INC.

STATEMENT OF ISSUES TO BE DECIDED

1. Is it plausible that plaintiff was deceived by the alleged product labeling such that he has standing to bring his claims?

2. Is it plausible that the reasonable consumer would be deceived by the alleged product labeling such that a claim is stated?

3. Does the FAC contain plausible allegations of reliance, causation, and injury?

4. Do plaintiff's claims require the Court to adjudicate issues that fall under the primary jurisdiction of FDA?

5. May plaintiff bring this case to enforce alleged technical violations of provisions of the FDCA or Sherman Law? In any event, does the FAC contain plausible allegations of such violations?

6. Are plaintiff's state law claims expressly preempted by 21 U.S.C. § 343-1?

7. Are plaintiff's state law claims impliedly preempted by 21 U.S.C. § 337?

8. May plaintiff assert claims based on products he never purchased?

9. May plaintiff assert claims for sales made outside of California?

10. Are the claims in the FAC pled with particularity as required by Rule 9(b)?

11. Has plaintiff stated a claim for breach of express warranty?

12. Has plaintiff stated a claim for breach of the implied warranty of merchantability?

13. Has plaintiff stated a claim for negligence?

14. Has plaintiff stated a claim for declaratory judgment?

15. May plaintiff pursue a claim for unjust enrichment?

16. May plaintiff pursue a claim for money had and received?

17. Are the FAL, CLRA, implied warranty, negligent misrepresentation, and negligence claims time-barred in part?

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I. INTRODUCTION

Plaintiff Robert E. Figy initially tried to prosecute this case based solely on an alleged violation of labeling law without allegations of reliance or deception. The Court rejected plaintiff's strict liability theory. Dkt. 38. Plaintiff then filed an amended complaint purporting to allege reliance and deception, but grounded upon the implausible allegation that he affirmatively read the ingredient "evaporated ***cane*** juice" ("ECJ") and had no idea it was a sweetener. FAC ¶ 134. There is no dispute, however, that plaintiff knew the product contained "sugars," and in fact the label discloses the amount of sugars to the gram.[1] Nevertheless, plaintiff seeks to proceed on a theory that he purchased Amy's products believing that the admittedly-present sugars were only naturally-occurring in other ingredients in the products, and that no sugar was added. *Id*. ¶ 71. Judge Koh recently had an opportunity to assess the legal viability of an identical ECJ theory asserted by the same plaintiff's counsel. Judge Koh flatly dismissed the theory as implausible as a matter of law. *Kane v. Chobani, Inc.*, 2013 WL 5289253, at *7 (N.D. Cal. Sept. 19, 2013) (plaintiffs' belief "that the Yogurts contained 'only natural sugars from milk and fruit and did not contain added sugars or syrups' is simply not plausible"). The following exchange between Judge Koh and plaintiff's counsel in *Kane* really says it all:

The Court: But what kind of cane is there other than sugar cane?

Plaintiff's Counsel: None.

The Court: Candy Cane? I mean, what are people thinking of when they're looking at cane juice? Are they thinking asparagus? I mean, I'm asking you, what are they thinking of when they see cane juice?

Plaintiff's Counsel: Well, I don't know . . . what they are thinking of.

Kane, No. 5:12-cv-2425 (N.D. Cal.), Dkt. 127 at 17:15-14.

The same questions expose the implausibility of this case. Plaintiff never explains how a consumer – especially one with the sensitivity to added sugar that he supposedly had – could be

[1] For example, the 14 grams of sugars per serving in the Chunky Tomato Bisque that plaintiff purchased is listed less than an inch away from the ingredient "evaporated cane juice." *See* Amy's Request for Judicial Notice ("RJN"), Ex. 1.

unaware that "cane" refers to sugar cane. This would be like a vegetarian alleging that he read an ingredient with the word "beef," but did not know the product contained meat. As Judge Koh recognized in reasoning directly applicable here, consumers know that "cane" in food products refers to sugar cane – and consumers like Mr. Figy who are hyper-sensitive to added sugar most definitely know (or at a bare minimum must suspect) that "cane" refers to sugar cane.[2]

Conveniently, and just like the plaintiffs in *Kane*, Mr. Figy never alleges what he believed the cane ingredient to be if not a form of sugar. *Kane*, 2013 WL 5289253, at *7. This failure alone defeats his claims. *See, e.g., Pelayo v. Nestlé U.S.A., Inc.*, 2013 WL 5764644, at *5 (C.D. Cal. Oct. 25, 2013) (dismissing claims with prejudice where plaintiff failed to allege a plausible definition of what she believed the challenged advertising term to mean).

Nor can plaintiff reconcile his added sugar/ECJ theory with his allegations relating to "dried cane syrup." Throughout his amended complaint, plaintiff alleges that an alternative name for ECJ is dried cane syrup. *See, e.g.*, FAC ¶ 22. Indeed, plaintiff relies heavily on draft, non-binding FDA guidance (discussed in detail below) suggesting ECJ should be called dried cane syrup. Just as in *Kane*, however, the amended complaint "fails to explain how Plaintiff[] could have realized that dried cane syrup was a form of sugar, but nevertheless believed that evaporated cane *juice* was not." *Kane*, 2013 WL 5289253, at *7 (emphasis in original).

This brings us back to plaintiff initially alleging claims *without* reliance and deception. Proceeding on a strict liability theory was no accident or oversight; plaintiff could not plausibly make reliance and deception allegations, as the FAC unambiguously shows. Accordingly, the complaint should be dismissed for lack of standing and for failing the reasonable consumer test. But there's more. Numerous other, independent grounds support dismissing plaintiff's claims. We preview one of those independent grounds – primary jurisdiction – now, and detail others in the argument section below.

[2] Mr. Figy is a plaintiff in eight other pending ECJ lawsuits filed by the same plaintiff's counsel. *See* Appendix A, attached hereto. Totaling up just the purchases alleged in his portfolio of federal lawsuits, Mr. Figy (repeatedly, no less) purchased at least 22 ECJ products over the course of the prior two years. *Id.* Despite purporting to care deeply about avoiding added sugar, however, Mr. Figy alleges that he purchased *all* of these ECJ products not knowing what the ECJ ingredient was in any of them and, significantly, never bothering to check. That is not plausible.

Judge Rogers recently dismissed – under the primary jurisdiction doctrine – the same ECJ claims asserted by the same plaintiff's counsel. *See Hood v. Wholesoy Co.*, 2013 WL 3553979, at *5 (N.D. Cal. July 12, 2013). The same result based on the same analysis is warranted here.

The FDA is currently in the midst of its regulatory process under 21 C.F.R. § 10.115 to determine whether evaporated cane juice is the "common or usual" name of the challenged ingredient under 21 C.F.R. § 102.5(a), (d). As the first step in its process, FDA issued "[d]raft guidance," "[c]ontain[ing] [n]onbinding [r]ecommendations" regarding ECJ, "distributed for comment purposes only," and, specifically, "[n]ot for [i]mplementation":

> This draft guidance, ***when finalized, will represent*** the Food and Drug Administration's (FDA's) current thinking on this topic. ***It does not create or confer any rights for or on any person and does not operate to bind FDA or the public***. . . . FDA's guidance documents, including this guidance, ***do not establish legally enforceable responsibilities***.[3]

FDA received over 50 comments in response to the guidance (almost all disagreeing with it), and, significantly, has not yet determined its position on the issue.[4] This process should not be short-circuited, let alone by consumer class action litigation.

Moreover, FDA, not the courts, should interpret and apply FDA's ingredient regulations to determine the proper name for the ECJ ingredient. *See All One God Faith, Inc. v. Hain Celestial Group, Inc.*, 2012 WL 3257660, at *8-11 (N.D. Cal. Aug. 8, 2012) (applying the primary jurisdiction doctrine because the allegations "would necessarily require the Court to interpret and apply federal standards"). Otherwise, there will be chaos in the marketplace – as courts and juries try to apply FDA regulations and inevitably make inconsistent decisions about what the ingredient should be called – all while FDA is engaged in answering the same question.

For example, Amy's is currently facing ECJ lawsuits in Florida, Illinois, Arkansas and California. *See* RJN, Exs. 2-4. Imagine the result if one court determines the ingredient should be called "evaporated cane juice," another rules it should be called "dried cane syrup," another rules it should be called "evaporated cane syrup," and another rules it should be called "cane

[3] http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm181491.htm

[4] http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=FDA-2009-D-0430

sugar." Amy's would be forced to print different labels for different jurisdictions – the very thing FDA's national uniform labeling system was designed to prevent. *See Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 426 (7th Cir. 2011) ("It is easy to see why Congress would not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide … [as m]anufacturers might have to print 50 different labels"); *Taradejna v. Gen. Mills, Inc.*, 909 F. Supp. 2d 1128, 1135 (D. Minn. 2012) ("potential for inconsistent judicial rulings . . . underscores the importance of promoting uniformity by referral of this matter to the FDA"). Such a result can and should be avoided by deference to the agency charged with making labeling determinations.

