

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 -----oo0oo-----

12 ALBA MORALES and LANIE COHEN,
13 on behalf of themselves and
14 all others similarly
situated,

Plaintiffs,

15 v.
16

UNILEVER UNITED STATES, INC.,
17

Defendant.
18
19

CIV. NO. 2:13-2213 WBS EFB

MEMORANDUM AND ORDER RE: MOTION
TO DISMISS

20 -----oo0oo-----

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

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

3 I. Factual & Procedural History

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

21 (Id. ¶ 16.)

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

1 Bus. & Prof. Code § 17200 et seq., on behalf of the California
2 Subclass; (2) a claim by Morales under the Consumers Legal
3 Remedies Act ("CLRA"), Cal. Civ. Code § 1750 et seq., and twenty
4 other state consumer protection statutes¹ on behalf of the Class
5 and the California Subclass; and (3) a claim by Cohen under the
6 Massachusetts Consumer Protection Act ("MCPA"), Mass. Gen. Laws.
7 Ann. ch. 93A, and twenty other state consumer protection statutes
8 on behalf of the Class and the Massachusetts Subclass. Defendant
9 now moves to dismiss the complaint pursuant to Rule 12(b)(1) for
10 lack of standing and pursuant to Rule 12(b)(6) for failure to
11 state a claim upon which relief can be granted.

12 II. Standing

13 A. Article III and Statutory Standing

14 "An Article III federal court must ask whether a
15 plaintiff has suffered sufficient injury to satisfy the 'case or
16 controversy' requirement of Article III of the U.S.
17 Constitution." Brazil v. Dole Food Co., 935 F. Supp. 2d 947, 960
18 (N.D. Cal. 2013) (citing Clapper v. Amnesty Int'l, --- U.S. ---,
19 133 S.Ct. 1138, 1146 (2013)). "To establish Article III
20 standing, an injury must be concrete, particularized, and actual
21 or imminent; fairly traceable to the challenged action; and
22 redressable by a favorable ruling." Clapper, 133 S.Ct. at 1147
23 (internal quotation marks omitted). A plaintiff invoking federal

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

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

4 In addition to the requirements set forth by Article
5 III, a plaintiff asserting claims under California's consumer
6 protection statutes must also establish statutory standing. To
7 have standing to sue under the UCL, a plaintiff must "(1)
8 establish a loss or deprivation of money or property sufficient
9 to qualify as an injury in fact, i.e., economic injury, and (2)
10 show that that economic injury was the result of, i.e., caused
11 by, the unfair business practice or false advertising that is the
12 gravamen of the claim." Kwikset Corp. v. Superior Court, 51 Cal.
13 4th 310, 322 (2011) (emphasis in original).

14 The standing requirements under the UCL are both
15 similar to and "substantially narrower than federal standing
16 under [A]rticle III . . . which may be predicated on a broader
17 range of injuries." Id. at 324. The standing requirements under
18 the UCL are also more stringent than those imposed by the CLRA,
19 which requires only that a plaintiff have suffered "any damage"
20 as a result of the defendant's misconduct. Cal. Civ. Code §
21 1780(a); see also Hinojos v. Kohl's Corp., 718 F.3d 1098, 1108
22 (9th Cir. 2013) ("[A]ny plaintiff who has standing under the
23 UCL's . . . 'lost money or property' requirement will, a
24 fortiori, have suffered 'any damage' for purposes of establishing
25 CLRA standing." (emphasis in original)); Meyer v. Sprint Spectrum
26 L.P., 45 Cal. 4th 634, 641-43 (2009) (discussing standing
27 requirements under CLRA). Therefore, if plaintiffs have
28 sufficiently alleged standing under the UCL, they have also

1 alleged standing under the CLRA and Article III.

2 1. Economic Injury

3 A plaintiff must establish that he suffered "some form
4 of economic injury" in order to have standing under the UCL.
5 Kwikset, 51 Cal. 4th at 323. "An economic injury exists where a
6 seller misrepresents a product and, had the product been
7 represented accurately, buyers would not have been willing to pay
8 as much as they did, or would have refused to purchase the
9 product altogether." Rosales v. FitFlop USA, LLC, 882 F. Supp.
10 2d 1168, 1174 (S.D. Cal. 2012).

