UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-56066

MAURICIO CHAVEZ, *et al.*,

Plaintiffs-Appellants,

vs.

NESTLÉ USA, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. CV09-9192 GW (CWx)
Hon. George H. Wu, District Judge, Presiding

ANSWERING BRIEF FOR DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Defendant-appellee Nestlé USA, Inc. is a wholly-owned subsidiary of Nestlé Holdings, Inc., which in turn is a wholly-owned subsidiary of Nestlé S.A., a publicly-traded company headquartered in Vevey, Switzerland.

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INTRODUCTION

This case involves a challenge to the labeling and marketing of two products sold by defendant-appellee Nestlé USA, Inc. ("Nestlé"), under the Juicy Juice brand. The first was a fruit juice beverage with added fish oil, a source of omega-3 fatty acids including Docosahexaenoic acid ("DHA"). "Juicy Juice with DHA"[1] was sold in a package stating that DHA is "a building block for brain development" "in children under two years old" and disclosing that the product contained 16 milligrams of DHA per 4-ounce serving. SER27-28.

The second product was a fruit juice beverage with added vitamin C, zinc, and a prebiotic fiber called gum arabic. "Juicy Juice Immunity" was sold in a package labeled "Vitamin C & Zinc for Immunity plus Prebiotic Fiber for Digestive Health," alongside a logo with the text "Helps Support Immunity." SER29-30.

Although this is a suit alleging false advertising and deceptive business practices, plaintiffs-appellants ("plaintiffs") do not dispute the truth of *any* of those statements. They thus do not deny that DHA contributes to brain development in children under two years old or that Juicy Juice with DHA in fact provided 16 milligrams of DHA per serving. Nor do they deny that vitamin C and zinc support

[1] Plaintiffs refer to this product as "Juicy Juice Brain Development."

immunity or that prebiotic fiber supports digestive health, or that Juicy Juice Immunity in fact contained all of those ingredients.

That being so, it is not surprising that plaintiffs have struggled to identify precisely what they *do* think was wrong about the products' labeling and marketing; over the course of three separate consolidated complaints they have attacked the products' labels and marketing on three radically different grounds. Their final theory, offered in the currently operative complaint, is that Nestlé's statements falsely implied that it had substantiation for the representations on the product packaging, when it actually did not.

But having settled on that lack-of-substantiation theory before the district court, plaintiffs do not defend it in their brief to this Court. Rather, plaintiffs have now retreated to an old theory, one addressed only in passing and in wholly conclusory terms in their currently operative complaint: that the marketing of these products was somehow misleading because Juicy Juice with DHA does not contain *enough* DHA to be beneficial and because Juicy Juice Immunity—although containing the advertised ingredients—does not contain *more* of those ingredients than do other juice products.

This old contention, however, is itself defective, for two fundamental reasons. Plaintiffs are not entitled, on appeal, to argue theories not elucidated in their current complaint. And to the extent that plaintiffs' current complaint is

understood to allege that Nestlé's labels and advertising were misleading, no reasonable consumer would have been deceived by the truthful and straightforward statements now in dispute. Because plaintiffs repeatedly have tried and failed to state a plausible claim, the district court correctly dismissed their final complaint with prejudice. This Court should affirm that judgment.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction pursuant to the Class Action Fairness Act because the matter in controversy exceeds $5 million, exclusive of interest and costs, and at least one member of the putative class is a citizen of a different state than Nestlé. 28 U.S.C. § 1332(d)(2)(A). The district court entered judgment dismissing plaintiffs' complaint with prejudice on May 27, 2011. Plaintiffs noticed an appeal on June 23, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court properly dismissed plaintiffs' California state-law claims challenging an alleged lack of substantiation for marketing statements because such claims are not actionable under California law.

2. Whether the district court properly dismissed plaintiffs' California state-law claims alleging affirmative misrepresentations in marketing statements, where (a) plaintiffs did not allege that they relied upon the alleged

misrepresentations; and (b) plaintiffs did not plausibly allege any misrepresentations that would likely mislead a reasonable consumer.

3. Whether the district court properly dismissed plaintiffs' California state-law claims premised on a failure to make certain disclosures where plaintiffs did not sufficiently allege that Nestlé had any duty to disclose.

4. Whether the district court properly concluded that plaintiffs' claims challenging the DHA content of certain Nestlé Juicy Juice products are within the primary jurisdiction of the U.S. Food and Drug Administration (FDA), which is better situated to make conclusions of scientific policy.

5. Whether plaintiffs waived their arguments that Nestlé engaged in "unfair" and "unlawful" conduct by failing to press those claims before the district court and failing to adequately raise the claims in their opening brief.

STATEMENT

A. Statutory Background

Plaintiffs' complaint invokes two California statutes. The Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, provides a cause of action to challenge an "unlawful, unfair or fraudulent business act or practice" or "unfair, deceptive, untrue or misleading advertising." *Id.* § 17200. The False Advertising Law ("FAL"), Cal. Bus. & Prof. Code, §§ 17500 *et seq.*, makes it unlawful to make a statement in "any advertising device . . . which is

untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Id.* § 17500.

Both the UCL and the FAL were amended by referendum in 2004. Pursuant to Proposition 64, private enforcement of the UCL and FAL is limited to those "who ha[ve] suffered injury in fact . . . as a result of the unfair competition," in the case of the UCL, or "as a result of a violation of" the FAL. Cal. Bus. & Prof. Code §§ 17204, 17535; *cf. Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (requiring a showing of injury-in-fact in an action under the UCL, prior to the enactment of Proposition 64, as a matter of Article III standing).

B. Procedural Background and Statement of Facts

Plaintiff Mauricio Chavez filed suit in the U.S. District Court for the Central District of California on December 15, 2009, alleging that Nestlé violated the UCL, the FAL, and California's deceit statute, Cal. Civ. Code § 1709, with respect to various alleged misrepresentations concerning Juicy Juice with DHA and Juicy Juice Immunity. SER106-42. Plaintiffs Vincent Bonsignore and Zanetta Taddesse-Bonsignore ("Bonsignores") filed a substantially similar complaint in the same court on January 7, 2010. SER72-105. The cases were consolidated on April 8, 2010, ER227, and the plaintiffs filed a consolidated complaint on April 16, 2010, SER31-71.

1. Initial Consolidated Complaint

a. The consolidated complaint reflected the allegations of the individual plaintiffs. Plaintiffs' theory was that, although the Juicy Juice products contained nutrients with beneficial attributes, they did not contain *enough* of those nutrients to warrant advertising them. As to Juicy Juice with DHA, plaintiffs acknowledged that "some studies . . . show benefits to a child's visual function and/or cognitive and behavioral development" from DHA. SER47 ¶ 53. But they alleged that there was "no sound scientific basis" for Nestlé to "affirmatively represent to consumers . . . that Juicy Juice [with DHA] beverage enhances brain development because the beverage contains 16 mg of DHA per 4 fl. oz. serving." *Id.*; SER48 ¶ 59. As a point of comparison, the consolidated complaint alleged that the World Health Organization ("WHO") recommends daily DHA intake of 145 milligrams for a six-month-old infant or 200 milligrams for a one-year-old child. SER48 ¶ 60.

As to Juicy Juice Immunity, plaintiffs acknowledged that "[p]rebiotics are . . . beneficial to the health of the body" and that "Juicy Juice Immunity contains gum arabic," which has "been shown to have a prebiotic effect." SER52-53 ¶¶ 72-75. But they alleged that studies had shown a prebiotic effect from daily consumption of ten grams of gum arabic, while Juicy Juice Immunity contains only three grams of dietary fiber (including gum arabic) per serving. SER53 ¶ 75. As to the other ingredients in Juicy Juice Immunity, plaintiffs acknowledged that

"both vitamin C and zinc may play roles in immune function." SER53 ¶ 78. But they contended that "correlating . . . zinc with immunity[] is a structure/function claim that Defendants cannot substantiate and affirmatively misleads and misinforms consumers because . . . there is a relatively low amount of zinc – 10% Daily Value" per serving." *Id.* Plaintiffs also alleged that, although Juicy Juice Immunity contains 100% of the recommended daily value of vitamin C, its packaging implies that it contains *more* vitamin C than other juices. SER53 ¶ 79.

As to both products, plaintiffs alleged that Nestlé had misrepresented the type of juice contained, the percentage of juice content, and the superiority of the containers in which they were sold. SER44-45 ¶¶ 44-46, SER54-55 ¶¶ 84-87.

b. On Nestlé's motion, the district court dismissed the consolidated complaint with leave to amend. After noting that the complaint was "obviously deficient" by virtue of its "scattershot approach," which made it "difficult to discern in what way Plaintiffs believe they were supposedly deceived," ER210, the court held the complaint subject to dismissal under Federal Rule of Civil Procedure 9(b), which requires allegations of fraud to be alleged with particularity. ER216. The court noted that plaintiffs failed to allege that any specific advertisements were deceptive, when and how plaintiffs viewed those advertisements, or how they relied upon the advertisements to make purchasing decisions. *Id.* The court further found that plaintiffs failed to allege the sort of "long-term advertising

campaign" that might obviate the need to prove reliance on particular advertisements. *Id.* (citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009)).