For these and other reasons detailed below, Amy's respectfully requests that the First Amended Complaint ("FAC") be dismissed with prejudice.

II. THE THEORIES ALLEGED IN THE FIRST AMENDED COMPLAINT

In response to this Court's order (Dkt. 38) rejecting his strict liability theory, plaintiff filed an unwieldy, repetitive, 61-page FAC with fourteen causes of action. Plaintiff now alleges that his case "has two facets," (1) the "UCL unlawful" part, and (2) the "deceptive" part. FAC ¶¶ 6-7. According to plaintiff, the unlawful part "stand[s] alone without any allegations of deception . . . or reliance," and "is a strict liability claim." *Id.* ¶ 6. The Court already dismissed this claim, and there is no basis for plaintiff to assert the same flawed theory in light of the Court's November 25, 2013 order. Amy's will not devote further time addressing claims and theories the Court has already dismissed.[5] Rather, this motion focuses on plaintiff's new (and unsuccessful) efforts to allege reliance and deception.

Plaintiff's deception claim rests upon a series of allegations that do not add up. First, plaintiff alleges that he is so concerned about added sugar that he reads ingredient lists to determine if products have added sugar and does not purchase products with added sugar. FAC ¶¶ 133-34. Second, he allegedly read the ingredient lists on the Amy's products he purchased for the express purpose of determining whether they might contain added sugar. *Id.* ¶ 134. Third,

[5] The Court's decision was entirely correct and in line with other decisions rejecting the same flawed theory. *See, e.g., Wilson v. Frito-Lay N. Am.*, 2013 WL 5777920, at *6, *8 (N.D. Cal. Oct. 24, 2013).

he read the ingredient "evaporated cane juice" in Amy's ingredients. *Id*. Fourth, despite his atypical concern over added sugar, he supposedly had no idea that the ***cane juice*** ingredient could add sugar to the products. *Id*. ¶¶ 134-35. Significantly, Mr. Figy never alleges exactly what he believed evaporated cane juice to be if not a form of sugar or juice containing sugar. Fifth, even though Amy's package does not make a "no sugar added" claim, Mr. Figy alleges he believed that all of the grams of sugars identified on the Nutrition Facts Panel were naturally occurring sugars in the non-ECJ ingredients and was deceived into purchasing products with added sugar. *Id*. ¶ 71; *see also* RJN, Ex. 1. As explained below, such allegations are implausible on their face.

Plaintiff also has difficulty articulating what he believes the ECJ ingredient should have been called. On the one hand, plaintiff tries to wrap himself in FDA's draft, non-binding guidance. *See, e.g.*, FAC ¶¶ 24, 47. Setting aside for the moment that plaintiff conveniently omits all of the language in the draft guidance confirming that the guidance is unenforceable, the guidance actually proposes to label the ingredient as "dried cane sirup." *See* note 3, *supra*. As Judge Koh concluded, it is not plausible that consumers would recognize dried cane syrup as an added sugar but not evaporated cane juice. *Kane*, 2013 WL 5289253, at *7. As such, plaintiff cannot allege reliance or causation in connection with his added sugar theory.

Recognizing these problems, plaintiff alleges another theory, namely that the ingredient should have been called "sugar." *See, e.g.*, FAC ¶¶ 22, 40. But this theory is inconsistent with the very FDA draft guidance relied on by plaintiff and with plaintiff's own allegations that show ECJ is ***not*** sugar.[6] Plaintiff's theory is thus at war with itself. All of this demonstrates precisely why this type of interpretation and application of FDA regulations is best handled by FDA.

III. THE FAC MUST BE DISMISSED FOR LACK OF STANDING

Both Article III and state law require plaintiff to demonstrate his standing to assert the claims alleged in the FAC. Dkt. 38 at 4-7. In the context of a false advertising case, this means

[6] FAC ¶¶ 112-13, n. 4-7 (citing McCaffree, D., *The Truth About Evaporated Cane Juice* (Nov. 1, 2010), which states: "white sugar goes through one processing step more than evaporated cane juice"). The different manufacturing processing results in two products, sugar and ECJ, which look different, taste different, and have different chemical characteristics.

that plaintiff must make plausible allegations of reliance on the challenged advertising and resulting injury. *See id.* (citing *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326-27 (2011)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *McKinniss v. Sunny Delight Beverages Co.*, 2007 WL 4766525, at *5 (C.D. Cal. Sept. 4, 2007) (requiring justifiable reliance for negligent misrepresentation claim).

Courts do not hesitate to dismiss false advertising claims for lack of standing where the asserted claims are implausible. *See, e.g., Kane*, 2013 WL 5289253, at *8-10 (dismissing ECJ and natural claims as implausible); *Pelayo*, 2013 WL 5764644, at *5 (dismissing natural claims with prejudice based on plaintiffs' implausible definitions of "natural"); *Maple v. Costco Wholesale Corp.*, 2013 WL 5885389, at *4-5 (E.D. Wash. Nov. 1, 2013) (claim dismissed as implausible); *Rooney v. Cumberland Packing Corp.*, 2012 WL 1512106, at *3-4 (S.D. Cal. April 16, 2012) (case dismissed where plaintiff's allegations were not plausible).

Significantly, plaintiff's allegations are indistinguishable from the ones rejected by Judge Koh in *Kane*. *Compare, e.g.*, FAC ¶¶ 96, 97 *with* Second Amended Complaint in *Kane*, No. 5:12-cv-2425, Dkt. 35 ("Kane SAC") ¶¶ 93-95 (plaintiff believed the yogurt "did not contain added sugars or syrups"); *compare* FAC ¶ 71 *with* Kane SAC (plaintiff believed the yogurt "contained only natural sugars from milk and fruit"). And they should be dismissed for the same reasons.

A. The FAC Does Not Contain Plausible Allegations Of Reliance Or Deception

Plaintiff is apparently so concerned about avoiding added sugar that much like someone with an allergy, he reads ingredient lists on products before buying them for the express purpose of determining if they include an ingredient that adds sugar. FAC ¶¶ 133-34. If a product has added sugar, he will not purchase it. *Id.* It is not plausible that such a person could have read "evaporated ***cane juice***" and concluded that the ingredient was not adding sugar to the product.

As Judge Koh asked in *Kane*, "I mean, what are people thinking of when they're looking at cane juice? Are they thinking asparagus? I mean, I'm asking you, what are they thinking of when they see cane juice?" *Kane*, Dkt. 127 at 17:15-14. Plaintiff's counsel responded, "Well, I don't know . . . what they are thinking of." *Id.* Judge Koh's question about what "people" are

thinking when they read cane juice is enough to defeat plaintiff's case, as it shows that the claims do not pass the reasonable consumer test. *See infra* at IV. In the context of ***Mr. Figy's*** standing, however, the pertinent question is even more dispositive: what was ***Mr. Figy*** – *i.e.*, a consumer who has a peculiar focus on avoiding added sugar – thinking when ***he*** read cane juice?

The FAC does not answer the question.[7] Instead, plaintiff alleges that "he did not know what evaporated cane juice was at the time he purchased Defendant's food products," but "because of the fact it used the term 'juice,' it sounded like something healthy." FAC ¶ 134.[8] These allegations do not withstand scrutiny. How can an individual with hyper-sensitivity to added sugar plead complete ignorance as to the term "cane"? The allegations are all the more implausible given that Mr. Figy alleges that he purchased five of Amy's products and nearly twenty other products – all listing ECJ as an ingredient – for more than a year. *See* Appendix A. A person who allegedly cares deeply about the ingredients in his food – and added sugar in particular – would not repeatedly buy so many products for so long, all with a cane juice ingredient, without knowing the ingredient or finding out what it was.

Moreover, plaintiff alleges throughout the FAC that one alternative appropriate name for ECJ is "dried cane syrup," suggesting that such a name somehow would have clued him in and caused him not to purchase the products. *See, e.g.*, FAC ¶¶ 22, 134. Again, it simply is not plausible that a person would avoid a product because it had an ingredient called "dried cane syrup" (believing it to be added sugar), but would purchase the same product with ECJ (having no idea that it was a form of added sugar). *Kane*, 2013 WL 5289253, at *7.