11 Here, plaintiffs allege that they suffered economic
12 injury because they paid a premium for TRESemmé Naturals products
13 over comparable products that are not marketed as "natural."
14 (FAC ¶ 17.) The "extra money paid" for these products above what
15 plaintiffs would have paid but for defendant's allegedly
16 deceptive representations constitutes economic injury. Kwikset,
17 51 Cal. 4th at 330; see also Mazza v. Am. Honda Motor Co., 666
18 F.3d 581, 595 (9th Cir. 2012) (holding that plaintiffs'
19 allegations that "class members paid more . . . than they
20 otherwise would have paid . . . because Honda made deceptive
21 claims" sufficiently alleged economic injury). Even if
22 plaintiffs have not alleged what they would have paid absent
23 defendant's alleged misrepresentations that the products were
24 free from artificial ingredients, they are not required to do so
25 in order to allege economic injury under the UCL. See Hinojos,
26 718 F.3d at 1105 (noting that the UCL does not require a
27 plaintiff "to plead how much he would have paid for the
28 merchandise had he known its true value"). Accordingly,

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

4 2. Causation

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

14 The California Supreme Court has recognized that a
15 presumption of actual reliance arises whenever a
16 misrepresentation is material--that is, if a reasonable person
17 would "attach importance to its existence or nonexistence in
18 determining his choice of action." Id. As a result, a plaintiff
19 "need only allege a misrepresentation of a material fact" in
20 order "[t]o satisfy the requirement of pleading actual reliance,
21 or causation, in connection with false advertising for purposes
22 of the UCL." Chapman v. Skype Inc., 220 Cal. App. 4th 217, 229
23 (2d Dist. 2013). "The materiality of a misrepresentation is
24 generally a question of fact unless the misrepresentation was so
25

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

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

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

22
23 ³ Defendant's contention that plaintiffs must identify
24 the particular aspect of the labeling they relied on is
25 particularly inappropriate where, as plaintiffs allege, the
26 labeling of the TRESemmé Naturals products was part of a larger
27 advertising campaign that emphasized the products' "natural"
28 qualities. See In re Tobacco II Cases, 46 Cal. 4th at 328
("[W]here, as here, a plaintiff alleges exposure to a long-term
advertising campaign, the plaintiff is not required to plead with
an unrealistic degree of specificity that the plaintiff relied on
particular advertisements or statements.").

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

7 Even if defendant were correct that plaintiffs have not
8 alleged that they relied upon any particular representation or
9 aspect of the product label, plaintiffs have sufficiently alleged
10 that the product labels contained material misrepresentations.
11 Plaintiffs allege that consumers are "increasingly concerned"
12 about the effects of synthetic chemicals, pay a premium for
13 natural products, and that, as a result, the nationwide market
14 for "natural" products exceeds \$100 billion dollars. (FAC ¶ 9.)
15 In light of these concerns, plaintiffs allege that the
16 representation that the products contain only natural ingredients
17 is "material to a reasonable consumer." (Id. ¶ 14.) Those
18 allegations are sufficient to invoke a presumption of reliance.⁴
19 See In re Tobacco II Cases, 46 Cal. 4th at 326; see also, e.g.,
20 Bruton v. Gerber Prods. Co., 961 F. Supp. 2d 1062, 1089 (N.D.
21 Cal. 2013) (holding that plaintiff sufficiently alleged that
22

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

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

4 Accordingly, because plaintiffs have sufficiently
5 alleged economic injury and reliance, they have standing to bring
6 this action under California's consumer protection statutes, see
7 Kwikset, 51 Cal. 4th at 322, as well as Article III, see Clapper,
8 133 S.Ct. at 1147.

9 B. Radiant Volume Conditioner Claims

10 In the Ninth Circuit, there is "no controlling
11 authority" on whether a plaintiff in a class action has standing
12 to assert claims based on products he did not purchase. Miller
13 v. Ghirardelli Chocolate Co., 912 F. Supp. 2d 861, 868 (N.D. Cal.
14 2012). However, "[t]he majority of the courts that have
15 carefully analyzed the question hold that a plaintiff may have
16 standing to assert claims for unnamed class members based on
17 products he or she did not purchase so long as the products and
18 alleged misrepresentations are substantially similar." Id. at
19 869; accord Wilson v. Frito-Lay N. Am., Inc., 961 F. Supp. 2d
20 1134, 1140-41 (N.D. Cal. 2013). "Factors that . . . courts have
21 considered include whether the challenged products are of the
22 same kind, whether they are comprised of largely the same
23 ingredients, and whether each of the challenged products bears
24 the same alleged mislabeling." Id. at 1141.