Alternatively, the court found that the complaint was subject to dismissal under Rule 12(b)(6) for failure to properly plead causation or reliance. ER217. Finally, the court found that the type-of-juice and percentage-juice-content claims were preempted by the Federal Food, Drug, & Cosmetic Act ("FFDCA"), ER211-12, and suggested (but did not decide) that plaintiffs' claims relating to the amount of DHA in Juicy Juice fell within the primary jurisdiction of the FDA, ER213.

2. First Amended Consolidated Complaint

a. Plaintiffs filed their first amended consolidated complaint ("FACC") on November 10, 2010. ER168. Despite the consolidated complaint's acknowledgment of DHA's beneficial effects, the FACC asserted that use of the term "Brain Development" in connection with the product is deceptive as to "any consumer aged 2 or older," noting the disclaimer ("in children under two years old") that appears on the front of the package for Juicy Juice with DHA. ER178-79 ¶ 32. And despite the consolidated complaint's acknowledgment of the health benefits associated with prebiotic fiber, vitamin C, and zinc, the FACC alleged that "Juicy Juice Immunity beverage does not improve a child's immune system or in any way improve immunity." ER184 ¶ 63. The FACC did not, however, allege

that plaintiffs relied on any particular representations of fact when purchasing Juicy Juice products.

The FACC dropped plaintiffs' challenge to the product containers and their deceit claim under Cal. Civ. Code § 1709, while adding a new claim for unjust enrichment. ER199-200 ¶¶ 127-30.

b. The district court granted Nestlé's motion to dismiss the FACC on January 10, 2011. ER56-57, ER232. After noting that "the [FACC] is still frustratingly non-specific," ER60, the court concluded that the FACC failed to allege fraud with particularity under Rule 9(b) because it did not "identify with specificity when the Plaintiffs purchased the products or . . . what specific misrepresentations they allegedly saw, when they viewed them, or how they relied upon them," ER64.

The court further ruled that plaintiffs' allegations failed to state a claim under California law. The court found "no factual allegations . . . that support Plaintiffs' contention that Nestle marketed [Juicy Juice with DHA] as having the ability to make children smarter," and no facts to support plaintiffs' challenges to the description of the zinc, vitamin C, and prebiotic contents of Juicy Juice Immunity, given that a single serving of the juice does contain 10% of the daily value of zinc, 100% of the daily value of vitamin C, and 30% of the gum arabic shown to have beneficial prebiotic effects in adults. ER61-62. The court also

found no factual allegations to support plaintiffs' theory that the products were marketed as 100% juice and concluded that such a claim would in any event be preempted by the FFDCA. The court likewise found that plaintiffs' challenge to the DHA product "arguably should be dismissed under the primary jurisdiction doctrine" because the district judge doubted "whether the courtroom is the appropriate forum in deciding whether, or in what amounts, DHA promotes brain development in children." ER61, ER66. Finally, the court dismissed plaintiffs' unjust enrichment claim because unjust enrichment is not an independent claim under California law and plaintiffs' claim was duplicative of their claims for restitution under the UCL and the FAL. ER67.

The court granted plaintiffs leave to amend their complaint after admonishing them "this will be it, if I give them one more opportunity." SER19-20. The court directed plaintiffs to specify "in detail what their claims are." It also reminded them that, "if their claims are based upon some sort of misrepresentation, . . . the requirements of Rule 9 [must] be satisfied in detail." SER20. And the court instructed plaintiffs "to make sure that everything the[y are] basing [their] claims on [is] contained in the pleading" so that a final ruling could be made on all issues. *Id*.

3. Second Amended Consolidated Complaint

a. Plaintiffs filed their Second Amended Consolidated Complaint (SACC) on January 31, 2011. ER125. The SACC reflected substantial changes from plaintiffs' previous complaints. The allegation that Juicy Juice Immunity contained insufficient amounts of zinc, vitamin C, or prebiotic fiber to benefit health was deleted, as was the challenge to use of the term "Brain Development" in connection with a product used by children who are more than two years old. The suggestion that Juicy Juice with DHA contained an inadequate amount of DHA was pared down to a single paragraph and was no longer the foundation of plaintiffs' attack on the product. ER137 ¶ 32. And plaintiffs dropped the claim for unjust enrichment.

In place of those allegations, plaintiffs adopted the theory that Nestlé's marketing materials made misrepresentations because Nestlé allegedly lacked "scientific evidence to substantiate [its] claims." ER130 ¶ 22. This lack-of-substantiation theory is asserted throughout the SACC. *See* ER137 ¶ 30, ER138 ¶¶ 34-35, ER139 ¶ 38, ER142 ¶ 49, ER143 ¶ 52, ER147 ¶ 66, ER150 ¶¶ 76, 79, ER151 ¶ 83.

Plaintiffs also added allegations concerning reliance. In particular, the SACC alleges that Chavez and the Bonsignores "read and relied upon the following misleading statements on the front and rear of the Brain Development

Apple packaging: 'BRAIN DEVELOPMENT' and 'Good to Remember… The human brain triples in volume between birth and two years, so it's never too early to start good nutrition habits.'" ER138 ¶ 37 (Chavez), ER142 ¶ 48 (Bonsignores). But plaintiffs did not allege that they believed those assertions to be true or relied on their truth; rather, consistent with the lack-of-substantiation theory, plaintiffs "purchased Brain Development Apple *believing that Defendant had a reasonable basis for its representations* that the product promoted brain development." ER139 ¶ 38 (Chavez), ER142 ¶ 49 (Bonsignores) (emphasis added). Plaintiffs also alleged that Chavez "viewed specific misleading advertising and marketing materials, ER139 ¶ 39, and "visited the Juicy Juice Brain Development and Immunity website," ER141 ¶ 46, but do not allege that he relied upon these materials in any way.[2]

In similar fashion, the SACC alleges that Chavez "read and relied upon the following misleading statements on the Immunity Apple and Berry packaging: 'HELPS SUPPORT IMMUNITY' and 'VITAMIN C & ZINC for Immunity **PLUS** PREBIOTIC FIBER for Digestive Health.'" ER147 ¶ 65. But again, in explaining what this means, the complaint carefully alleges only that Chavez believed "that Defendant had a reasonable basis for its representations that the product promoted

[2] Plaintiffs' failure to allege that Chavez *relied* upon any materials other than the packaging is consistent with their representation to the court that Chavez "only reviewed the materials on the packaging." SER23.

immunity and digestive health," *id.* ¶ 66; it does not allege that he believed and relied upon the truth of the statements. And again, although the SACC alleges that Chavez "viewed specific misleading advertising and marketing materials," *id.* ¶ 67, and "visited the Juicy Juice Brain Development and Immunity website," ER149 ¶ 73, it does not allege any reliance on those materials. The SACC does not make any allegations connecting the Bonsignores to any particular representations as to Juicy Juice Immunity.

b. Nestlé moved to dismiss the SACC and the district court issued a tentative ruling granting the motion with prejudice. ER48-55. After conducting two hearings to permit plaintiffs every opportunity to raise additional arguments in support of the SACC, ER6-47, SER1-7, the court adopted its proposed ruling as a final ruling and dismissed the case, ER234.

The court noted that "[o]ne difficulty with the SACC, as with previous versions of Plaintiffs' pleading in this action, is that it lumps together distinct products and multiple factual allegations without giving the reader a clear sense of which allegations support which specific claims." ER49. But the court was able to discern that "the focus of Plaintiffs' pleading has shifted from allegations of affirmative misrepresentations by Defendant . . . to essentially alleging that Defendant's claims about its products are deceptive because they are unsubstantiated." ER49. As to that central theory, the court held that lack of

substantiation is not a cognizable theory of liability under the UCL or the FAL. ER53-54. Rather, under California law, the court found that plaintiffs must allege and prove that a statement is *actually* false or misleading, rather than shift the burden onto defendants to prove that their assertions have been substantiated. *See* ER54.

Thus, the court found that a fraudulent misrepresentation claim under the UCL or the FAL must be based on an affirmative misrepresentation or the omission of information that a speaker has a duty to disclose. Here, the court continued, plaintiffs "have not identified any examples of" "affirmative misrepresentations," because "[n]one of the [challenged] statements are alleged to be actually or identifiably false." ER49; *see* ER52 (plaintiffs did not "adequately explain why the identified statements are false or misleading"). Specifically, as to Juicy Juice with DHA, the court found "no allegations that consumers were misled regarding the actual amount of DHA in the products, nor any explicit link between the amount of DHA and Plaintiffs' false advertising theory." *Id.* As for Juicy Juice Immunity, the court saw no "facts challenging . . . the role of Vitamin C and zinc in immune function, or of pre-biotic fiber in digestion." *Id.* Nor did the court find any actionable omissions, as plaintiffs did not establish that Nestlé had a duty to make any additional disclosures about the product. ER54-55.

Finally, the court determined that, "[a]lthough it is not necessary to decide the issue of primary jurisdiction based on Plaintiffs' apparent failure to articulate any cognizable claim," "Plaintiffs' claims regarding the presence of DHA in the Brain Development beverage would be subject to dismissal under the primary jurisdiction doctrine." ER55.

SUMMARY OF ARGUMENT

I. The primary theory of plaintiffs' SACC is that Nestlé violated the UCL and the FAL by making statements for which it lacks adequate substantiating evidence. But plaintiffs have abandoned that theory on appeal; that is enough to dispose of this aspect of the case, and therefore of most of the allegations in the SACC. Even if that were not so, however, the failure-to-substantiate claims would be insupportable: the district court correctly held that California law does not permit false advertising claims under such a theory.

