

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KYM PARDINI and CARRIE WOOD, on	)	Case No. 13-1675 SC
behalf of themselves and other	)	
others similarly situated,	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART MOTION TO
Plaintiffs,	)	<u>DISMISS</u>
	)	
v.	)	
	)	
UNILEVER UNITED STATES, INC.,	)	
	)	
Defendant.	)	

I. INTRODUCTION

Plaintiffs Kym Pardini and Carrie Wood (collectively "Plaintiffs") bring this putative class action in connection with Defendant Unilever United States, Inc.'s ("Defendant") marketing of I Can't Believe It's Not Butter! Spray. Defendant now moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 33 ("Mot."). The Motion is fully briefed, ECF Nos. 34 ("Opp'n"), 35 ("Reply"), and appropriate for determination without oral argument per Civil Local Rule 7-1(b). For the reasons described below, the Motion is GRANTED in part and DENIED in part.

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1 **II. BACKGROUND**

2 **A. Factual**

3 As it must on a Rule 12(b)(6) motion to dismiss, the Court
4 takes all well-pleaded allegations as true. I Can't Believe It's
5 Not Butter! is the second largest margarine brand in the United
6 States. SAC ¶ 17. The product at issue in this case, I Can't
7 Believe It's Not Butter! Spray ("ICBINBS") is marketed as a "0
8 Calorie" and "0 Fat" alternative to butter. Id. ¶ 25. The Court
9 takes judicial notice of the fact that the product is dispensed via
10 manual pump, with each pump delivering a squirt of oil. See Compl.
11 Figure 1 ("Front Label").

12 The front label of the ICBINBS packaging prominently states
13 that the product is "Great for Topping & Cooking" and contains "0
14 Calories per serving" and "0 g Trans Fat* per serving." Id. The
15 asterisk refers to an explanatory phrase printed in smaller type
16 immediately below: "Contains 0 g fat (0 g saturated fat), and 0 g
17 trans fat per serving, see nutrition information for serving size."
18 Id.

19 The back of the packaging displays the "nutrition panel,"
20 which states "Calories 0" and "Calories from Fat 0." Compl. Figure
21 2 ("Back Label"). The nutrition panel states that the serving size
22 is "1 Spray (0.20g) Cooking Spray" or "5 Sprays (1g) per Topping."
23 Id. The nutrition panel also discloses the fat, cholesterol, and
24 sodium per serving and the product's ingredients. Id. The first
25 three listed ingredients are water, liquid soybean oil, and sweet
26 cream buttermilk. Id. Next to "sweet cream buttermilk" in the
27 ingredients list, there is an asterisk, which cites to the
28 following footnote: "Adds a dietarily insignificant amount of

1 cholesterol." Id. Figure 2.

2 Plaintiffs claim that Defendant's "0 Fat" and "0 Calorie"
3 representations are false and misleading because the listed serving
4 sizes fail to account for the manner in which ICBINBS is
5 customarily used. SAC ¶ 6. Essentially, Plaintiffs allege that
6 Defendant has set an artificially small serving size so that the
7 calories and fat per serving can be rounded down to zero.
8 Plaintiffs allege that each bottle of ICBINBS actually contains
9 1160 calories and 124 grams of fat, meaning that each recommended
10 serving of cooking spray (one spray) contains about 0.8 calories
11 and 0.08 grams of fat, and each recommended serving of topping
12 (five sprays) contains about 4 calories and 0.4 grams of fat. Id.
13 ¶ 26.¹ Plaintiffs also allege that the label does not disclose
14 that ICBINBS contains ingredients that are fats and which, even in
15 small quantities, add certain amounts of fat and calories per
16 serving. Id. ¶ 7. Plaintiffs allege that the soybean oil and
17 buttermilk ingredients listed in the nutrition panel should have
18 been followed by an asterisk and language disclosing the presence
19 of fat. Id. ¶ 31.

20 Plaintiff Pardini is from California, and Plaintiff Wood is
21 from Missouri. They represent two putative state classes.
22 Plaintiffs are reasonably diligent consumers who sought to buy fat-
23 free and calorie-free alternatives to butter. Id. ¶ 64. They
24 inspected the ICBINBS bottle and purchased it believing it to be
25 such a product, paying a premium they would not have paid had they

26 ¹ The Court questions why Plaintiffs changed this total measurement
27 of fat and calories from their original complaint. See ECF No. 1
28 ("Compl.") ¶ 4 ("ICBINB contains 771 calories and 82 grams of fat
per bottle."). However, this does not affect the Court's holding.