That the name "evaporated cane juice" includes the word "juice," does not, as Mr. Figy alleges (FAC ¶ 134), somehow give him a free pass from knowing the ingredient added sugar to the products. A person who allegedly goes out of his way to avoid added sugar like Mr. Figy

[7] Plaintiff's failure to allege a plausible definition of what he believed ECJ to mean is reason enough to dismiss his claims. *See, e.g., Pelayo*, 2013 WL 5764644, at *5.

[8] Anticipating a confrontation in this case with Judge Koh's common-sense and dispositive questions, the FAC alleges other forms of cane. FAC ¶ 111. But the allegation is not legally relevant because plaintiff never alleges that he thought ECJ referred to those other forms of cane. Nor could he plausibly do so – consumers purchasing pizza, beans and soup know that "cane" refers to "sugar cane" and do not believe it refers to other, far less common, forms of cane.

cannot plausibly allege that he was unaware that such a "juice" ingredient could be a form of added sugar. *See, e.g.*, 21 C.F.R. § 101.60(c)(2)(ii) (FDA recognizes added juice can be source of added sugar in food products). Moreover, the context in which the "juice" ingredient is present – *i.e.*, an ingredient in ***pizza, baked beans and soups*** – further undermines the implausibility, as a matter of law, of plaintiff's allegations.

Not surprisingly, on allegations identical in relevant respects to Mr. Figy's, Judge Koh dismissed the ECJ claims as implausible. *Kane*, 2013 WL 5289253, at *7. The exact reasoning applies here and the same result is warranted.[9]

B. The FAC Does Not Allege A Plausible Injury As A Result Of ECJ

To state a claim, plaintiff must allege "injury in fact and . . . lost money or property as a result of" the alleged unfair competition. Dkt. 38 at 4 (quoting Cal. Bus. & Prof. Code § 17204). Plaintiff does not allege such injury. Plaintiff paid for the products and has not alleged that the products were tainted or contaminated or that they caused any physical injuries. Plaintiff does not allege that he had to discard the products before consuming them. These missing allegations are not an oversight – plaintiff is unable to make them consistent with the actual facts. Because he is required to allege actual injury and a loss of money or property, however, he is not at liberty simply to avoid this inconvenient record. *Simpson v. Cal. Pizza Kitchen, Inc.*, 2013 WL 5718479, at *4 (S.D. Cal. Oct. 1, 2013) (dismissing complaint for lack of standing because plaintiff "consumed the pizzas" and therefore "received the benefit of her bargain").

This is a false advertising case. But, plaintiff received precisely what the products were advertised to be – *i.e.*, pizza, beans, and soups, all with the listed ingredients and the stated nutritional content. There is no difference between each product "as labeled" and "as it actually is," and thus no injury under *Kwikset*. *See Kwikset*, 51 Cal. 4th at 330 (finding economic loss because there was a difference between the product "as labeled" and "as it actually is").

Plaintiff tries to patch up this hole in his case by alleging an "illegal product" theory of injury, *i.e.*, because the products are allegedly misbranded, they are "illegal to own or possess."

[9] To be sure, other courts have allowed ECJ claims to survive motions to dismiss and we expect plaintiff to cite all he can find. But, those decisions are no better than their underlying analysis, and none analyzes the issues as carefully as Judge Koh in *Kane* or as set out in this motion.

See, e.g., FAC ¶¶ 7, 9. Plaintiff's circular illegal product approach does not constitute allegations of injury and is flawed in every conceivable respect.

First, and most fundamentally, plaintiff's illegal product theory is simply another aspect of his strict liability/no reliance theory, which the Court rejected in its November 25, 2013 order. *See, e.g.*, FAC ¶ 69 (alleging injury under the illegal product theory "even absent reliance").

Second, the California Supreme Court considered and decisively rejected the same theory of injury in *Kwikset*.[10] The plaintiffs in that case advanced the position that because California law made it "unlawful for any person, firm, corporation or association to sell or offer for sale in this State [specifically mislabeled] merchandise," a cause of action could be stated by merely alleging a legal violation. 51 Cal. 4th at 317, n.1; *see also Open. Br. of Real Parties*, 2009 WL 2954740, at *18 (Cal. Aug. 11, 2009). The California Supreme Court held that such a theory was inadequate as a matter of law under Proposition 64. Judge Conti recently relied on *Kwikset* in rejecting the same type of violation of law strict liability theory in a food labeling case:

> According to Plaintiffs, misbranded food products are unlawful by nature and therefore actionable. *Id*. Plaintiffs are wrong. ***Holding for them on this point would be an affront to state and federal standing rules***.

Wilson, 2013 WL 5777920, at *6, *8 (emphasis added); *see also Kane*, 2013 WL 5289253, at *9 ("Plaintiffs' 'illegal product' theory would eviscerate the enhanced standing requirements imposed by Proposition 64 and . . . *Kwikset*").

Third, plaintiff is wrong to contend that the products are "worthless." Plaintiff received a real, tangible benefit from his purchases – he obtained real products, which we can only assume that he consumed and that he did so without any ill effects. Plaintiff does not allege that the products ***would have been different in any way*** if the labels bore the terms that plaintiff

[10] Plaintiff tries an end around Proposition 64 and *Kwikset* by alleging that Amy's breached some duty to disclose the illegality of its products. FAC ¶ 67. Amy's had no such duty, as other courts have recognized. *See Brazil v. Dole Food Co., Inc.* 2013 WL 5312418, at *10 (N.D. Cal. Sept. 23, 2013) (rejecting the "counterintuitive proposition that a product's label must disclose the fact of its own illegality"); *see also Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1143 (9th Cir. 2012) (duty to disclose only triggered when there is an unreasonable safety hazard). Indeed, if plaintiff could dodge the pleading requirements with such a theory, every UCL claim (including the one in *Kwikset*) could be converted to a duty to disclose case. In any event, reliance is still required for this theory, and plaintiff cannot plausibly allege reliance.

prefers.[11] *See In re Cheerios Mkt. & Sales Practices Litig.*, 2012 WL 3952069, at *11 (D.N.J. Sept. 10, 2012) (plaintiffs' allegation of a regulatory violation did not render cereal "essentially worthless," because the violation had no bearing on the "crunchiness, taste, convenience," or other qualities that made the cereal worth purchasing in the first place).

Finally, plaintiff is wrong that it is "illegal" for him to "possess" (FAC ¶ 55) a misbranded product. The only statutory provision that plaintiff cites for his illegal-possession theory is Health & Safety Code § 110760. FAC ¶ 69. But that provision says not one word about consumer purchases or possession. It says only that "[i]t is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded." No plausible interpretation of those words makes it illegal for a consumer to purchase a misbranded product.[12]

C. Plaintiff Lacks Standing To Sue On Non-Purchased Products

Plaintiff alleges that he purchased only five of the forty-eight products challenged in the FAC. FAC ¶ 2. Some courts – including this Court – have taken the sound position that plaintiffs lack any alleged economic injury as to non-purchased products and, therefore, their claims on such products should be dismissed for lack of standing. *See Larsen v. Trader Joe's Co.*, 2012 WL 5458396, at *5 (N.D. Cal. June 14, 2012) (without having purchased the non-purchased product, "as a matter of law, [plaintiffs] could not have suffered a particularized injury as required by Article III"); *see also, e.g., Granfield v. NVIDIA Corp.*, 2012 WL 2847575, at *6 (N.D. Cal. July 11, 2012) ("claims relating to products not purchased must be dismissed for lack of standing"); *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 2011 WL 159380, at *3 (N.D. Cal. Jan. 10, 2011) (same). Other courts have allowed a plaintiff to pursue non-purchased product

[11] In another attempt at an end around Proposition 64 and *Kwisket*, plaintiff alleges a claim for money had and received, expressly alleging no reliance is required for the claim. *See* FAC ¶ 244. Such a claim would also eviscerate California's standing requirements.

[12] Section 110760's reference to "hold[ing]" misbranded products, does not help plaintiff. The catalogue of verbs appearing in § 110760 precisely tracks the supply chain: producers "manufacture" food products and "sell" and "deliver" them to distributors; the distributors then "hold" the products in inventory until requested by retailers, which "offer [them] for sale" to retail customers. The Sherman Law also makes it unlawful for any person to "engage in the . . . holding of any processed food . . . unless the person has a valid registration," or to "hold . . . any potentially hazardous refrigerated food at any temperature above 45 degrees Fahrenheit." Health & Saf. Code §§ 110460, 110960. Consumers do not have to register their home kitchens and office break rooms annually under § 110470, and pay a registration fee, in order to "hold" foods.

claims but only if the plaintiff sufficiently alleges that the non-purchased and purchased products are "substantially similar." *See, e.g., Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 869-70 (N.D. Cal. 2012) (plaintiffs may have standing to assert claims on non-purchased products if they are "substantially similar"); *Kane*, 2013 WL 5289253, at *10 (same).