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

1 Radiant Volume conditioner is strikingly similar to the five
2 products that plaintiffs purchased: it contains the same
3 "Naturals" label and prominent green leaf as the other five
4 products and makes the same claim of "silicone free conditioning"
5 as the two conditioners that plaintiffs purchased. (Id. ¶ 11.)
6 Plaintiffs have therefore alleged that the mislabeling of the
7 Radiant Volume conditioner misled other purchasers in the same
8 way that the mislabeling of defendant's other five products
9 misled them. See, e.g., Chavez v. Blue Sky Natural Beverage Co.,
10 268 F.R.D. 365, 378 (N.D. Cal. 2010) (holding that, "[a]lthough
11 plaintiff did not purchase each type of beverage carrying the
12 misleading label, his claims are reasonably coextensive with
13 those of absent class members").

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

19 C. Claims Based On Other States' Consumer Protection Laws

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

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

5 Here, although Morales only alleges that she purchased
6 TRESemmé Naturals products in California, (see FAC ¶ 6), she
7 asserts claims under the consumer protection laws of twenty-one
8 different states, (see id. ¶ 52). Likewise, although Cohen only
9 alleges that she purchased TRESemmé Naturals products in
10 Massachusetts, (see FAC ¶ 7), she asserts claims under the
11 consumer protection laws of those states, (see id. ¶ 60).
12 Because neither Morales nor Cohen is a resident of any state
13 other than California or Massachusetts, respectively, and did not
14 purchase defendant's products in any state but her own,
15 plaintiffs do "not have standing to assert a claim under the
16 consumer protection laws of the other states named in the
17 Complaint." Pardini v. Unilever U.S., Inc., 961 F. Supp. 2d
18 1048, 1061 (N.D. Cal. 2013); see also, e.g., In re Apple & AT&TM
19 Antitrust Litig., 596 F. Supp. 2d 1288, 1309 (N.D. Cal. 2008)
20 ("Plaintiffs lack standing to bring consumer protection claims in
21 the forty states where no named Plaintiff resides.").

22 Plaintiffs contend that the court should resolve this
23 question at class certification, rather than on a motion to
24 dismiss. However, the Ninth Circuit has emphasized that, with
25 narrow exceptions not relevant here, a district court should
26 "addresss[] the issue of standing before it addresse[s] the issue
27
28

1 of class certification.”⁵ Easter v. Am. W. Fin., 381 F.3d 948,
2 962 (9th Cir. 2004); see also Lee v. Oregon, 107 F.3d 1382, 1390
3 (9th Cir. 1997) (“Standing is a jurisdictional element that must
4 be satisfied prior to class certification.” (citations and
5 internal quotation marks omitted)). Because plaintiffs’ lack of
6 standing is “plain enough from the pleadings,” it is an
7 appropriate basis for dismissal even if it overlaps with issues
8 typically raised at class certification. Gen. Tel. Co. of Sw. v.
9 Falcon, 457 U.S. 147, 160 (1982).

10 Plaintiffs also argue that even if this question is
11 appropriate for resolution on a motion to dismiss, plaintiffs
12 have standing to bring claims on behalf of purchasers in other
13 states so long as the consumer protection laws of those states
14 are materially identical to the CLRA or the MCPA. This argument
15 conflates the inquiry required under Rule 23⁶ with the inquiry

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

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

1 into whether Morales has standing to assert those claims in the
2 first instance. See In re Genentech, Inc. Sec. Litig., Civ. No.
3 88-4038 DLJ, 1990 WL 120641, at *6 n.4 (N.D. Cal. June 6, 1990)
4 ("The requirements for individual standing represent a threshold
5 inquiry that must be analyzed separate and apart from Rule 23.
6 If the named plaintiffs for the proposed . . . class in this
7 action do not have standing, the necessary consequence is
8 dismissal . . . of the claim, not denial of class certification."

9 The cases that plaintiffs cite in support of this
10 argument do not even discuss standing; rather, those cases
11 address whether differences in state law undermine commonality,
12 see, e.g., In re Conseco Life Ins. Co. LifeTrend Ins. Sales &
13 Marketing Litig., 270 F.R.D. 521, 529 (N.D. Cal. 2010), or
14 predominance, see, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011,
15 1022-23 (9th Cir. 1998). Plaintiffs have not cited, and the
16 court cannot identify, any case holding that a plaintiff may
17 assert class-wide claims that no named plaintiff has standing to
18 bring. By contrast, numerous cases make clear that a plaintiff
19 may not do so. See, e.g., Ditropan, 529 F. Supp. 2d at 1107.