II. Plaintiffs have not alleged an affirmative misrepresentation that states a claim under California law. Under that law, a plaintiff claiming fraudulent misrepresentation under the UCL and the FAL must prove that (1) he or she actually relied on allegedly misleading statements to his or her detriment; and (2) the statements were likely to deceive an ordinary consumer. Plaintiffs adequately allege neither element.

To show the required actual reliance, plaintiffs must allege with particularity that the challenged misrepresentation caused their injury. But plaintiffs' SACC does not allege that they relied on *any* misrepresentation in making a purchase of Juicy Juice products. To the contrary, there is no allegation in the SACC that some of the supposed misstatements were even seen by any of the plaintiffs; the SACC alleges that other misstatements were seen but not that they were relied upon; and for the few claims where plaintiffs have alleged reliance, that reliance involved believing that Nestlé had adequate substantiation for its product claims, an allegation that is insufficient as a matter of law.

Nor does plaintiffs' SACC allege misstatements that would be likely to deceive an ordinary consumer. As to Juicy Juice with DHA, plaintiffs principally challenge the label text "DHA 16 mg per serving," which they contend was an insufficient amount of DHA to provide health benefits. But every statement on the product label was accurate, which belies any claim of deception; and if consumers did infer that 16 milligrams is a significant amount of DHA, they were *correct* in doing so, as is demonstrated by other allegations in the SACC itself. As to Juicy Juice Immunity, plaintiffs fail to allege why any supposed misstatement is false or misleading *at all*.

III. Plaintiffs have not alleged an omission that states a claim under California law. California courts have generally rejected a broad duty to disclose.

Absent an affirmative duty imposed by law, a duty to disclose exists only if affirmative representations have the likely effect of misleading the public absent a corrective disclosure. But plaintiffs suggest a far broader theory of omissions liability, under which an advertiser is liable for damages whenever, in the course of making a representation, it omits any additional information that might have altered a consumer's behavior. No court has adopted such a rule. Under the correct standard for false advertising claims, none of the omissions alleged by plaintiffs would likely deceive an ordinary consumer.

IV. In the alternative, plaintiffs' claims regarding Juicy Juice with DHA must be dismissed under the doctrine of primary jurisdiction. The crux of plaintiffs' challenge is that Juicy Juice with DHA contains an insufficient amount of DHA to provide health benefits. But Congress has vested the authority to determine nutrient daily values in the FDA. That agency is currently reviewing several requests to set the daily value for DHA. It would be inappropriate for a federal court to undermine that administrative process by determining the amount of DHA that is beneficial—a determination that, in any event, the expert agency is much better qualified to make.

V. Plaintiffs' opening brief also mentions theories of liability under the "unfair" and "unlawful" prongs of the UCL. Plaintiffs waived both arguments by

failing to raise them before the district court or to brief them adequately on appeal. In any event, they have no merit.

STANDARD OF REVIEW

The district court's dismissal of the SACC under Federal Rules of Civil Procedure 9(b) and 12(b)(6) is subject to *de novo* review by this Court. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003). As to the district court's alternative holding that plaintiffs' claims against Juicy Juice with DHA should be dismissed in favor of the FDA's primary jurisdiction, panels of this Court have applied both an abuse of discretion and a *de novo* standard when reviewing such rulings. *Compare GCB Comm'cns, Inc. v. U.S. S. Comm'cns, Inc.*, 650 F.3d 1257, 1262 (9th Cir. 2011) (abuse of discretion), *and Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (same), *with Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1162 n.11 (9th Cir. 2007) (*de novo*), *and Int'l Bhd. of Teamsters Local 952 v. Am. Delivery Serv. Co.*, 50 F.3d 770, 773 (9th Cir. 1995) (same). As explained below, plaintiffs' claim should be dismissed under either standard.

ARGUMENT

This case involves exceedingly peculiar claims of deception: plaintiffs do not assert that *any* of the defendant's statements actually were false. Plaintiffs now agree that each of the ingredients added to the Juicy Juice products at issue here

has health benefits; they do not deny that those products in fact contained the ingredients listed on their labels; and they evidently recognize that the labels accurately stated the amount of those ingredients included in each product. But plaintiffs nevertheless insist that they somehow were misled by the product labels and associated marketing, in ways that their brief leaves hazy.

In fact, plaintiffs' difficulty in articulating a theory of liability has led their case to resemble a very expensive version of the game whack-a-mole; as each of their theories has been rejected, they have replaced it with a new one (or, sometimes, with a repackaged older one). But plaintiffs' pleadings make clear that they were not, and that no reasonable consumer would have been, misled by any of the truthful statements challenged here. Courts consistently reject such claims on the pleadings, and the district court, after displaying considerable patience by allowing repeated repleading by plaintiffs, correctly brought plaintiffs' game to an end by dismissing their final complaint. This Court should affirm that decision.

I. PLAINTIFFS HAVE WAIVED ANY CLAIM FOR RELIEF UNDER THEIR FAILURE-TO-SUBSTANTIATE THEORY, WHICH IN ANY EVENT IS INSUPPORTABLE AS A MATTER OF LAW.

Plaintiffs have abandoned on appeal the theory of relief that underlies most of the SACC's allegations. As the district court recognized, "[t]he primary focus of the SACC is . . . , unarguably, on a supposed lack of substantiation for the advertised attributes of the nutrients contained in the Brain Development and

Immunity products." ER53 (citing ER130 ¶ 22, ER133 ¶ 25, ER137 ¶ 30, ER138 ¶¶ 35-36, ER143 ¶ 55, ER147 ¶¶ 63-64, ER150 ¶¶ 80-81, ER151 ¶ 85). Again and again, plaintiffs allege in the SACC that Nestlé lacks "competent and reliable scientific evidence" for its labeling and advertising, leaving these statements "unsubstantiated" and injuring plaintiffs because they thought Nestlé "had a reasonable basis for its representations." ER137 ¶ 30, ER138 ¶ 35, ER139 ¶ 38, ER147 ¶ 66.

But plaintiffs do not press their failure-to-substantiate theory on appeal.[3] To the contrary, they now insist that their "claims are *not* based on a lack of substantiation theory." AOB37 (emphasis added). Indeed, they go to great lengths to suggest that the district court erred, not because it *rejected* the failure-to-substantiate theory, but because it labored under the misimpression that plaintiffs' *only* theory was that Nestlé lacked substantiation for its product claims. AOB31-37. Because this failure-to-substantiate theory is not advanced in plaintiffs' brief to this Court, it has been abandoned: the Court "won't 'consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.'" *Christian Legal Soc'y v. Wu*, 626 F.3d 483, 487 (9th Cir. 2010) (quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986)).

[3] Perhaps that is because the SACC and plaintiffs' opening brief in this Court themselves identify studies that substantiate Nestlé's claims. *See* Appellants' Opening Brief ("AOB") 10 (citing six studies); ER132-33 ¶ 24 (same).

Although that is enough to dispose of this aspect of the case, it may be added that, even if not waived, such a theory is insupportable under California law. Simply put, under the UCL and the FAL, "a private plaintiff cannot" "sue an advertiser for making unsubstantiated advertising claims." *Fraker v. Bayer Corp.*, 2009 WL 5865687, at *8 (E.D. Cal. Oct. 6, 2009); *see also Nat'l Council Against Health Fraud, Inc. v. King Bio Pharms., Inc.*, 107 Cal. App. 4th 1336, 1345 (2003) ("Private plaintiffs are not authorized to demand substantiation for advertising claims."); *Stanley v. Bayer Healthcare LLC*, 2012 WL 1132920, at *4 (S.D. Cal. Apr. 3, 2012). As the district court explained, "'there is no basis in California law to shift the burden of proof to a defendant in a representative false advertising and unlawful competition action. . . . [T]he Legislature has indicated an intent to place the burden of proof on the plaintiff in such cases.'" ER 54 (quoting *Nat'l Council Against Health Fraud, Inc.*, 107 Cal. App. 4th at 1342). The district court therefore correctly concluded that the primary theory stated in plaintiffs' currently operative complaint is fatally flawed. ER53-54.

II. PLAINTIFFS DO NOT ADEQUATELY PLEAD AND STATE A CLAIM AS TO ANY AFFIRMATIVE MISREPRESENTATIONS.

Having abandoned the SACC's theory that Nestlé is liable for failing to substantiate its marketing claims, plaintiffs now argue to this Court that Nestlé is liable for making affirmative misrepresentations. *E.g.*, AOB25, 32, 37. But the scattershot and conclusory allegations of falsity that remain in the SACC do not

satisfy the most basic requirements for challenging an affirmative misrepresentation under California law and the Federal Rules of Civil Procedure.