The distinction in these approaches is irrelevant in this case. Either way, plaintiff's claims on non-purchased product must be dismissed. There is not a single factual allegation that could support a finding that the purchased and non-purchased products are substantially similar. *See, e.g., Wilson*, 2013 WL 5777920, at *3-5 (dismissal with prejudice of products not purchased). To the contrary, the allegations show the opposite. *Compare* purchased products (spinach pizza, beans and soups) in Table 1 *with* non-purchased products (including stir-fry, wraps, breakfast foods, cakes, cookies, toaster pops and other entrees) (FAC ¶ 5). Moreover, as shown on the website alleged in the FAC (*id.* ¶ 13), the packaging of these diverse products is not the same and numerous products are no longer even labeled with ECJ. *See* http://www.amys.com/products .

D. Plaintiff May Not Sue For Non-California Sales

Plaintiff purports to bring claims under California law on behalf of a nationwide class of consumers resident in other states, who made purchasing decisions outside of California and made their purchases from retailers located in states other than California. FAC ¶ 138. Claims brought with respect to such non-California purchasers and purchases, however, implicate the presumption against extraterritorial application of California's laws. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1207-08 (2011). "Indeed, beyond California's presumption against the extraterritorial application of its laws, a California court's adjudication of non-residents' claims that lack a nexus with California raises significant due process problems." *Churchill Vill., L.L.C. v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1126-27 (N.D. Cal. 2000) (quotations and citations omitted). The non-California residents' claims are not supported where, as here, "none of the alleged misconduct or injuries occurred in California." *Id.*; *see also Wilson*, 2013 WL 5777920, at *9-10.

IV. FOR THE SAME REASONS PLAINTIFF FAILS TO PLAUSIBLY ALLEGE DECEPTION, THE ECJ CLAIMS DO NOT PASS THE REASONABLE CONSUMER TEST

Plaintiff's false advertising claims are governed by the "reasonable consumer" test. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir.1995). Under this test, plaintiff must show that "members of the public are likely to be deceived." *Id*. "'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." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). This standard requires a probability "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id*. The "reasonable consumer" is not the "least sophisticated consumer" or an "unwary consumer," but rather "the ordinary consumer within the larger population." *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1304 (2011). And where plaintiffs do not satisfy the reasonable consumer test, courts – including this Court – dismiss the claims. *See Stevens v. Morgan JP Chase Bank, N.A.*, 2010 WL 329963, at *5 (N.D. Cal. Jan. 20, 2010) (dismissing claim because plaintiff failed to allege "'that the challenged advertising [was] false or misleading to a reasonable consumer'") (quoting *Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm, Inc.*, 107 Cal. App. 4th 1336, 1344 (2003)).[13]

The reasonable consumer would not be deceived by ECJ for the same reasons Mr. Figy

[13] *See also, e.g., Balser v. Hain Celestial Group, Inc.*, 2013 WL 6673617, at *2 (C.D. Cal. Dec. 18, 2013) (dismissing claims with prejudice because "no reasonable consumer would be misled by the label"); *Shaker v. Nature's Path Foods, Inc.*, 2013 WL 6729802, at *4-5 (C.D. Cal Dec. 16, 2013) (same); *Hairston v. S. Beach Bev. Co., Inc.*, 2012 WL 1893818, at *5 (C.D. Cal. May 18, 2012) (natural claims dismissed with prejudice); *Carrea v. Dreyer's Grand Ice Cream*, 475 Fed. App'x 113, 115 (9th Cir. 2012) (affirming Rule 12(b)(6) dismissal and reasoning that "it strains credulity to claim that a reasonable consumer would be misled to think that an ice cream dessert, with 'chocolate coating topped with nuts,' is healthier than its competitors . . . ."); *Werbel v. Pepsico, Inc.*, 2010 WL 2673860, at *3 (N.D. Cal. July 2, 2010) (granting motion to dismiss where "no reasonable consumer would be deceived into believing that Cap'n Crunch 'has some nutritional value derived from fruit'"); *Videtto v. Kellogg USA*, 2009 WL 1439086, at *3 (E.D. Cal. May 21, 2009) (granting motion to dismiss UCL, FAL and CLRA claims about Froot Loops where the packaging made no claim that the product is particularly nutritious or designed specifically to meet the nutritional needs of toddlers or children); *Hill*, 195 Cal. App. 4th at 1304 (green water droplet on label would not lead reasonable consumer to believe product was being marketed as "environmentally superior").

could not plausibly have been deceived by the ingredient. *See infra* at 6-8. In addition:

First, a significant portion of the general consuming public does not make purchasing decisions in the idiosyncratic manner Mr. Figy apparently buys his food. The reasonable consumer purchases pizza, beans and soup based on texture, quality, taste, and price. Consumers who want nutrition information look to the Nutrition Facts Panel. *See McKinnis v. Kellogg USA*, 2007 WL 4766060, at *4 (C.D. Cal. Sept. 19, 2007) (nutrition information labels "have long been required on food products and are familiar to a reasonable consumer").

Second, consumers who care about sugar look to the Nutrition Facts Panel for the *amount – to the gram –* of sugars in a serving of the product. *See, e.g.*, RJN, Ex. 1. A significant portion of the public does not differentiate between sugars naturally occurring in the product's ingredients and added sugar. In other words, the reasonable consumer purchasing pizza, beans and soups *might* care about the amount of sugars but certainly does not have a heightened sensitivity to the *source* of the sugars.

Third, the reasonable consumer – especially one concerned about the source of sugars – appreciates that "cane juice" refers to a sweetener. Indeed, plaintiff has not alleged what *he*, let alone the reasonable consumer, believed evaporated cane juice to be if not a form of sugar. Moreover, the reasonable consumer would not be deceived into thinking a "juice" ingredient in pizza, beans and soups is a healthy ingredient that contains no sugar.

Fourth, there is nothing on the product label that states the product contains "no added sugar" or otherwise suggests that the sugars come only from the non-ECJ ingredients.

Accordingly, the reasonable consumer test provides another ground supporting dismissal.

V. THE COURT SHOULD APPLY THE PRIMARY JURISDICTION DOCTRINE

Amy's is currently a defendant in ECJ lawsuits in California, Florida, Illinois and Arkansas. *See* RJN, Exs. 2-4. In each case, the following question must be adjudicated if plaintiff's ECJ claims are allowed to proceed: Is "evaporated cane juice" the "common and usual name" of an ingredient under 21 C.F.R. § 102.5? If the answer is "yes," Amy's ***must*** identify the ingredient as "evaporated cane juice" on the product label (*see* 21 C.F.R. § 101.4(a)(1)), and any claim seeking to require a different name (as in this action) would be an

attempt to impose a non-identical requirement and would be expressly preempted. *See infra* at 19. If the answer is "no," Amy's ***must not*** identify the ingredient as "evaporated cane juice" under the regulations or risk marketing a misbranded product. If the cases render inconsistent results, Amy's will be forced to print different labels to satisfy the determination in each state.

Not surprisingly, the FDA has a process to make ingredient decisions like the one presented here to ensure, among other things, a national uniform labeling system and certainty in the marketplace. The FDA is in the midst of its regulatory process to consider the ECJ labeling issue and, as part of that process, has solicited and received scores of comments from the public about the appropriate response. As Judge Rogers recognized in *Hood*, the FDA is in the middle of the process and has not yet made a decision. *See Hood*, 2013 WL 3553979, at *5 ("FDA has not yet set a uniform enforcement standard"). As Judge Rogers also recognized, the FDA, not courts, should interpret its regulations and decide the labeling issue .

A. The Analysis In *Hood* Is Sound And Should Be Followed Here

In *Hood*, Judge Rogers concluded that the four factors in *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) were "met" and ultimately held that:

> [I]t is appropriate to defer to the authority and expertise of the FDA to say what the appropriate rules should be with respect to . . . "evaporated cane juice." Rendering a decision based on what this Court believes the FDA might eventually decide . . . "would usurp the FDA's interpretive authority."

Hood, at *6; *see also All One God Faith, Inc.*, 2012 WL 3257660, at *8-11. Judge Rogers also made a series of statements in support of her conclusion, none of which is open to debate:

> The FDA has regulatory authority over food labeling
>
> * * *
>
> Food labeling enforcement is a matter that Congress has indicated requires the FDA's expertise and uniformity in administration. Congress amended the FDCA through the passage of the . . . NLEA . . . to "clarify and to strengthen" the FDA's "legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods." . . . . With respect to "evaporated cane juice," the Draft ECJ Guidance on which Plaintiff relies says expressly that it is not a "legally enforceable" standard, but only a suggestion . . . . So far as it appears, FDA has not yet set a uniform enforcement standard.