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

25 III. Motion to Dismiss

26 On a motion to dismiss under Rule 12(b)(6), the court
27
28 different types of classes." Leyva v. Medline Indus. Inc., 716
F.3d 510, 512 (9th Cir. 2013) (citations omitted).

1 must accept the allegations in the complaint as true and draw all
2 reasonable inferences in favor of the plaintiff. Scheuer v.
3 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
4 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S.
5 319, 322 (1972). To survive a motion to dismiss, a plaintiff
6 must plead "only enough facts to state a claim to relief that is
7 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
8 544, 570 (2007). This "plausibility standard," however, "asks
9 for more than a sheer possibility that a defendant has acted
10 unlawfully," and where a complaint pleads facts that are "merely
11 consistent with a defendant's liability," it "stops short of the
12 line between possibility and plausibility." Ashcroft v. Iqbal,
13 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

14 A. Reasonable Consumer Test

15 California's UCL prohibits "any unlawful, unfair, or
16 fraudulent business act or practice." Cal. Bus. & Prof. Code §
17 17200; see Cel-Tech Comm'ns, Inc. v. L.A. Cellular Tel. Co., 20
18 Cal. 4th 163, 180 (1999) (describing application of UCL).
19 California's CRLA prohibits "unfair methods of competition and
20 unfair or deceptive acts or practices." Cal. Civ. Code § 1770;
21 see Meyer, 45 Cal. 4th at 639 (describing application of CLRA).
22 "The standard for California's UCL, FAL, and CLRA is the
23 'reasonable consumer' test, which requires a plaintiff to show
24 that members of the public are likely to be deceived by the
25 business practice or advertising at issue." Brazil, 935 F. Supp.
26 2d at 962-63 (N.D. Cal. 2013) (citing Williams v. Gerber Prods.,
27 552 F.3d 934, 938 (9th Cir. 2008)).

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

1 competition" or "unfair or deceptive acts or practices" when used
2 "in the conduct of any trade or commerce." Mass. Gen. Laws. ch.
3 93A § 11; see Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d
4 47, 55-56 (1st Cir. 1998) (analyzing case law defining "unfair or
5 deceptive acts or practices"). The MCPA likewise incorporates a
6 "reasonable consumer" test. See Aspinall v. Philip Morris Cos.,
7 442 Mass. 381, 397 (2004) (holding that an advertisement is
8 deceptive only "when it has the capacity . . . to entice a
9 reasonable consumer to purchase the product").

10 As a general rule, whether a business practice is
11 likely to deceive a reasonable consumer is a "question of fact"
12 that cannot be resolved on a motion to dismiss. Williams, 552
13 F.3d at 938; see also, e.g., Von Koenig v. Snapple Beverage
14 Corp., 713 F. Supp. 2d 1066, 1079 (E.D. Cal. 2010) (Damrell, J.);
15 Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal. App. 4th
16 115, 134-35 (6th Dist. 2007) (noting that this inquiry is a
17 "question of fact which requires consideration and weighing of
18 evidence from both sides"). Dismissal is appropriate only in the
19 "rare situation" where "the advertisement itself made it
20 impossible for the plaintiff to prove that a reasonable consumer
21 was likely to be deceived." Williams, 552 F.3d at 939.

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

1 ingredients." (Id. ¶ 2.) Defendant argues that reasonable
2 consumers would not be misled by those product labels because
3 they understand that cosmetics are not natural--that "there are
4 neither shampoo trees nor conditioner streams." (Def.'s Mem. at
5 12:2-3 (citing Balser v. Hain Celestial Grp., Inc., Civ. No. 13-
6 5604 R, 2013 WL 6673617, at *2 (C.D. Cal. Dec. 18, 2013).) In
7 support of this contention, defendant points to numerous FDA
8 regulations referring to the "manufacture" of cosmetic products
9 and argues that those regulations foreclose the possibility that
10 cosmetics can be "natural." (Id. at 11-12 (citing 21 C.F.R. §
11 700.3(b)-(k)).)

12 Despite defendant's contention that a cosmetic product
13 cannot be natural, numerous courts have denied motions to dismiss
14 claims alleging that cosmetic products were falsely labeled as
15 "natural". See, e.g., Brown v. Hain Celestial Grp., 913 F. Supp.
16 2d 881, 898 (N.D. Cal. 2012) (denying motion to dismiss when
17 defendant claimed that various cosmetic products were "pure,
18 natural, and organic"); Fagan v. Neutrogena Corp., Civ. No. 5:13-
19 1316 SVV OP, 2014 WL 92255, at *2 (C.D. Cal. Jan. 8, 2014)
20 (denying motion to dismiss when defendant claimed that its
21 sunscreen was "100% naturally sourced"). Even if defendant were
22 correct that a cosmetic product cannot be "natural," it does not
23 follow that labeling cosmetic products as natural is per se not
24 misleading. Defendant's argument leads to the opposite
25 conclusion--namely, that labeling cosmetic products manufactured
26 from artificial ingredients as "natural" is misleading.