To state a claim under the UCL or the FAL for an affirmative misrepresentation, plaintiffs must allege, at a minimum, that they (1) *relied* upon a representation that (2) was *likely to deceive* a reasonable consumer. As in any case, plaintiffs in suits under these statutes are required to specify the "'grounds'" of their "'entitlement'" to relief, which "requires more than labels and conclusions" and for which "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *accord Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). And because misrepresentation claims sound in fraud, it is not sufficient for plaintiffs merely to allege in conclusory terms that they satisfy those elements. Their allegations must identify "'the who, what, when, where, and how' of the misconduct charged," and they must identify "'what is false or misleading about a statement, and why it is false.'" *Vess*, 317 F.3d at 1106. As the district court correctly found, *see* ER49, ER52, plaintiffs' allegations do not remotely satisfy those requirements: "what they do not do (either in their Opposition [to Nestlé's motion to dismiss] or in the SACC itself) is adequately explain *why* the identified statements are false and misleading." ER52 (emphasis

added). Plaintiffs' failure to satisfy that burden requires dismissal of their complaint.

A. Plaintiffs do not adequately allege reliance as to any affirmative misrepresentations.

At the outset, plaintiffs' allegations of affirmative misrepresentation fail because they do not allege reliance in the manner required by California law.

"[T]here is no doubt that reliance is the causal mechanism of fraud." *In re Tobacco II Cases*, 46 Cal. 4th at 326. A consumer suffers no harm and is entitled to no redress based on a false statement that he or she never saw, or he or she saw but did not believe. Thus, California courts recognize that reliance is "'an essential element'" of false advertising claims that must be pleaded and proved by plaintiffs. *Id.* (quoting *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1110-11 (1993) (opinion of Kennard, J.)); *see also Princess Cruise Lines, Ltd. v. Superior Court*, 179 Cal. App. 4th 36, 43 (2009) ("it is very clear that reliance is required in a UCL action . . . involving some form of fraud").

In California, the reliance requirement was codified by Proposition 64, which amended both the UCL and the FAL to provide that named plaintiffs may sue for relief only if they suffered injury "as a result of" unfair competition or false advertising. Cal. Bus. & Prof. Code §§ 17204, 17535. In *In re Tobacco II Cases*, the California Supreme Court explained that the expression "as a result of" "imposes an actual reliance requirement" on named plaintiffs. 46 Cal. 4th at 326;

id. at 306 ("We conclude that a class representative proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions."). Consequently, "a plaintiff must show that the misrepresentation was an *immediate cause* of the injury-producing conduct," which means that, but for the misrepresentation, "the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct." *Id.* at 326 (emphasis added) (quoting *Mirkin*, 5 Cal. 4th at 1111 (opinion of Kennard, J.)).[4]

Here, although plaintiffs' *brief* declares that they "viewed and specifically relied on the representations made by Nestlé on the packaging" of Juicy Juice With DHA and Juicy Juice Immunity, AOB 11, 15, that assertion is not borne out by the SACC. That document alleges only (1) that certain Nestlé statements were false or misleading, not that plaintiffs saw the statements, *e.g.*, ER130-33 ¶ 24, ER159 ¶ 124; (2) that some statements were unsubstantiated and plaintiffs relied on their belief that Nestlé had adequate substantiation for those assertions, *e.g.*, ER139 ¶ 38, ER142 ¶ 49, ER147 ¶ 66; and (3) that plaintiffs saw misleading statements,

[4] The same statutory language in the FAL has been interpreted to require the same proof of actual reliance. *See Peviani v. Natural Balance, Inc.*, 774 F. Supp. 2d 1066, 1070 (S.D. Cal. 2011); *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1168 (C.D. Cal. 2011).

but not that they relied on those statements. None of these contentions sufficiently alleges reliance under the UCL or the FAL.

1. Plaintiffs may not state a claim of fraudulent misrepresentation as to statements that they never saw. "[T]here is absolutely no likelihood [plaintiffs] were deceived by the alleged false or misleading advertising or promotional campaign" if they did not see it. *Pfizer Inc. v. Superior Ct.*, 182 Cal. App. 4th 622, 632 (2010). And if plaintiffs were not deceived, they were not injured and are not entitled to relief.

This is not one of those rare cases in which reliance can simply be presumed. In the tobacco context, the California Supreme Court crafted a limited exception to the rule requiring demonstration of specific reliance. The Court considered tobacco industry assurances disputing the connection between cigarette smoking and various diseases to be pervasive, and therefore found it reasonable to permit a challenge by a plaintiff who believed that broadly disseminated message, even if the plaintiff could not identify *particular* advertisements upon which he or she relied. *In re Tobacco II Cases*, 46 Cal. 4th at 327-28. But as this Court recognized in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), there can be no presumption of reliance "[i]n the absence of the kind of massive advertising campaign at issue in *Tobacco II*." *Id.* at 596.

Needless to say, the marketing campaign for Juicy Juice with DHA and Juicy Juice Immunity—products introduced in 2009, ER130 ¶ 23—pales in comparison to the California Supreme Court's finding that tobacco companies engaged in a pervasive and decades-long effort to deny the risks of cigarettes. Although plaintiffs allude to a "nationwide advertising campaign" for Juicy Juice products, AOB25, they do not allege any facts to suggest that one existed. And they do not allege that they relied upon assertions made in such a campaign but are unable to identify particular misrepresentations. To the contrary, plaintiffs' SACC seeks to dissect *particular* assertions. In such a circumstance, actual reliance on those assertions must be alleged and proved.

As a textbook example of deficient pleading, plaintiffs cite a three-page press release introducing Juicy Juice with DHA and Juice Juice Immunity. Indeed, they quote the entire press release verbatim in both the SACC and their brief to this Court. AOB8-10; ER130-33 ¶ 24. But remarkably, *none of the plaintiffs claims to have seen the press release or to have detrimentally relied upon it*. The same holds true for marketing materials mentioned in passing by plaintiffs—newspapers, magazines, direct mail, and point-of-sale displays—the contents of which are not described. AOB11; ER159 ¶ 124. Because plaintiffs do not allege that they saw any of those materials, they cannot form a basis for liability.

2. Nor do plaintiffs adequately allege reliance on materials that assertedly led them to believe that Nestlé had substantiation for its product claims. Their only allegations of *reliance* relating to Juicy Juice with DHA are that they "believ[ed] that [Nestlé] had a reasonable basis for its representations that the product promoted brain development, which, in fact, [Nestlé] did not." ER139 ¶ 38 (Chavez), ER142 ¶ 49 (Bonsignores). Likewise, as to Juicy Juice Immunity, plaintiffs' only allegation of reliance is the statement that Chavez "believ[ed] that [Nestlé] had a reasonable basis for its representations that the product promoted immunity and digestive health, which, in fact, [Nestlé] did not." ER147 ¶ 66.

These assertions are doubly flawed. As discussed above, plaintiffs expressly abandoned their lack-of-substantiation approach before this Court, and California law does not permit such claims.

But even if that were not so, plaintiffs' reliance claims regarding these statements fail on their own terms. To establish reliance, a plaintiff must "allege he or she was motivated to act or refrain from action *based on the truth or falsity of a defendant's statement*." *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 327 n.10 (2011) (emphasis added). But plaintiffs point to no false statements upon which they could have relied—indeed, they point to no statements *at all*—that Nestlé had substantiation for its product claims. On the face of it, this renders plaintiffs' assertion of reliance, and thus the entirety of their misrepresentation claim,

defective; they could not have been "motivated to act" by the "truth or falsity" of statements that were never made.

3. Finally, plaintiffs cannot state a claim as to materials that they allege to have seen but not to have relied upon. Because plaintiffs' claims sound in fraud, they must satisfy the requirements of Rule 9(b). They acknowledge as much in their opening brief. AOB2-4, 18, 20, 30-31. Under Rule 9(b), "reliance must be pled with particularity to state a claim." *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1198 (C.D. Cal. 2008). It follows, of course, that plaintiffs do not state a claim when they fail to allege reliance *at all*. Yet notwithstanding the district court's admonition that plaintiffs must be detailed and specific, the SACC does not allege that any of the named plaintiffs *relied* on television advertisements, just that Chavez "saw" them. ER139 ¶ 40 (DHA), ER148 ¶ 68 (Immunity). The SACC likewise does not allege that any of the named plaintiffs *relied* upon any particular statements on the Juicy Juice website, only that Chavez "visited" the site. ER141 ¶ 46 (DHA), ER149 ¶ 73 (Immunity).

Plaintiffs must allege (and later prove) that false or misleading statements were the "immediate" cause of their injury. *In re Tobacco II Cases*, 46 Cal. 4th at 326. Plaintiffs do not specifically contend that the commercials or the website had any bearing on their decision to purchase Juicy Juice with DHA or Juicy Juice

Immunity. Accordingly, their allegations are insufficient to establish the required element of actual reliance.

B. Plaintiffs do not adequately allege any affirmative representations that were likely to deceive an ordinary consumer.

The lack of reliance is enough to dispose of plaintiffs' misrepresentation claims. But even if that were not so, there is a separate and independent basis for rejecting those claims: plaintiffs have failed to allege with particularity misrepresentations that were likely to deceive an ordinary consumer.

A claim for fraudulent misrepresentation under the UCL or false advertising under the FAL requires proof that members of the public were likely to be deceived by the defendant's statement. *Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153, 1160 (2000). Such claims "'must be evaluated from the vantage of a reasonable consumer.'" *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). The "likely to deceive" standard "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). Rather, it must be "probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id.*; *see also Girard v. Toyota Motor Sales U.S.A., Inc.*, 316 F. App'x 561, 562 (9th Cir. 2008); *People ex rel. Dep't of Motor Vehicles v. Cars 4 Causes*, 139 Cal. App. 4th 1006, 1016 (2006).