Hood, at *4-5. Thus, the Court in *Hood* recognized that (1) Congress placed the ECJ food labeling issue within the jurisdiction of the FDA based on the FDA's expertise and the need for

"uniformity in administration," and (2) the FDA is considering the ECJ labeling question but has not yet rendered a "uniform enforcement standard." Judge Rogers correctly found that nothing else was needed to apply the primary jurisdiction doctrine.

B. There Are Additional Compelling Reasons To Apply Primary Jurisdiction

Judge Rogers had no need to take a "deeper dive" into the policy considerations supporting primary jurisdiction. Such a fully developed analysis, however, substantially bolsters *Hood*.

1. The FDA, Not The Court, Should Interpret Its Regulations

Resolution of the ECJ labeling issue involves the interpretation of integrated regulations with which the FDA is intimately familiar, including but not limited to the common and usual name regulations, "juice" regulations and sugar regulations.[14] The various provisions form a carefully constructed regulatory scheme that requires expertise to navigate.

Take 21 C.F.R. §§ 102.5(d) and 102.5(a), for example. Section 102.5(d) provides that the "common or usual name of a food may be established by common usage or by . . . regulation." Section 102.5(a) provides that the name must accurately describe the basic nature of the food, and may not be "confusingly similar to the name of any other food that is not reasonably encompassed within the same name." "Common usage" is not defined by the regulations, and nowhere do the regulations explain what should be done if the name established by common usage happens to conflict with section 102.5(a). Such questions about FDA regulations should be left to the FDA. *See All One God Faith, Inc*, 2012 WL 3257660, at *8-11.

Moreover, the interpretation of "common usage" under section 102.5(d) will be critical in resolving any ECJ claim. Adjudication of an ECJ claim will require, among other things, a decision whether identification of ECJ on approximately 9,000 products[15] (and other evidence regarding its usage) satisfies ***the FDA's interpretation*** of "common usage."[16] The FDA is

[14] *See, e.g.*, 21 C.F.R. §§ 101.4(a)(1), 101.4(b)(2), 101(4)(b)(20), 101.9(c)(6)(ii), 102.5(a), 102.5(d), 120.1(a), 101.30, 168.30, 184.1854.

[15] *See* Mintel Int'l Group, *Evaporated Cane Juice – Ingredient / Panel by Country* (Mar. 2013).

[16] Plaintiff is hard-pressed to allege that ECJ is not the common or usual name for the ingredient given the number of products on which ECJ is identified and the 50 ECJ lawsuits against some of the country's largest food manufacturers. *See* Appendix A.

uniquely positioned to decide what its term "common usage" should mean in this context.

2. Judicial Resolution Of ECJ Claims Is Incompatible With A National Uniform Labeling Standard

In enacting federal food labeling laws, "Congress set out to create uniform national standards regarding the labeling of food and to prevent states from adopting inconsistent requirements . . . ." *Red v. Kroger Co.*, 2010 WL 4262037, at *3 (C.D. Cal. Sept. 2, 2010); *see also* 21 U.S.C. § 343-1 (preempting non-identical state laws); *Turek*, 662 F. 3d at 427.

This same rationale underlies the primary jurisdiction doctrine. *See, e.g.*, *Syntek*, 307 F. 3d at 781 ("uniformity in administration" supports primary jurisdiction); *see also Gordon v. Church & Dwight Co*. 2010 WL 1341184, at *1-2 (N.D. Cal. April 2, 2010) (same). And *Taradejna v. Gen. Mills, Inc.*, makes the point crystal clear:

> Moreover, the FDA's ultimate decision on the permitted ingredients in yogurt will ensure ***national uniformity*** in labeling, utilizing the Agency's special expertise in this regard. ***The Agency's unique role in ensuring such consistency and uniformity is particularly significant here, as several recently-filed yogurt lawsuits throughout the country involve the same or similar issues as found in the instant suit. The increasing volume of this litigation creates the potential for inconsistent judicial rulings. This underscores the importance of promoting uniformity by referral of this matter to the FDA.*** While the Court is very mindful of added expense and delay that may result from a primary jurisdiction referral, the need for scientific and technical expertise ***and uniformity and consistency*** within this field outweighs these other considerations.

909 F. Supp 2d 1128, 1135 (D. Minn. 2012) (emphasis added).

Adjudication of the ECJ issue in court – under varying state consumer protection laws, no less – will defeat Congress's goal of creating a national uniform labeling standard. Fifty ECJ lawsuits have been filed, in eleven jurisdictions in California, Florida, Illinois, New York, New Jersey, and Arkansas, asserting ECJ claims under various state laws – four ECJ lawsuits have been filed against Amy's alone. *See* Appendix A. This means that one court could decide that "evaporated cane juice" is the common or usual name of the ingredient and other courts could require various other names. The result: manufacturers like Amy's would have to print different labels for different states, not to mention the impossible situation they would face when courts in the same state reach different conclusions, as they undoubtedly will do.

3. Judicial Resolution Of ECJ Claims Would Conflict With The FDA's Well-Crafted Enforcement Scheme

The FDA has developed a comprehensive scheme regarding the promulgation and enforcement of its regulations, including provisions in its Regulatory Procedures Manual and regulations like 21 C.F.R. § 10.115. Judicial adjudication of ECJ issues would undermine this scheme by allowing courts to usurp the FDA's authority over its own regulations.

Specifically, section 10.115 provides, in part:

> After providing an opportunity for public comment on a Level 1 guidance document, ***FDA will***: (A) Review any comments received and prepare the final version of the guidance document that incorporates suggested changes, ***when appropriate***; (B) Publish a notice in the Federal Register announcing that the guidance document is available; (C) Post the guidance document on the Internet and make it available in hard copy; and (D) Implement the guidance document.

Id. at § 10.115(g) (emphasis added). Here, after the FDA published the draft guidance, over 50 comments were submitted. Almost all were opposed to the proposed draft guidance. *See* note 4, *supra*. And, significantly, the FDA has yet to "prepare the final version of the guidance document." 21 C.F.R. § 10.115(g). When and how the FDA acts – including even *whether* it chooses to act – is exactly the type of policy decision that Congress has entrusted exclusively to the FDA and USDA, the regulatory bodies with the expertise to consider and make policy decisions regarding food labeling. The Court should not step into the FDA process mid-stream and take action on ECJ.

The Court's adjudication of the ECJ claim would also conflict with the FDA's deliberate decision that its guidance and warning letters do ***not*** create enforceable obligations. The FDA has specifically determined that even its ***final*** guidance documents "do not establish legally enforceable rights or responsibilities," and "do not legally bind the public or FDA." *See* 21 C.F.R. §10.115(d)(1). It is difficult to see how draft, non-binding guidance issued for public comment can be relied upon as FDA's settled position on a subject, as plaintiff suggests, when FDA has determined that even its final guidance documents are not enforceable. The same is true with respect to its warning letters. *See, e.g., Holistic Candlers & Consumers Ass'n. v. FDA*, 664 F.3d 940, 943-44 (D.C. Cir. 2012) (warning letters are not final); *see also Cytosport, Inc. v.*

Vital Pharm., Inc., 894 F. Supp. 2d 1285, 1296 (E.D. Cal. 2012) ("FDA warning letter is not final decision by the FDA").[17] As such, giving "controlling" effect to either draft guidance or warning letters not only is counter to their plain language, but also undermines the federal regulatory scheme.[18]

C. The Draft Guidance Provides No Basis To Reject Primary Jurisdiction

Other courts have relied on the draft guidance to reject primary jurisdiction, believing that the guidance provides FDA's position on ECJ and, thus, there is no reason for a court to abstain.[19] Judge Rogers, however, analyzed this issue critically and correctly in determining that the draft guidance *supports* primary jurisdiction because it "indicates to the Court that the FDA's position is not settled. So far as it appears, FDA has not yet set a uniform enforcement standard." *Hood*, 2013 WL 3553979, at *5 ("Thus, determination of Plaintiff's claim would require the Court to decide an issue committed to the FDA's expertise without a clear indication of how FDA would view the issue").

The guidance itself contains a bright yellow box on page one providing that:

> This draft guidance, when finalized, will represent the Food and Drug Administration's (FDA's) current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations. If you want to discuss an alternative approach, contact the FDA staff responsible for implementing this guidance. If you cannot identify the appropriate FDA staff, call the telephone number listed on the title page of this guidance.