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

1 an objective meaning.” (Def.’s Mem. at 11:1-8 (citing Balser,
2 2013 WL 6673617, at *1).) Although the FDA has not defined the
3 term “natural” in the context of cosmetics labeling, see Astiana
4 v. Hain Celestial Grp., 905 F. Supp. 2d 1013, 1016 (N.D. Cal.
5 2012), plaintiffs allege that their understanding of the term
6 “natural” reflects the dictionary definition of the term--that
7 is, that the products’ ingredients are “existing in or produced
8 by nature” and are “not artificial.” (FAC ¶ 2 n.1 (citing
9 Merriam-Webster Dictionary, www.merriam-webster.com/dictionary).)

10 Even if plaintiffs had not proffered an “objective
11 meaning” of the term “natural,” they need not do so; the relevant
12 question is the meaning that consumers would attach to the term.
13 As many courts have observed, this is generally not a question
14 that can be resolved on a motion to dismiss. See, e.g., Brown,
15 913 F. Supp. 2d at 899; Vicuna v. Alexia Foods, Inc., Civ. No.
16 11-6119 PJH, 2012 WL 1497507, at *2 (N.D. Cal. Apr. 27, 2012)
17 (holding that “the question whether a reasonable consumer would
18 likely be deceived by the designation ‘All Natural’ is a factual
19 dispute [that] cannot be resolved” on a motion to dismiss);
20 Parker v. J.M. Smucker Co., Civ. No. 13-690 SC, 2013 WL 4516156,
21 at *6 (N.D. Cal. Aug. 23, 2013) (holding that the plaintiff’s
22 allegations that a reasonable consumer would believe that a
23 product labeled as “all natural” contained no bioengineered or
24 chemically altered ingredients “cannot be resolved as a matter of
25 law”). The court therefore cannot conclude at this stage of the
26 litigation that a reasonable consumer would not be misled by the
27
28

1 term "natural" or "Naturals."⁷

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

7 We do not think that the FDA requires an ingredient
8 list so that manufacturers can mislead consumers and
9 then rely on the ingredient list to correct those
10 misinterpretations and provide a shield for liability
11 for the deception. Instead, reasonable consumers
12 expect that the ingredient list contains more detailed
13 information about the product that confirms other
14 representations on the packaging.

15 Williams, 552 F.3d at 939-40; see also Lam v. Gen. Mills, Inc.,
16 859 F. Supp. 2d 1097, 1105 (N.D. Cal. 2012) (citing Williams and
17 holding that the "ingredients list cannot be used to correct the
18 message that reasonable consumers may take from the rest of the

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

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

1 packaging").

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

21 B. Rule 9(b)

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

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

1 1125 (9th Cir. 2009); Vess v. Ciba-Geigy Corp. USA, 317 F.3d
2 1097, 1103-04 (9th Cir. 2003). Rule 9(b) requires a plaintiff
3 whose claim "sounds in fraud" to "state with particularity the
4 circumstances constituting fraud or mistake." Fed. R. Civ. P.
5 9(b). Under Rule 9(b), "[a]verments of fraud must be accompanied
6 by the 'who, what, where, when, and how' of the misconduct
7 charged." Vess, 317 F.3d at 1106 (quoting Cooper v. Pickett, 137
8 F.3d 616, 627 (9th Cir. 1997)). In addition to identifying the
9 particulars of the alleged fraud, Rule 9(b) requires that a
10 plaintiff "must 'set forth what is false or misleading about a
11 statement, and why it is false.'" Rubke v. Capitol Bancorp Ltd.,
12 551 F.3d 1156, 1161 (9th Cir. 2009) (quoting Yourish v. Cal.
13 Amplifier, 191 F.3d 983, 993 (9th Cir. 1999)).

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

26 1102. Rule 9(b) specifically applies to claims brought under the
27 UCL and CLRA, see Kearns, 567 F.3d at 1125, and the MCPA, see
28 First Choice Armor & Equip. Co. v. Toyobo Am., Inc., 717 F. Supp.
2d 156, 163 (D. Mass. 2010).