Under this standard, neither plaintiffs' allegations of affirmative misrepresentations concerning Juicy Juice with DHA nor their allegations concerning Juicy Juice Immunity "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

1. Juicy Juice with DHA

In their opening brief, plaintiffs state that the packaging of Juicy Juice with DHA "impl[ies] that [the] juice contains enough DHA to enhance cognitive development, at least in children under two years old, which is misleading where the amount of DHA present is insignificant." AOB25. In support of their assertion that Nestlé's statements about Juicy Juice were misleading, plaintiffs point to the "name 'Brain Development,'" and the following three statements appearing on the product label:

- "Good to Remember . . . The human brain triples in volume between birth and two years";
- "DHA – A BUILDING BLOCK for Brain Development[*] . . . [*]in children under two years old"; and
- "DHA 16 mg per serving."

Id. (quoting ER133 ¶ 27, ER136 ¶ 28).

This theory fails for two principal reasons. *First*, plaintiffs do not allege this theory in their SACC, which does *not* assert that plaintiffs were deceived into

thinking that Juicy Juice with DHA had enough DHA to enhance cognitive development when in fact it did not. To the contrary, as the district court found:

> Where prior versions of the Complaint alleged that the products contained insufficient amounts of the nutrients to provide the claimed attributes, there are no such allegations in the SACC except for a single reference to the "exceedingly small amount of DHA" contained in the Brain Development beverages. Even here, as Defendant observes, there are no allegations that consumers were misled regarding the actual amount of DHA in the products, nor any explicit link between the amount of DHA and Plaintiffs' false advertising theory.

ER52.

Nor can plaintiffs save their case by relying on allegations that were included in the consolidated complaint or the FACC but omitted from the SACC. "[I]t is well-established that an ' "amended complaint supersedes the original, the latter being treated thereafter as non-existent." ' " *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857 (9th Cir. 2011) (quoting *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), *aff'd*, 525 U.S. 299 (1999) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967))). So even though the *FACC* alleged that "Defendant's averment that Brian Development will enhance brain development by the inclusion of DHA is misleading [because] Juicy Juice deceives consumers into believing that a normal serving of the product will . . . provid[e] an efficacious amount of DHA," ER180 ¶ 44, plaintiffs' omission of that allegation in the *SACC* means that they no longer may rely upon that theory. Application of this principle is particularly

appropriate here given the district court's clear and unambiguous directive that plaintiffs include "everything" in the SACC that they were "basing [their] claims on." SER20.

Second, even if the theory that Juicy Juice with DHA did not contain enough DHA to offer health benefits had been alleged in the SACC, nothing in the Nestlé statements invoked in plaintiffs' brief would have deceived an ordinary consumer.

Plaintiffs first challenge the "very name" of the product. But the packaging of Juicy Juice with DHA does *not* label the product "Juicy Juice Brain Development," as plaintiffs suggest. Rather, the product label uses the innocuous brand name "Juicy Juice" and separately contains an image with the text "DHA—A Building Block for Brain Development." ER134-36. And as the district court recognized, "[p]laintiffs do not . . . allege facts challenging the relationship of DHA and brain development." ER52. To the contrary, plaintiffs' earlier complaints *touted* DHA's contribution "to a child's visual function and/or cognitive and behavioral development." SER47 ¶ 49, SER85 ¶ 44, SER120 ¶ 44. Nor do plaintiffs dispute the volume growth of the human brain during childhood, the other fact noted on the product label. That being so, it is difficult to imagine how these statements might deceive the ordinary consumer of Juicy Juice with DHA.

As for the *amount* of DHA in Juicy Juice, plaintiffs do not allege that the disclosure "DHA 16 mg per serving" is *inaccurate*. Rather, they argue that it misleadingly suggests that 16 milligrams per 4-ounce serving is a sufficient quantity to have a positive effect on a child's development. AOB25. But that claim fails as a matter of law. It is undisputed that the Juicy Juice label is accurate in stating both that DHA has health benefits *and* that Juicy Juice contains the listed amount of DHA. In such circumstances, the challenged statement is not one by which "the public is likely to be deceived . . . given that the amount [of DHA in the product] [was] clearly printed on the [product label]." *Shvarts*, 81 Cal. App. 4th at 1160. Thus, as the district court explained, even if the Juicy Juice with DHA label is understood to imply "that Juicy Juice promotes 'brain development' (whatever that means) in children, plaintiff has not articulated what about that claim is deceptive beside the fact that it is supposedly unsubstantiated." ER53.

In any event, despite plaintiffs' claim in their brief to this Court that 16 milligrams per 4-ounce serving is "insignificant," AOB25, the SACC itself demonstrates otherwise. Accepting plaintiffs' other allegations as true, a 4-ounce serving of Juicy Juice with DHA contains 11% of the WHO's suggested daily amount for a six-month-old and 8% of that amount for a one-year-old. ER137 ¶ 32. Such an amount is hardly trivial as a matter of federal law. *See* 21 C.F.R. § 101.54(c) (permitting a food to be described as a "good source" of a nutrient if

the amount ordinarily consumed contains 10% of the daily value of the nutrient). Significantly, Nestlé does not claim—and plaintiffs do not allege that it does claim—that Juicy Juice is intended to be a child's *sole source* of DHA.[5] On the face of it, plaintiffs cannot establish that they were misled by a product label that notes inclusion of what plaintiffs' complaint itself recognizes to be a significant amount of a beneficial ingredient.

In this setting, plaintiffs could prevail only if advertising the positive attributes of an ingredient necessarily implies that all of the benefits can be achieved in a single serving of the product. But no reasonable consumer would be so deceived, just as no reasonable consumer would believe that "'all "Danish pastry" is made in Denmark.'" *Lavie*, 105 Cal. App. 4th at 507 (quoting *In re Kirchner Trading as Universe Co.*, 63 F.T.C. 1282 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964)). Under California law, "'[a] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an

[5] Other products with supplemental DHA contain similar quantities. *See Dairying-Do Taste Test*, Indianapolis Star, Feb. 1, 2009, at D1 (Horizon Organic DHA Omega-3 Milk and Silk Plus Omega-3 DHA Soy Milk contain 32 mg of DHA per cup, *i.e.*, double the serving size of Juicy Juice with DHA); Dennis Hoffman et al., *Soy-Based Infant Formula Supplemented with DHA and ARA Supports Growth and Increases Circulating Levels of these Fatty Acids in Infants*, 43 Lipids 29 (2008) (discussing health benefits of infant formula supplemented with 17 mg of DHA per 5-ounce serving); Nature's One, Baby's Only Essentials DHA & ARA Frequent Questions & Answers, http://www.naturesone.com/dha/frequent-questions (Baby's Only Essentials DHA supplement contains 15 mg of DHA per serving).

insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.'" *Id.* Plaintiffs point to no authority recognizing liability in circumstances like those here.

In fact, the flaw in plaintiffs' theory is demonstrated by comparing the claim in this case with that in the decision on which they principally rely, *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008). *See* AOB 21-22, 23-25. In *Williams*, this Court reversed the dismissal of a complaint under the UCL and the Consumer Legal Remedies Act as to packaging that advertised "Fruit Juice Snacks" with "the words 'Fruit Juice' juxtaposed alongside images of fruits such as oranges, peaches, strawberries, and cherries," even though none of those juices appeared in the product. *Id.* at 936. This Court concluded that dismissal was inappropriate because a reasonable consumer might have been misled by the pictures of the fruits and claims suggesting that the products were all natural. *Id.* at 939.

But those claims bear no resemblance to plaintiffs' case here. In *Williams*, a fruit juice snack implied that it was made with orange juice because the label pictured an orange next to the words "Fruit Juice," even though there was no orange juice in the product. Here, in contrast, plaintiffs contend that the appearance of the phrase "Brain Development" on the packaging "implies a causal connection between drinking [the beverage] and cognitive development (just like

the name says)." AOB26. But the packaging uses the words "Brain Development" only in the context of a graphic that actually reads "DHA—A Building Block for Brain Development." ER134-36. A reasonable consumer would understand that *DHA* is a building block for brain development, and that a single serving of Juicy Juice with DHA contains 16 milligrams of DHA, as the product clearly discloses. It does not follow—under *Williams* or as a matter of common sense—that a reasonable consumer would understand a single serving of the beverage to contain so much DHA that drinking one serving would itself result in tangible developmental improvements. Factual falsity, of the sort addressed in *Williams*, is not present here.

Although plaintiffs suggest that dismissing false-advertising claims at the Rule 12(b)(6) stage is inappropriate under *Williams*, *see* AOB22, that is surely not the law. *Williams* acknowledged that false advertising claims *should* be dismissed if not sufficiently pled. 552 F.3d at 938. Indeed, there, are numerous examples of such dismissals applying California law. *See, e.g.*, *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 2012 U.S. App. LEXIS 6851 (9th Cir. Apr. 5, 2012) (affirming dismissal of complaint that use of terms "original" and "classic" on packaging of Drumstick ice cream implied that the product was more nutritious than other desserts); *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1306-08 (2011) (affirming dismissal of complaint alleging that green water droplet image on Fiji

water bottle falsely conveyed impression that product was environmentally friendly); *Searle v. Wyndham Int'l, Inc.*, 102 Cal. App. 4th 1327, 1336 (2002) (affirming dismissal of complaint alleging that 17% surcharge on room service deliveries was misleading because it was actually a gratuity paid to servers); *Shvarts*, 81 Cal. App. 4th at 1160 (affirming dismissal of complaint alleging that public was likely to be deceived by pricy fuel refilling charge for car rentals because the amount of the service was disclosed to renters); *see also Kent v. Avis Rent a Car Sys. LLC*, 2012 WL 831561 (Cal. App. Mar. 13, 2012) (unpublished) ("A UCL cause of action enjoys no immunity from demurrer.").[6] This case should be added to the list.