See note 3, *supra*. . This language means that ***until "finalized,"*** the draft guidance does ***not*** "represent the FDA's current thinking on this topic." Any contrary conclusion would undermine

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[17] *See also* FDA Regulatory Procedures Manual, Section 4-1-1 ("warning letter is informal and advisory") (http://www.fda.gov/downloads/ICECI/ComplianceManuals/RegulatoryProceduresManual/UCM074330.pdf); *Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 547 F. Supp. 2d 939, 946 (E.D. Wis. 2008); *Prof'ls & Patients for Customized Care v. Shalala*, 847 F. Supp. 1359, 1365 (S.D. Tex. 1994); *Estee Lauder, Inc. v. FDA*, 727 F. Supp. 1, 5 (D.D.C. 1989); *Genendo Pharm. N.V. v. Thompson*, 308 F. Supp. 2d 881, 885 (N.D. Ill. 2003).

[18] FDA's decision that its guidance and warning letters are not enforceable is part of a well thought-out regulatory regime. In making them non-binding, FDA enjoys a situation where it can make public pronouncements and encourage informal compliance and/or comment, but avoid formal legal challenges. If, however, FDA draft guidance and warning letters were given final effect by this and other courts, it would open up FDA to lawsuits by, for example, food manufactures seeking a declaration that a given FDA policy violates the law.

[19] None of the decisions rejecting primary jurisdiction in the context of ECJ have reconciled the many reasons supporting application of the doctrine that are presented here.

the notice and comment process under 21 C.F.R. §10.115.

In short, the draft guidance is a reason to apply the primary jurisdiction doctrine, not to reject it. *Hood*, 2013 WL 3553979, at *5.

VI. PLAINTIFF'S STATE LAW CLAIMS ARE PREEMPTED

A. Plaintiff's Claims Are Expressly Preempted

The Nutritional Labeling & Education Act ("NLEA") contains an express preemption provision, which provides no state "may ***directly or indirectly*** establish . . . ***any requirement*** for the labeling of food ***of the type***" regulated by federal law "that is ***not identical*** to the [federal] requirement." 21 U.S.C. § 343-1 (emphasis added). Express preemption covers federal statutes as well as labeling regulations. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).[20] Plaintiff's claims are expressly preempted because they seek to impose additional requirements. *See Trazo v. Nestle USA, Inc.*, 2013 WL 4083218, at *6 (N.D. Cal. Aug. 9, 2013).

First, in alleging that evaporated cane juice is not the "common or usual name" for the ingredient, plaintiff relies on draft non-binding FDA guidance. FAC ¶¶ 46-48. In doing so, plaintiff ignores FDA's clear statements that the draft guidance carries no force,[21] and plaintiff's attempt to enforce such requirements is an effort to enforce non-identical requirements.

Second, the thrust of plaintiff's claim is that Amy's did not disclose the presence of "added sugar" in its products or declare the amount of any such "added sugar." FAC ¶¶ 18, 41-42, 44, 71-115, n.3. But federal law does not require any such added sugar disclosures, and thus plaintiff's effort to impose such requirements is preempted. Indeed, sweeteners are pervasively regulated under FDCA. *See, e.g.*, 21 C.F.R. §§ 101.3, 101.4, 101.9, 102.5, 101.60, 168.130. Those regulations, which are promulgated under 21 U.S.C. § 343(g), (i) & (k), are covered by the NLEA's preemption provision. 21 U.S.C. § 343-1(a)(1) & (a)(2). Significantly, in requiring

[20] The "not identical" language means what it says. *See Turek*, 662 F.3d at 427 ("consistency is not the test; identity is.").

[21] Not surprisingly, plaintiff quotes none of the guidance's express limitations in the FAC. Even worse, plaintiff quotes statements from the guidance such as "[s]weeteners derived from sugar cane syrup ***should not*** be listed in the ingredient declaration by names which suggest that the ingredients are juice, such as 'evaporated cane juice'" (FAC ¶ 47 (emphasis added)), but fails to include FDA's instruction that "[t]he use of the word should in Agency guidance means that something is suggested or recommended, but not required." *See* note 3, *supra*.

food manufacturers to list the amount of "sugars," FDA requires manufacturers to provide a *single* number representing the "sum of all free mono- and disaccharides (such as glucose, fructose, lactose, and sucrose)," and does not allow food companies to break down the sugars into type or whether they are naturally-occurring. 21 C.F.R. § 101.9(c)(6)(ii). Plaintiff's demand for precisely that *additional, non-identical* information is expressly preempted.

B. Plaintiff's Claims Are Impliedly Preempted

In *Perez v. Nidek Co.*, 711 F.3d 1109 (9th Cir. 2013), the Ninth Circuit held that there is a "'narrow gap' through which a state-law claim must fit to escape preemption by the FDCA: 'The plaintiff must be suing for conduct that *violates* the FDCA (or else his claim is expressly preempted by [21 U.S.C.] § 360k(a)), but the plaintiff must not be suing *because* the conduct violates the FDCA (such a claim would be impliedly preempted under *Buckman* [*Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 350 (2001)]).'" *Id.* at 1120. Claims that "'exist solely by virtue of the FDCA,'" are therefore impliedly preempted. *Id.* at 1119.

Among other things, the FDCA impliedly preempts any state-law claim that "'originates from, is governed by, and terminates according to federal law.'" *Stengel v. Medtronic, Inc.*, 704 F.3d 1224, 1230 (9th Cir. 2013). Preemption can be avoided only if a "claim is grounded in a traditional category of state law . . . that predated the federal enactments in question, and . . . the claim therefore does not exist solely by virtue of those enactments." *Id.* at 1235 (binding concurring opinion).

Far from alleging violations of independent, preexisting state-law duties, plaintiff's claims here would not exist but for the FDCA. Plaintiff alleges that Amy's unlawfully lists evaporated cane juice as an ingredient on its labels when, according to plaintiff, doing so violates (1) FDA requirements that ingredients be identified using their common and usual names (21 C.F.R. §§ 101.3-.4, 102.5) and (2) FDA's nonbinding draft guidance on use of the term "evaporated cane juice." *See* FAC ¶¶ 44-48. Plaintiff's claims would not exist but for the common-and-usual-name requirement and the non-binding draft guidance, which in turn would not exist but for the FDCA. Plaintiff's claims therefore are impliedly preempted.

Plaintiff's attempt to circumvent preemption by using state consumer protection statutes

to enforce the Sherman Law is unavailing. The Sherman Law merely adopts the FDCA. *See* Cal. Health & Safety Code § 110100(a). Were the FDA to rescind or amend its regulations, the Sherman Law would change too, which just confirms that any claim brought to enforce the Sherman Law "'originates from, is governed by, and terminates according to federal law.'" *Stengel*, 704 F.3d at 1230. Again, this means plaintiff is really suing to enforce the FDCA – which 21 U.S.C. § 337(a), *Buckman*, *Perez*, and *Stengel* all flatly forbid. *See Loreto v. Procter & Gamble Co.*, 515 F. App'x 576, 579 (6th Cir. 2013) ("The statute's public enforcement mechanism is thwarted if savvy plaintiffs can label as arising under a state law for which there exists a private enforcement mechanism a claim that in substance seeks to enforce the FDCA.").

VII. THE FAC DOES NOT COMPLY WITH RULE 9(B)

Plaintiff fails to plead his claims with particularity, as required by Rule 9(b). Where a plaintiff alleges "fraudulent conduct" as the basis for his claims, the claims "sound in fraud," and the pleading "as a whole must satisfy the particularity requirement of Rule 9(b)." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-27 (9th Cir. 2009). Here, plaintiff's claims clearly "sound in fraud." *See, e.g.*, FAC ¶¶ 67, 100, 103.

The FAC fails to comply with Rule 9(b) in at least three ways. ***First***, plaintiff does not allege what he understood evaporated cane juice to mean if not a form of sugar or juice containing sugar. ***Second***, plaintiff makes a number of references to Amy's website and states that he relied upon "various representations and information" on the website. FAC ¶¶ 16, 18. But he never alleges precisely which website statements, if any, form a basis of his claims. Nor does he allege what he understood the statements to mean, when he viewed them, why they are allegedly deceptive, or how they support the alleged claims. This lack of specificity violates Rule 9(b). *See Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1027 (N.D. Cal. 2012).