1 known the product's full fat and calorie content. Id. ¶¶ 64-67.

2 Plaintiffs assert that Defendant violated the Federal Food,
3 Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et seq., and its
4 implementing regulations by (1) failing to adequately disclose the
5 level of fat and calories per serving in accordance with 21 U.S.C.
6 § 343(q), and 21 C.F.R. § 101.9(b)(1); and (2) making "fat free"
7 and "zero calorie" nutrient content claims in violation of 21
8 U.S.C. § 343(r), 21 C.F.R. §§ 101.13(b), 101.62(a)(3), and
9 101.60(a)(3). Plaintiffs assert the following causes of action
10 against Defendant: (1) fraud by concealment, (2) breach of express
11 warranty, (3) intentional misrepresentation, (4) violations of New
12 Jersey's Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. § 56:8-1, et
13 seq., (5) violations of California's Consumer Legal Remedies Act
14 ("CLRA"), Cal. Civ. Code § 1750, et seq., (6) violations of
15 California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code
16 § 17200, et seq., and (7) violations of the Missouri Merchandising
17 Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010, et seq.

18 **B. Procedural**

19 The operative pleading is Plaintiffs' second amended
20 complaint. The original complaint did not include Plaintiff Wood.
21 Plaintiffs Wood and Pardini now allege the same basic facts, though
22 Ms. Pardini's claims arise in California and Ms. Wood's in
23 Missouri. The Court previously dismissed Plaintiff Pardini's
24 complaint in its July 9 Order, ECF No. 24, Case No. 13-1675 SC,
25 2013 WL 3456872 (N.D. Cal. July 9, 2013). In the July 9 Order, the
26 Court found Ms. Pardini's claims preempted except to the extent
27 that they were predicated on Defendant's failure to provide a
28 notation on the nutrition panel that certain ingredients contain

1 fat (the "asterisk claim").² The Court dismissed all of Plaintiff
2 Pardini's claims with leave to amend, except her unjust enrichment
3 claim, which was dismissed with prejudice.

4
5 **III. LEGAL STANDARD**

6 A motion to dismiss under Federal Rule of Civil Procedure
7 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
8 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
9 on the lack of a cognizable legal theory or the absence of
10 sufficient facts alleged under a cognizable legal theory."
11 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
12 1988). "When there are well-pleaded factual allegations, a court
13 should assume their veracity and then determine whether they
14 plausibly give rise to an entitlement to relief." Ashcroft v.
15 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
16 must accept as true all of the allegations contained in a complaint
17 is inapplicable to legal conclusions. Threadbare recitals of the
18 elements of a cause of action, supported by mere conclusory
19 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
20 Twombly, 550 U.S. 544, 555 (2007)).

21 Claims sounding in fraud are subject to the heightened
22 pleading requirements of Federal Rule of Civil Procedure 9(b),
23 which requires that a plaintiff alleging fraud "must state with
24 particularity the circumstances constituting fraud." See Kearns v.
25 Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy

26 ² In discussing the July 9 Order, the Court sometimes refers to
27 "Plaintiffs," for the sake of consistency throughout this Order.
28 While Ms. Wood was not a party to the complaint then, her inclusion
now affects nothing in this Order except the Court's consideration
of Plaintiffs' non-California claims.

1 Rule 9(b), a pleading must identify the who, what, when, where, and
2 how of the misconduct charged, as well as what is false or
3 misleading about [the purportedly fraudulent] statement, and why it
4 is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys.,
5 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (quotation marks and
6 citations omitted).

7
8 **IV. DISCUSSION**

9 Defendant's main argument in favor of dismissal is that
10 Plaintiffs' claims are preempted. It also contends that
11 Plaintiffs' individual claims fail for a variety of pleading and
12 legal reasons.³

13 **A. Preemption**

14 In its July 9 Order, the Court held that Plaintiffs' claims
15 were preempted by 21 C.F.R. § 101.12(b). July 9 Order at *5.
16 Defendant maintains that Plaintiffs' amended claims are also
17 preempted.