2. Juicy Juice Immunity

As for Juicy Juice Immunity, plaintiffs contend that the statements "HELPS SUPPORT IMMUNITY" and "VITAMIN C & ZINC for Immunity **PLUS** PREBIOTIC FIBER for Digestive Health" are misleading "because Immunity is no more nutritious than or superior to any other, substantially cheaper Juicy Juice product." AOB28. This assertion, however, rests on a *non sequitur*. Nestlé has

[6] Although unpublished decisions of the California Court of Appeal are generally not citable, this Court has deemed it appropriate to rely upon such decisions for the purpose of identifying the actual practice in California state courts, which here includes the fact that UCL claims are actually subject to dismissal on demurrer. *See, e.g.*, *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 876 n.3 (9th Cir. 2008).

disclosed the additives to *its* Juicy Juice Immunity product; it has said *nothing* about other products.

The statements that Nestlé did make are unquestionably true. Plaintiffs acknowledge that vitamin C and zinc support immunity and that prebiotic fiber has been shown to aid in digestion. SER53 ¶ 78. And it is undisputed that Juicy Juice Immunity contains 100% of the daily value of vitamin C, 10% of the daily value of zinc, and 30% of the gum arabic that has been shown to have beneficial prebiotic effects in adults. ER62. *Cf.* 21 C.F.R. § 101.54(c) (permitting a food to be described as a "good source" of a nutrient if the amount ordinarily consumed contains 10% of the daily value of the nutrient).

Plaintiffs' challenge to the packaging for Juicy Juice Immunity therefore fails because plaintiffs have not alleged "*why* it is false." *Vess*, 317 F.3d at 1106 (emphasis added; internal quotation marks omitted). This is a fatal omission. Unsurprisingly, in both of the decisions cited by plaintiffs in support of their Juicy Juice Immunity claim, the plaintiffs actually alleged a false representation, and it was clear why plaintiffs thought that the statement was false. *See* AOB28 (citing *Red v. Kraft Foods, Inc.*, 2011 WL 938297, at *4 (C.D. Cal. Jan. 13, 2011); *Rikos v. Procter & Gamble Co.*, 782 F. Supp. 2d 522, 526, 537 (S.D. Ohio 2011)).

In *Red*, a case decided by the same district judge as this case, plaintiffs challenged the representation "Support[s] Kid's Growth and Development"

regarding a product that plaintiffs alleged was unhealthy. Thus, their theory was that the statement "Support[s] Kid's Growth and Development" was, in fact, false, not that the representation inferred a comparison to other products. 2011 WL 938297, at *4. In *Rikos*, plaintiffs challenged a food supplement containing probiotic bacteria, which was advertised as helping to "Protect against occasional digestive upsets." 782 F. Supp. 2d at 526. Plaintiffs alleged that the supplements did not, in fact, have any digestive health benefits, and were instead "nothing but sugar-filled capsules injected with a small amount of unremarkable bacteria." *Id.* at 527. Again, plaintiffs' theory was that the assertion was actually false, not that it implied a comparative advantage over similar products. Courts applying California law have not hesitated to dismiss claims grounded in an implied comparative advantage theory. *See, e.g.*, *Carrea*, 2012 U.S. App. LEXIS 6851; *Hill*, 195 Cal. App. 4th at 1307. The same result is warranted here.

III. PLAINTIFFS DO NOT STATE A CLAIM AS TO ANY OMISSION.

A. Plaintiffs' omission theory does not state a claim under California law.

Plaintiffs' remaining theory, premised on Nestlé's asserted *omissions*, does not state a claim under California law. "California courts have generally rejected a broad obligation to disclose." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012). Instead, an omission claim is sustainable only if (1) a defendant has a legal obligation to make a certain disclosure; or (2) in the absence

of an additional disclosure, the defendant's affirmative representations will have the likely effect of misleading the public. *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835-37 (2006); *Bardin*, 136 Cal. App. 4th at 1276. Absent one of those situations, "a consumer is not 'likely to be deceived' by the omission of a fact that was not required to be disclosed in the first place." *Buller v. Sutter Health*, 160 Cal. App. 4th 981, 987 (2008).[7]

Plaintiffs, however, offer a different and much broader theory of liability. As presented to this Court, their contention is that a claim for a fraudulent omission lies wherever a plaintiff can allege that he or she might have "behaved differently" had additional disclosures been made. AOB39 (internal quotation marks omitted).

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[7] A broader duty to disclose may apply in circumstances in which consumer safety is implicated. *See Wilson*, 668 F.3d at 1141 ("California federal courts have generally interpreted *Daugherty* as holding that '[a] manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue.' ") (quoting *Oestreicher v. Alienware Corp.*, 322 F. App'x 489, 493 (9th Cir. 2009)). In the safety context, some courts have permitted claims for the omission of "material" information, defined as follows: "had the omitted information been disclosed, one would have been aware of it and behaved differently." *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007) (internal quotation marks omitted). But as this Court made clear in *Wilson*, "for the omission to be material, the failure must [still] pose 'safety concerns.' " 668 F.3d at 1142 (quoting *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010), *aff'd*, 2011 WL 6322200 (9th Cir. Dec. 19, 2011)); *see also In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010); *Oestreicher*, 322 F. App'x at 493. Plaintiffs' reliance on the *Falk* test outside the safety context, *see* AOB39, is incorrect. Plaintiffs also rely on *Kwikset*, 51 Cal. 4th 310. *See* AOB39. But *Kwikset* involved affirmative misrepresentations, not omissions.

Remarkably, plaintiffs here do not allege that they *would* have behaved differently absent the alleged omissions. Moreover, such a rule defies common sense and would expose companies operating in California to limitless and speculative challenges based on what might somehow happen. It will always be possible to imagine additional information that could have been provided by a seller and that might have affected the behavior of certain consumers. Some consumers, for example, might benefit from being told that table salt might clump when exposed to humidity, that cookies might crumble, or that dried plums are really prunes. But no court has ever suggested that such disclosures are required.

B. The SACC does not plead the elements of a fraudulent misrepresentation by omission.

Moreover, even if plaintiffs' omissions theory *could* be supportable, it is not in fact supported by the allegations in the SACC. Allegations of fraudulent misrepresentation by omission are subject to Rule 9(b)'s requirement of particularized pleading. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). But there is nothing particularized about plaintiffs' allegations about omissions in this case. Although plaintiffs have expanded upon their theory in their briefing before this Court, the SACC offers nothing more than a scattering of wholly conclusory assertions that Nestlé "fails to adequately disclose" certain facts—including the impermissible theory that Nestlé failed to disclose that it had no substantiation for the statements made on its product labels. ER137 ¶ 30 (DHA

claim unsubstantiated), ER138 ¶ 35 (DHA claim unsubstantiated), ER147 ¶ 63 (Immunity claim unsubstantiated); *see also, e.g.*, ER138 ¶ 36 (implications of dissolving DHA in juice), ER143 ¶ 55 (same), ER147 ¶ 64 (adequacy of form or amount of additives in Juicy Juice Immunity), ER150 ¶ 81 (same), ER130 ¶ 22 ("failed to disclose" that products are not "superior to other products" and do not "provide any material benefit in cognitive development or immune function").

Nowhere in the SACC do plaintiffs allege that Nestlé was *required* to disclose those facts. Nor do they allege that plaintiffs were *deceived* by the omission. And they do not allege that any particular omitted fact was *material* to any decision made by any plaintiff. Thus, plaintiffs do not allege that any plaintiff sustained injury from the omissions.

In particular:

1. Plaintiffs state that Nestlé should have disclosed that DHA "may not" render the brain development benefits claimed when dissolved in juice. AOB40; ER138 ¶ 36, ER143 ¶ 55. But that is simply a reprise of the failure-to-substantiate claim. Plaintiffs do not allege that DHA dissolved in juice *is not* effective. And they do not allege any particular duty to disclose that bears on this potential fact.

2. Plaintiffs state that Nestlé should have disclosed that the amount of DHA in its product is small. AOB40. But as explained above, it was not misleading for Nestlé to advertise the actual amount of DHA in Juicy Juice with

DHA. *See supra* pp. 32-36. In any event, the *SACC* does not allege that Nestlé omitted any disclosure concerning the DHA amount, *see* ER137 ¶ 32 (discussing the amount of DHA but making no allegation of an omission), and plaintiffs' own allegations concede that the amount of DHA in a 4-ounce serving of Juicy Juice With DHA is significant, *see supra* pp. 33-34.

3. Plaintiffs contend that Nestlé wrongly omitted from its television advertisements the caveat that DHA has been proven to support cognitive development only in children under two years old. AOB40. Again, this allegation appears nowhere in the SACC. Even if it did, plaintiffs allege that they relied on the packaging, which *did* include the disclaimer regarding two-year-olds. SER27-28.