1 dates on which they made those purchases. (Id. ¶¶ 6-7.) Finally,
2 plaintiffs allege that the product labels are misleading because
3 each product contains three to twelve artificial and unnatural
4 ingredients, all of which are identified in the Complaint. (Id.
5 ¶¶ 2, 16.)

6 District courts in California have found that similar
7 allegations are sufficient to satisfy Rule 9(b). For instance,
8 one court held that plaintiffs who provided labels from cooking
9 oils marketed as "100% natural," that they viewed those labels
10 throughout the class period, and that the labels were false
11 because the oils were made from genetically modified crops
12 satisfied Rule 9(b), even though plaintiffs failed to specify the
13 specific dates on which they viewed the product labels. In re
14 ConAgra Foods Inc., 908 F. Supp. 2d 1090, 1100-01 (C.D. Cal.
15 2010). Another judge in this district held that a plaintiff who
16 submitted copies of Snapple labels containing the term "all
17 natural" and alleged that the labels were false because Snapple
18 contained high-fructose corn syrup satisfied Rule 9(b). Von
19 Koenig, 713 F. Supp. 2d at 1077. Plaintiff's allegations are at
20 least as detailed as the allegations in ConAgra and Von Koenig
21 and are therefore sufficient to satisfy Rule 9(b). See Janney,
22 944 F. Supp. 2d at 818.

23 Defendant contends that even if plaintiffs have
24 described the alleged misrepresentations with adequate
25 specificity, they have not satisfied Rule 9(b) because they have
26 not adequately alleged reliance. As a preliminary matter, it is
27 not clear whether allegations of reliance are subject to Rule
28 9(b)'s heightened pleading requirement. Compare Andrews Farms v.

1 Calcot, Ltd., 527 F. Supp. 2d 1239, 1252 (E.D. Cal. 2007)
2 (O'Neill, J.) (holding that Rule 9(b) does not "require[] more
3 particular pleading for the element of reliance"), and Anthony v.
4 Yahoo Inc., 421 F. Supp. 2d 1257, 1264 (N.D. Cal. 2006) (holding
5 that the "heightened standards" of Rule 9(b) do not apply to
6 allegations of reliance), with Kane v. Chobani, Inc., --- F.
7 Supp. 2d ----, Civ. No. 12-2425 LHK, 2014 WL 657300, at *10 (N.D.
8 Cal. Feb. 20, 2014) (holding that the plaintiffs' allegations of
9 reliance "fail[] to meet the heightened pleading requirement
10 under Rule 9(b)"), and In re Countrywide Fin. Corp. Sec. Litig.,
11 588 F. Supp. 2d 1132, 1198 (C.D. Cal. 2008) (holding that "[t]he
12 reliance element is subject to the pleading requirements of Rule
13 9(b) because it is one of the 'circumstances constituting
14 fraud'").

15 The court need not resolve this question, however,
16 because plaintiffs have adequately pled reliance even under Rule
17 9(b). Plaintiffs allege that they understood the product labels
18 to mean that the products were free of artificial or unnatural
19 ingredients and that they paid a premium for those products as a
20 result. Those allegations are sufficiently particular to satisfy
21 Rule 9(b). See, e.g., ConAgra, 908 F. Supp. 2d at 1100-1101
22 (holding that the plaintiffs satisfied Rule 9(b) when they
23 "alleged that the phrase '100% natural' meant that Wesson Oil was
24 not made from genetically modified organisms, and that they
25 purchased the product based on this understanding"); In re Toyota
26 Motor Corp. Unintended Acceleration Marketing, Sales Practices, &
27 Prods. Liability Litig., 754 F. Supp. 2d 1145, 1172 n.18 (C.D.
28 Cal. 2010) ("Allegations of representations from product labels

1 and statements that, had consumers not been deceived by the
2 labels, they would not have purchased the product, are sufficient
3 to plead under Rule 9(b)."); Werdebaugh v. Blue Diamond Growers,
4 Civ. No. 12-2724 LHK, 2013 WL 5487236, at *14 (N.D. Cal. Oct. 2,
5 2013) (holding that a plaintiff sufficiently alleges reliance
6 under Rule 9(b) when she states "why a reasonable consumer would
7 be misled" by allegedly misleading food labels).

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

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

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

20 Dated: April 9, 2014

21 
22 WILLIAM B. SHUBB
23 UNITED STATES DISTRICT JUDGE
24
25
26
27
28