Third, plaintiff does not identify with the requisite specificity when he purchased the products, where he purchased them, or how many times. Such allegations are needed to satisfy Rule 9(b). *See Ermon v. Grand Auto Sales, Inc.*, 351 F. Supp. 2d 825, 828 (N.D. Ill. 2004) (Rule 9(b) "requires more than an allegation that the fraud occurred sometime during a period of months or years"); *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1123-24 (C.D. Cal.

2010) (allegations that plaintiff purchased product repeatedly during class period are insufficient); *Edmunson v. Procter & Gamble Co.*, 2011 WL 1897625, at *5 (S.D. Cal. May 17, 2011) (dismissing claims under Rule 9(b) where plaintiff failed to allege "when during the class period, where, how many, or how many times" plaintiff purchased the products at issue).

VIII. PLAINTIFF'S CLAIMS FAIL FOR ADDITIONAL, INDEPENDENT REASONS

A. Plaintiff Fails To Allege A Breach Of Express Warranty

To plead express warranty, a plaintiff "must allege: [1] the exact terms of the warranty, [2] plaintiff's reasonable reliance thereon, and [3] a breach of that warranty which proximately causes plaintiff's injury."[22] *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986). As discussed above, plaintiff has not alleged the reliance and causation elements.

The claim also fails for the independent reason that plaintiff has not identified "the exact terms of the warranty," as he is required to do. *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010); *Williams*, 185 Cal. App. 3d at 142; *see also McKinney v. Google, Inc.*, 2011 WL 3862120, at *4 (N.D. Cal. Aug. 30, 2011) ("General assertions about representations or impressions given by Defendants… are not equivalent to a recitation of the exact terms of the underlying warranty."). Plaintiff generally alleges that Amy's provided written warranties that its products were labeled properly and not misbranded. FAC ¶ 212. But nowhere in the FAC does plaintiff explain where such express statements are found, to whom they were made, when Amy's made them, whether and how plaintiff was aware of the statements, and how relying on them was reasonable. Plaintiff's vague allegations do not establish the required "specific and unequivocal" promise. *Cuevas v. United Brands Co., Inc.*, 2012 WL 760403, at *7 (S.D. Cal. Mar. 8, 2012).

B. The Breach Of Implied Warranty Claim Fails

1. The FAC Lacks Allegations That The Products Are Not Fit For Their Ordinary Purpose

To sustain a breach of implied warranty of merchantability claim, a product must be

[22] Plaintiff's vague claim "for violations of the laws of state and federal law pertaining to express warranties" (FAC ¶ 214) should be ignored entirely as lacking any basis whatsoever.

alleged to be defective or not fit for the *ordinary purpose* for which the product is used. *Hauter v. Zogarts*, 14 Cal. 3d 104, 117-18 (1975). The implied warranty "does not impose a general requirement that goods precisely fulfill the expectation of the buyer." *Stearns v. Select Comfort Retail Corp.*, 2009 WL 1635931, at *8 (N.D. Cal. June 5, 2009). "[T]here must be a fundamental defect that renders the product unfit for its ordinary purpose." *Id.*

While plaintiff makes the conclusory allegation that the products "were unfit for the ordinary purpose for which Plaintiff and the Class purchased them" (FAC ¶ 227), the FAC does not contain any factual allegations supporting that conclusion. First, the FAC does not identify what plaintiff contends constitute the products' "ordinary purposes." Second, there are no allegations that demonstrate the products are defective or unfit for their ordinary purposes as food. A food product is fit for its ordinary purpose if it is fit for human consumption. *See, e.g.*, *Luna v. Am. Airlines*, 676 F. Supp. 2d 192, 204 (S.D.N.Y. 2009) (implied warranty claim required plaintiff "to demonstrate injury as a result of her exposure to food not fit for consumption"). Absent such allegations, plaintiff's breach of implied warranty claim fails as a matter of law. *See, e.g., Rossi v. Whirlpool Corp.*, 2013 WL 5781673, at *6-7 (E.D. Cal. Oct. 25, 2013) (plaintiffs failed to state claim for breach of implied warranty because they did not allege refrigerators failed their ordinary purpose of refrigerating).

2. Plaintiff Has Not Alleged Privity

California requires privity between the plaintiff and the defendant for a breach of implied warranty claim. *Blanco v. Baxter Healthcare Corp.*, 158 Cal. App. 4th 1039, 1058-59 (2008). Plaintiff, however, does not allege that he purchased the products directly from Amy's; he alleges that Amy's "sells its food products to consumers through grocery and other retail stores." FAC ¶ 29. Without the required allegations of privity, plaintiff's implied warranty claim fails.

C. The Negligence Claim Is Deficient

A claim for negligence requires allegations of the existence and breach of a legal duty. *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 851 (N.D. Cal. 2012). Plaintiff alleges in a vague manner that Amy's "violated their [sic] duties to disclose the material facts alleged above." FAC ¶ 235. As an initial matter, such conclusory pleading is inadequate and does not give Amy's

proper notice of the claim against it. *See Iqbal*, 556 U.S. at 678. Moreover, to the extent plaintiff's claim relies on the purported failure to disclose the alleged illegality of the product's labels (*see, e.g.*, FAC ¶¶ 7, 66-67, 70), no such duty exists. Courts have rightly rejected the "counterintuitive proposition that a product's label must disclose the fact of its own illegality." *Brazil*, 2013 WL 5312418, at *10; *see also Wilson v. Hewlett-Packard*, 668 F.3d at 1143 (manufacturer's duty only triggered when there is an unreasonable safety hazard).

Plaintiff's "negligence per se" allegation (FAC ¶ 237) also fails. The per se presumption cannot be used to create a private right of action where none exists. *See Scott v. CIBA Vision Corp.*, 38 Cal. App. 4th 307, 324 (1995) ("There is no basis for allowing a negligence [per se] claim to proceed . . . while finding that negligence itself is a preempted cause of action."). That is precisely what plaintiff attempts to do here. The underlying violations allegedly supporting the negligence per se claim are violations of the FDCA and the Sherman Law. Neither statute permits a private right of action, so plaintiff's negligence per se claim must fail.

D. The Unjust Enrichment and Money Had And Received Claims Fail

Plaintiff's unjust enrichment and money had and received claims (SAC ¶¶ 242-253) are duplicative of his other claims and, therefore, should be dismissed for the same reasons. Moreover, as this Court has recognized, unjust enrichment is not an independent cause of action. *See e.g.*, *Robinson v. HSBC Bank USA*, 732 F. Supp. 2d 976, 987 (N.D. Cal. 2010); *see also Low*, 900 F. Supp. 2d at 1031; *Williamson v. Reinalt-Thomas Corp.*, 2012 WL 1438812, at *5 (N.D. Cal. Apr. 25, 2012); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1075-76 (N.D. Cal. 2012); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 814-815 (N.D. Cal. 2011). Nor is money had and received a standalone cause of action. *See e.g., In re NVIDIA GPU Litig.*, 2009 WL 4020104, at *12 (N.D. Cal. Nov. 19, 2009); *Crosbie v. Endeavors Tech., Inc.*, 2009 WL 3464135, at *10 (C.D. Cal. Oct. 22, 2009).[23]

[23] Plaintiff's money had and received claim also fails because Amy's does not possess a sum certain owed to plaintiff. *See, e.g., Tomek v. Apple, Inc.*, 2012 WL 2857035, at *7 (E.D. Cal. July 11, 2012) (dismissing claim for failure to plead an amount of indebtedness); *Kandel v. Brother Int'l Corp.*, 2009 WL 9100406, at *1 (C.D. Cal. Feb. 13, 2009) (dismissing claim where plaintiffs "do not allege that Defendants possess a sum certain owed to Plaintiffs").

E. The Declaratory Judgment Claim Fails

Through his declaratory judgment claim, plaintiff seeks to enforce the FDCA and the Sherman Law, the laws that he alleges render Amy's products mislabeled and misbranded. FAC ¶¶ 254-62. Declaratory judgment, however, "may not be used as a vehicle to enforce a private right" that is explicitly denied. *Foli v. Metro. Water Dist. of S. Cal.*, 2012 WL 1192763, at *4 (S.D. Cal. Apr. 10, 2012) (citing *Schilling v. Rogers*, 363 U.S. 666, 677 (1960) ('[T]he availability of [declaratory] relief presupposes the existence of a judicially remediable right.')"). There exists no private right of action under either the FDCA or the Sherman Law. As such, plaintiff's declaratory judgment claim is not actionable. *Id.*

F. Plaintiff's Claims Are, In Part, Time-Barred

CLRA, FAL, and negligence claims are subject to a three-year statute of limitations, and negligent misrepresentation and implied warranty claims are subject to a two-year statute of limitations. Cal. Civ. Code § 1783 (CLRA); *Yumul*, 733 F. Supp. 2d at 1130 (FAL); *In re Burbank Envtl. Litig.*, 42 F. Supp. 2d 976, 981 (C.D. Cal. 1998) (negligence); *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1054 (9th Cir. 2008) (negligent misrepresentation); Cal. Civ. Proc. Code § 339 (implied warranty). Plaintiff, however, alleges a class period for these claims commencing August 16, 2009 (FAC ¶ 1) – *i.e.*, more than three years ago. Accordingly, plaintiff's CLRA, FAL, negligence, negligent misrepresentation, and implied warranty claims are time-barred in part.