4. Plaintiffs contend that the form and/or amount of vitamin C, zinc, and prebiotic fiber in Juicy Juice Immunity "may not" offer the claimed benefits. AOB40; ER147 ¶ 64, ER150 ¶ 81. Again, this is a failure-to-substantiate claim. And it is unclear (and unexplained) how anyone (let alone a reasonable consumer) might be misled by that omission.

5. Plaintiffs contend that Nestlé was required to disclose that Juicy Juice Immunity is "no more nutritious than any other, substantially cheaper Juicy Juice product." AOB40; ER152 ¶ 91. But there is no duty to make such a statement because nothing on the Juicy Juice Immunity label suggests that Juicy Juice

Immunity *is* more nutritious than other products; it can hardly be thought that manufacturers labor under a general duty to inform consumers that particular products are no better than alternatives.

6. Finally, plaintiffs contend that Nestlé "omits that the amount of zinc and prebiotic fiber [in Juicy Juice Immunity] is negligible and that the amount of vitamin C is no greater than in any other typical fruit juice." AOB18. But those allegations, which appeared in the FACC, ER184 ¶¶ 62, 66, do *not* appear in the SACC. *See Valadez-Lopez*, 656 F.3d at 857. In any event, the amounts of these nutrients, which are stated in the product nutrition facts disclosure in the manner mandated by the FDA, satisfy the FDA's standard for being a "good source" of the nutrients. *See* 21 C.F.R. § 101.54(e).[8] Like plaintiffs' other contentions regarding omissions, this one is insufficient to state a claim under California law.

Accordingly, the SACC fails to allege required elements of a UCL or FAL claim based on an omission and fails to plead anything related to an omission with particularity. Thus, under either Rule 9(b) or Rule 12(b)(6), these claims must be dismissed. *See, e.g.*, *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th

[8] The SACC does allege that Nestlé omitted disclosing that it had no substantiation for its labeling claims about the DHA and Immunity products. ER137 ¶ 30, ER138 ¶ 35, ER147 ¶ 63. Plaintiffs do not argue these claims on appeal. Regardless, there is no obligation to disclose an alleged lack of substantiation given that a lack of substantiation is not, under California law, likely to deceive an ordinary consumer. *See supra* pp. 19-21.

1544, 1557 (2007) (affirming dismissal of UCL omission claim because complaint did "not allege any affirmative duty to disclose"); *Bardin*, 136 Cal. App. 4th at 1275 (affirming dismissal of UCL omission claim because complaint failed to allege that "members of the public had an[] expectation or made an[] assumption[]" that needed to be corrected through an additional disclosure); *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 2011 WL 3555610, at *23-*24 (C.D. Cal. Aug. 11, 2011) (dismissing complaint for failure to allege reliance).

IV. PLAINTIFFS' CLAIMS AGAINST JUICY JUICE WITH DHA SHOULD BE DISMISSED IN FAVOR OF THE FDA'S PRIMARY JURISDICTION.

Aside from the insufficiency of plaintiffs' pleadings, their challenges to Juicy Juice with DHA must be dismissed under the doctrine of primary jurisdiction. Plaintiffs' claims concerning Juicy Juice with DHA all depend upon the answer to a scientific question: whether (and at what quantities) DHA contributes to brain development. In such a circumstance, as the district court recognized, a courtroom is not "the appropriate forum for resolving scientific disputes regarding the efficacy of the nutrients." ER55. Rather, those questions should be resolved by the agency charged with identifying "daily values" of nutrients: the FDA.

A. Each of the factors for primary jurisdiction is present here.

The doctrine of primary jurisdiction "comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. W. Pac. R.R.*, 352 U.S. 59, 64 (1956). In this manner, the doctrine "promot[es] proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Id.* at 63; *see also United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1363 (9th Cir. 1987) (primary jurisdiction is appropriate when an agency has been "vested with the authority to regulate an industry or activity such that it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question").

Under this Court's precedents, dismissal in favor of primary jurisdiction is appropriate "where there is '(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.'" *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008) (quoting *Syntek Semiconductor*, 307 F.3d at 781). Those factors are satisfied here.

First, adjudicating plaintiffs' Juicy Juice with DHA allegations requires the determination of the level at which DHA contributes to brain development in children under two years old. As discussed above, plaintiffs' theory is that Juicy Juice with DHA does not contain enough DHA to permit a nutrient content claim. Their allegation depends on their analysis of a WHO study, from which they conclude that a six-month-old requires daily intake of 145 milligrams of DHA and a one-year-old requires daily intake of 200 milligrams. ER137 ¶ 32. But those figures are implausible—and the debate over their validity is one that courts are ill-equipped to resolve.

In 2005, the Food and Nutrition Board of the Institute of Medicine of the National Academy of Sciences published the comprehensive report *Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids*.[9] In that report, the Institute of Medicine published study results indicating that the *95th-percentile* of usual daily DHA intake for a 1-3 year-old is 88 milligrams. *Id.* at 1056-57 tbl. E-14. The mean intake is 32 milligrams for a 1-3 year-old, and 30 milligrams for a 7-12 month-old. *Id.* Based on its age-specific scientific analysis, the Institute of Medicine concluded that the adequate intake of all *n*-3 polyunsaturated fatty acids for infants under one year old

[9] *Available at* http://www.nal.usda.gov/fnic/DRI/DRI_Energy/energy_full_report.pdf.

is 500 milligrams per day, of which DHA and Eicosapentaenoic acid collectively contribute approximately ten percent. *Id.* at 469-70. Thus, a one-year-old would satisfy daily requirements of DHA by consuming 50 milligrams—not 145 milligrams, as alleged by plaintiffs. For 1-3 year-olds, the Institute of Medicine suggested an adequate intake of 70 milligrams—not 200 milligrams, as alleged by plaintiffs. *Id.* at 470. Needless to say, as implausible as plaintiffs' claims of deception already are, they cannot prevail on their claim that "the amount of DHA contained in [Juicy Juice with DHA] is . . . miniscule," AOB14-15, if, in fact, Juicy Juice contains a quarter of a toddler's daily requirements in a half-cup of juice. In any event, to adjudicate plaintiffs' claims, there is a need first to resolve the scientific issue as to the adequate intake of DHA by infants and toddlers.[10]

[10] Even plaintiffs' reliance on the WHO study appears to be suspect. The study referenced in the SACC, ER137 ¶ 12, appears to be *Fats and Oils in Human Nutrition: Report of a Joint Expert Consultation* (1993). That report said that infant formula milks for term infants should be supplemented with 20 milligrams of DHA per kilogram of infant body weight "to provide for the greatest possible release of the full genetic potential for neural and visual development." *Id.* at 54. A 2008 expert consultation by the WHO changed the DHA recommendation for infants 6-24 months old to 10-12 milligrams of DHA per kilogram of body weight. Interim Summary of Conclusions and Dietary Recommendations on Total Fat and Fatty Acids at 4, *available at* http://www.who.int/nutrition/topics/FFA_summary_rec_conclusion.pdf. Using plaintiffs' methodology, that would correspond to daily values of 72.5-120 milligrams of DHA per day, which further undermines plaintiffs' theory that there is an insufficient amount of DHA in the Juicy Juice product.

Second, this is an issue that has been placed by Congress in the FDA's jurisdiction. The FFDCA, as amended by the Food and Drug Administration Modernization Act of 1997 (FDAMA), authorizes the FDA to specify daily values for nutrients and to regulate how products containing certain levels of those nutrients may be described. *See* 21 U.S.C. § 343(r). A person seeking to characterize the relative level of a nutrient in a food intended for human consumption must file a notice with the FDA. *Id.* § 343(r)(1)(A). The nutrient claim is authorized by statute unless and until a regulation is issued overruling the claim or an FDA enforcement proceeding challenging the claim is filed in federal court. *Id.* § 343(r)(2)(H).

As to DHA in particular, the FDA has received at least three notices of nutrient claims, indicating that the daily value of DHA for adults is as little as 130 milligrams per day. The FDA has issued a notice of proposed rulemaking in response to those notices but has not yet issued a final rule. 72 Fed. Reg. 66103 (Nov. 27, 2007) (ER89). Accordingly, unless and until the FDA acts, it is permissible to claim a daily value of 130 milligrams. Congress has given the authority to set the daily value at a higher or lower level to the FDA.

Third, the FDA regulates pursuant to a statute that subjects industry to comprehensive regulation. One need look only at Part 101 of Title 21 of the Code of Federal Regulations to confirm the extent and specificity of FDA's authority

over statements regarding nutrient values. *See, e.g.*, *Rosen v. Unilever U.S., Inc.*, 2010 WL 4807100, at *2 (N.D. Cal. May 3, 2010) ("The [FFDCA] establishes a comprehensive federal scheme of food regulation to ensure that food is safe and labeled in a manner that does not mislead consumers.").

Fourth, determining nutrient content standards requires both expertise and uniformity. By statute, FDA is required to set nutrient criteria on the basis of an "authoritative statement" by "a scientific body of the United States Government with official responsibility for public health protection or research directly relating to human nutrition." 21 U.S.C. § 343(r)(2)(G)(i). And it is apparent that "competing state labeling standards . . . would create significant inefficiencies for manufacturers," *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 452 (2005), such that uniformity in nutrient criteria is important.