IX. CONCLUSION

Amy's respectfully requests that the Court dismiss the First Amended Complaint. Because the deficiencies cannot be cured, the dismissal should be with prejudice.

DATED: January 29, 2013

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Appendix A - Class Actions Against the Food & Beverage Industry Regarding Evaporated Cane Juice

No.	Case Information	Date Filed
Evaporated Cane Juice Cases Filed by Robert Figy*		
1	***Figy v. Amy's Kitchen, Inc.*** USDC - N.D. Cal., No. 3:13cv3816	8/16/2013
2	***Swearingen and Figy v. Pacific Foods of Oregon, Inc.*** USDC - N.D. Cal., No. 3:13cv4157	9/9/2013
3	***Swearingen and Figy v. Santa Cruz Natural, Inc.*** USDC - N.D. Cal., No. 3:13cv4291	9/16/2013
4	***Swearingen and Figy v. Late July Snacks LLC*** USDC - N.D. Cal., No. 3:13cv4324	9/18/2013
5	***Swearingen and Figy v. Healthy Beverage LLC*** USDC - N.D. Cal., No. 3:13cv4385	9/20/2013
6	***Swearingen and Figy v. Amazon Preservation Partners, Inc.*** USDC - N.D. Cal., No. 3:13cv4402	9/23/2013
7	***Swearingen and Figy v. Attune Foods, Inc.*** USDC - N.D. Cal., No. 4:13cv4541	10/1/2013
8	***Figy v. Lifeway Foods Inc.*** USDC – N.D. Cal., No. 3:13cv4828	10/17/2013
***** Robert Figy has also sued two food companies for false advertising not related to evaporated cane juice***:*** ***Figy v. Frito-Lay N. Am.***, N.D. Cal., No. 3:13cv3988 (filed 8/27/2013) and ***Swearingen and Figy v. ConAgra Foods, Inc.***, N.D. Cal., No. 3:13cv5322 (Filed 11/15/2013)		
Additional Evaporated Cane Juice Cases Brought by the same Consortium of Attorneys Representing Mr. Figy		
9	***Samet v. Procter & Gamble and Kellogg Company*** USDC - N.D. Cal., No. 5:12cv1891	4/16/2012
10	***Trazo v. Nestlé USA, Inc.*** USDC - N.D. Cal., No. 5:12cv2272	5/4/2012
11	***Kane v. Chobani, Inc.*** USDC - N.D. Cal., No. 5:12cv2425	5/14/2012
12	***Ivie v. Kraft Foods Global, Inc., Cadbury Adams USA LLC*** USDC - N.D. Cal., No. 5:12cv2554	5/17/2012
13	***Werdebaugh v. Blue Diamond Growers*** USDC - N.D. Cal., No. 5:12cv2724	5/29/2012
14	***Thomas v. Costco Wholesale Corporation*** USDC - N.D. Cal., No. 5:12cv2908	6/5/2012
15	***Smedt v. The Hain Celestial Group*** USDC - N.D. Cal., No. 5:12cv3029	6/12/2012
16	***Gitson v. Modesto Wholesoy Company*** San Francisco Superior Court (Cal.), No. CGC-12-522338	7/12/2012
17	***Hood v. Wholesoy & Co., et al.*** USDC - N.D. Cal., No. 3:12cv5550	10/29/2012

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No.	Case Information	Date Filed
18	***Pratt v. Whole Foods Market, Inc.*** USDC - N.D. Cal., No. 5:12cv5652	11/2/2012
19	***Avoy v. Turtle Mountain LLC*** USDC - N.D. Cal., No. 5:13cv236	1/17/2013
20	***Morgan v. Wallaby Yogurt Company, Inc.*** USDC - N.D. Cal., No. 3:13cv296	1/22/2013
21	***Avila v. Green Valley Organics LP*** USDC - N.D. Cal., No. 5:13cv335	1/24/2013
22	***Leonhart v. Nature's Path Foods, Inc.*** USDC - N.D. Cal., No. 5:13cv492	2/4/2013
23	***Reese v. Odwalla, Inc. and The Coca-Cola Company*** USDC - N.D. Cal., No. 4:13cv947	3/1/2013
24	***Gitson v. Trader Joe's Company*** USDC - N.D. Cal., No. 3:13cv1333	3/25/2013
25	***Gitson v. Clover-Stornetta Farms, Inc.*** USDC - N.D. Cal., No. 3:13cv1517	4/4/2013
26	***Ang v. WhiteWave Foods Company, et al.*** USDC - N.D. Cal., No. 3:13cv1953	4/29/2013
27	***Swearingen v. Yucatan Foods LP*** USDC - N.D. Cal., No. 3:13cv3544	7/31/2013
Additional Evaporated Cane Juice Cases Brought by Other Attorneys		
28	***Bernaz v. Chobani, Inc.*** USDC - E.D.N.Y., No. 12cv2845	6/6/2012
29	***Rosales v. Chobani, Inc.*** USDC - S.D. Cal., No. 3:12cv2071	8/22/2012
30	***Singer v. WWF Operating Co. dba WhiteWave Foods*** USDC - S.D. Fla., No. 1:13cv21232; 11th Circuit, No. 13-13387	4/8/2013
31	***Perel v. Kashi Company*** USDC - D.N.J., No. 2:13cv2369	4/12/2013
32	***Saubers v. Kashi Company*** USDC - S.D. Cal., No. 3:13cv899	4/15/2013
33	***Norwood v. Kashi Company*** USDC - S.D. Cal., No. 3:13cv956	4/22/2013
34	***Burns v. Kashi Company*** USDC - S.D. Cal., No. 3:13cv959	4/22/2013
35	***Reilly v. Amy's Kitchen, Inc.*** USDC - S.D. Fla., No. 1:13cv21525	4/29/2013
36	***Cortes v. Yucatan Foods LP*** USDC - S.D. Fla., No. 1:13cv21526	4/29/2013
37	***Greenfield v. Yucatan Foods LP*** USDC - S.D. Fla., No. 1:13cv21610	5/6/2013

Appendix A - Class Actions Against the Food & Beverage Industry Regarding Evaporated Cane Juice

No.	Case Information	Date Filed
38	***Franco v. Probar LLC*** San Diego Superior Court (Cal.), No. 37-2013-00065099 Removed USDC – S.D. Cal., No. 3:13cv2488	8/30/2013
39	***Gilbert v. Amy's Kitchen, Inc.*** Cook County Circuit Court (IL), No. 2013-L-011629 Removed USDC – N.D. Ill., No. 1:13cv9004	10/21/2013
40	***Miller v. Living Harvest Foods, Inc.*** USDC – S.D. Fla., No. 1:13cv23926	10/29/2013
41	***Melvin v. Blue Diamond Growers*** USDC – C.D. Cal., No. 8:13cv1746	11/5/2013
42	***Anderson v. The Hain Celestial Group, Inc.*** USDC – C.D. Cal., No. 8:13cv1747	11/5/2013
43	***Bontrager v. Intelligent Beverages, LLC*** Los Angeles Superior Court (Cal.), No. BC526990	11/7/2013
44	***Perera v. Pacific Foods of Oregon, Inc.*** USDC – C.D. Cal., No. 8:13cv1788	11/13/2013
45	***Ibarrola v. Kind LLC*** USDC – N.D. Ill., No. 3:13cv50377	11/26/2013
46	***Bennett v. Amy's Kitchen, Inc.*** Pulaski County Circuit Court, Arkansas, No. 60CV-13-4924	12/23/2013
47	***Melvin v. Blue Diamond Growers*** Los Angeles Superior Court, No. BC532044	1/2/2014
48	***Tchayelian v. Blue Diamond Growers*** USDC – N.D. Cal., No. 5:14cv91	1/7/2014
49	***Shaouli v. The Hain Celestial Group, Inc.*** Los Angeles Superior Court, No. BC532667	1/9/2014
50	***Cowan v. Guayaki Sustainable Rainforest Products, Inc.*** Sonoma County Superior Court, No. SCV254877	1/15/2014