Thus, the doctrine of primary jurisdiction counsels dismissing this action. Plaintiffs cannot evade the FDA's authority to determine daily values for nutrients such as DHA by seeking to establish the appropriate level in a proceeding under California's consumer protection laws. Prior to basing a false-advertising suit on their favored 200 milligram-per-day requirement for one-year-olds, plaintiffs must pursue that standard with the administrative agency responsible for resolving their

scientific claim.[11] It is not the role of a federal court to preempt the FDA's decisionmaking process.[12]

B. Plaintiffs' challenges to primary jurisdiction are unavailing.

Plaintiffs oppose the district court's conclusion that the "claims regarding the presence of DHA in the Brain Development beverage would be subject to dismissal under the primary jurisdiction doctrine," ER55, for two reasons. *First*, plaintiffs contend that "the FDA does not presently regulate or intend to regulate DHA." AOB44. *Second*, they argue that their claims are not technical ones that require application of the FDA's expertise. Both contentions are wrong.

1. As discussed above, FDA does regulate DHA nutrient claims. Pursuant to the FDAMA, the FDA exercises its regulatory power by overruling notices as to nutrient claims. Under plaintiffs' reasoning, the FDA's 2007 notice of proposed rulemaking cuts against primary jurisdiction because the FDA has not

[11] Were plaintiffs to challenge marketing representations as to DHA with the FDA, they would be unlikely to prevail. In the pending rulemaking on DHA disclosures, the FDA has indicated that "a conventional food or a dietary supplement may bear a statement such as 'Contains x mg of . . . DHA omega-3 fatty acids per serving.'" 72 Fed. Reg. at 66109 (ER105).

[12] As indicated above, panels of this Court have applied both an abuse of discretion and a *de novo* standard of review to dismissals under the doctrine of primary jurisdiction. Because the considerations warranting the application of primary jurisdiction in this case are plainly established as a matter of law, the standard of review does not affect the outcome of this case.

yet issued a rule. But the proposed rulemaking demonstrates that the FDA views itself as having jurisdiction over the determination of a daily value for DHA.

In any event, plaintiffs' reasoning misunderstands the requirements for primary jurisdiction, which exists when Congress has "placed" an issue "within the jurisdiction of an administrative body having regulatory authority." *Clark*, 523 F.3d at 1115. That standard does not turn on whether an agency has exercised its authority or the pace at which it does so.

Finally, even if it were true that primary jurisdiction would be undermined by FDA inaction, the FDA has not been inactive. Although FDA has a practice of withdrawing proposed rules when it decides not to move forward, *see, e.g.*, 73 Fed. Reg. 75625 (Dec. 12, 2008), it has not withdrawn the proposed rule concerning DHA, which demonstrates that the matter remains under consideration. Moreover, FDA continues to regulate DHA nutrient claims. *See, e.g.*, Letter from Daniel S. Fabricant, Director, Division of Dietary Supplement Programs, FDA, to Thomas T. Tierney, Vita Tech Int'l, Sept. 22, 2011;[13] Letter from Vasilios H. Frankos, Director, Division of Dietary Supplement Programs, FDA, to Michael Lelah, NOW Foods, Oct. 9, 2009;[14] Letter from Vasilios H. Frankos, Director, Division of

[13] FDA Docket No. FDA-1997-S-0006, Letter No. 1122, *available at* http://www.regulations.gov/#!documentDetail;D=FDA-1997-S-0006-1122.

[14] FDA Docket No. FDA-1997-S-0006, Letter No. 1072, *available at* http://www.regulations.gov/#!documentDetail;D=FDA-1997-S-0006-1072.

Dietary Supplement Programs, FDA, to David Hsu, New Century Co., Sept. 16, 2009; [15] Letter from Vasilios H. Frankos, Director, Division of Dietary Supplement Programs, FDA, to Robyn Damast, Country Life, Mar. 18, 2009.[16]

2. Plaintiffs also contend that this case "does not involve a technical area where the FDA has greater expertise than the courts." AOB47. As plaintiffs see it, their "claims involve only whether Nestlé's Brain Development-related partial representations are misleading where the claimed cognitive development benefit cannot be achieved under any circumstances due to the mere trace presence of DHA in the Brain Development juice." AOB48. But that assertion simply begs the technical question of what constitutes a "trace presence of DHA." It is *that* question that is not suitable for judicial resolution in the first instance.

The decisions on primary jurisdiction (including those cited by plaintiffs) distinguish between technical issues (for which primary jurisdiction is warranted) and nontechnical issues (for which it is not). *Compare, e.g.*, *Perez v. Nidek Co.*, 657 F. Supp. 2d 1156, 1165 (S.D. Cal. 2009) (dismissing claims that required the court to determine whether lasers were "adulterated"); *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 232 (3d Cir. 1990) (dismissing claim

[15] FDA Docket No. FDA-1997-S-0006, Letter No. 1069, *available at* http://www.regulations.gov/#!documentDetail;D=FDA-1997-S-0006-1069.
[16] FDA Docket No. FDA-1997-S-0006, Letter No. 1052, *available at* http://www.regulations.gov/#!documentDetail;D=FDA-1997-S-0006-1052.

concerning whether an ingredient is "active" or "inactive"); *and Gordon v. Church & Dwight Co.*, 2010 WL 1341184, at *2 (N.D. Cal. Apr. 2, 2010) (dismissing claims that necessitated "interpret[ing] scientific studies" as to the appropriate labeling of latex condoms with nonoxynol-9 spermicide), *with Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1034-35 (N.D. Cal. 2009) (declining to dismiss claim about the word "natural"); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1124 (N.D. Cal. 2010) (declining to dismiss claim about the word "wholesome"); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 375 (N.D. Cal. 2010) (declining to dismiss claim concerning whether references to Santa Fe, New Mexico, misled purchasers as to product's origin); *Rikos*, 782 F. Supp. 2d at 528-29 (declining to defer to the FDA's primary jurisdiction only after concluding that "the substantiation of dietary supplement advertising claims . . . is not the issue before the Court"). As between those two categories, plaintiffs' theory necessarily seeks the answer to a scientific question that the courts are ill-suited to answer. Dismissal in favor of FDA's primary jurisdiction is therefore appropriate.[17]

[17] Plaintiffs' contention that the doctrine of primary jurisdiction should not apply to their allegations concerning print and television advertisements, AOB54-56, misses the point. Plaintiffs' challenges to Nestlé's print and television advertisements for Juicy Juice with DHA turn on whether the product contained an adequate amount of DHA. The FDA is responsible for determining nutrient daily values. Although the FDA enforces those standards as to product labels, and the

V. PLAINTIFFS HAVE WAIVED THEIR ARGUMENTS UNDER THE "UNFAIR" AND "UNLAWFUL" PRONGS OF THE UCL.

Plaintiffs' brief is dedicated almost exclusively to the theory that Nestlé violated the UCL's "fraudulent" prong and the FAL. Although plaintiffs mention in passing that they have also alleged violations of the UCL's "unfair" and "unlawful" prongs, AOB22, they waived those claims by failing to raise them in opposition to Nestlé's motion to dismiss in the district court. *See Campbell v. Burt*, 141 F.3d 927, 931 (9th Cir. 1998). Moreover, plaintiffs waived their "unfair" theory of UCL liability by failing to include any supportive arguments or authorities in their opening brief to this Court. *See Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim") (internal quotation marks omitted).

In a footnote in plaintiffs' brief, they argue that Nestlé violated FDA regulations, which in turn constitutes a violation of the Sherman Food, Drug and Cosmetic Law, Cal. Health & Safety Code §§ 110660 *et seq.*, and permits a claim under the "unlawful" prong of the UCL. AOB29 n.8. In addition to their failure to

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FTC handles enforcement as to advertisements, that does not change the fact that the FDA makes the scientific judgment. In any event, plaintiffs' distinction between labeling and advertising was not raised below in opposition to Nestlé's motion to dismiss; thus, it has been waived.

press the argument below, plaintiffs again waived the claim "[b]y failing to address the issue in [their] opening brief except in a footnote." *City of Emeryville v. Robinson*, 621 F.3d 1251, 1262 n.10 (9th Cir. 2010).

In any event, the two claims identified in plaintiffs' footnote are unavailing. *First*, plaintiffs cite regulations limiting claims that a food "may help consumers maintain healthy dietary practices" when it has been fortified to provide the nutritional benefits. *See* ER161 ¶ 135; 21 C.F.R. §§ 101.65(d)(1)(i), 104.20. But plaintiffs do not allege that the product labels at issue here use the word "healthy" (directly or by implication) in a manner that would subject the product to FDA implied-nutrient-claim regulations. *See* 59 Fed. Reg. 24232, 24235 (May 10, 1994) (explaining that not all uses of the word "healthy" constitute an implied nutrient claim subject to § 101.65(d)). *Second*, plaintiffs assert that nutrient content claims may not be made in products intended for children under two years old. AOB30 n.8. But that allegation appears nowhere in the SACC.

Accordingly, plaintiffs' complaint cannot survive on the basis of either their "unfair" or "unlawful" theories of relief.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: April 9, 2012

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28.2-6, Nestlé states that it is not aware of any related cases pending in this Circuit.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,366 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that at the direction of Carmine R. Zarlenga, a member of this bar and counsel of record in this appeal for Nestlé, I electronically filed the foregoing Answering Brief for Defendant-Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 9, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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