18 The FDCA, as amended by the Nutrition Labeling and Education
19 Act of 1990 ("NLEA"), sets forth a comprehensive set of food
20 labeling requirements. See 21 U.S.C. § 343. The many subsections
21 of 21 U.S.C. § 343 establish the conditions under which food is
22 considered "misbranded." Sections 343(q) and 343(r) regulate the
23 information that must be included in all packed products' nutrition
24 panel as well as all other nutrient content claims that appear
25 elsewhere on the label. The FDCA contains a broad preemption
26 provision that prohibits states or other political subdivisions

27

³ Defendant also contends that Plaintiffs' complaint should be
28 dismissed on primary jurisdiction grounds, but the Court again
declines to entertain that theory. See July 9 Order at *5 n.5.

1 from directly or indirectly establishing any requirement for
2 nutrition labeling that is not identical to the requirements set
3 forth in § 343(q) or § 343(r). Id. § 343-1(a)(4)-(5). In arguing
4 preemption, it is Defendant's burden in this case to show that the
5 strong presumption against preemption -- especially with regard to
6 states' capacity to regulate the proper marketing of food -- is
7 overcome. See Brazil v. Dole Food Co., Inc., 935 F. Supp. 2d 947,
8 955 (N.D. Cal. 2013) (citing Fla. Lime & Avocado Growers v. Paul,
9 373 U.S. 132, 144 (1963)).

10 Here, Defendant argues that all of Plaintiff's claims are
11 preempted because they impose requirements that are not identical
12 to the FDCA and regulations promulgated by the U.S. Food and Drug
13 Administration ("FDA") pursuant to the FDCA. Specifically,
14 Defendant argues that the FDCA preempts Plaintiff's claims that:
15 (1) Defendant used artificially small serving sizes to understate
16 the amount of calories and fat contained in ICBINBS; (2) Defendant
17 made unlawful "0 Fat" and "0 Calories" nutrient content claims; and
18 (3) Defendant omitted the asterisk and explanatory notation
19 required when making "0 fat" claims on the front label.
20 Alternatively, Defendant argues that Plaintiff's claims are
21 preempted because the FDCA does not provide for a private right of
22 action.

23 Plaintiffs must navigate a narrow gap to avoid preemption:
24 "they must sue for conduct that specifically violates the FDCA to
25 avoid express preemption, but they cannot sue because the conduct
26 violates the FDCA." Allen v. ConAgra Foods, Inc., No. 13-cv-01279-
27 JST, 2013 WL 4737421, at *8 (N.D. Cal. Sept. 3, 2013) (emphases in
28 the original) (citations and quotations omitted).

1 **1. Plaintiffs' "Serving Size" Claim**

2 Where a single serving of a particular product contains less
3 than 0.5 grams of fat, FDA regulations provide that the product's
4 label shall express the fat content per serving as zero. 21 C.F.R.
5 § 101.9(c)(2). Likewise, calories per serving may be expressed as
6 zero where a product contains less than five calories per serving.
7 Id. § 101.9(c)(1). The crux of Plaintiffs' serving size claim is
8 that Defendant used unlawful serving sizes so that it could round
9 down to zero ICBINBS's fat and calories per serving. The FDCA
10 provides that a food label must list "the serving size which is an
11 amount customarily consumed and which is expressed in a common
12 household measure that is appropriate to the food." 21 U.S.C. §
13 343(q)(1)(A)(i). Plaintiffs allege that the suggested serving
14 sizes for ICBINBS -- one spray (or 0.20 grams) for "Cooking Spray,"
15 and five sprays (or 1.0 grams) for "Topping" -- are smaller than
16 the amount customarily consumed. See SAC ¶¶ 32-38.

17 Defendant contends that Plaintiffs' serving size claim is
18 preempted since ICBINBS's serving sizes are consistent with FDA
19 regulations. Mot. at 4-5. Specifically, Defendant points to 21
20 C.F.R. § 101.12, which sets forth the reference amounts customarily
21 consumed per eating occasion (the "Reference Amount") for various
22 categories of food products. Id. According to that regulation,
23 the Reference Amount for "Fats and Oils: Spray types" is 0.25
24 grams. 21 C.F.R. 101.12(b) (Table 2). Defendant maintains that
25 "[b]ecause ICBINBS is labeled as a spray and functions as a spray,
26 it is a spray, and therefore must be categorized in this group."
27 Mot. at 5. Defendant contends that the "Cooking Spray" and
28 "Topping" serving sizes listed in ICBINBS's nutrition facts comply

1 with the 0.25-gram Reference Amount for "Fats and Oils: Spray
2 types." Id. Defendant argues that at 1.0 grams, the five-spray
3 "Topping" serving size is four times the required amount. Mot. at
4 5. At one spray (0.20 grams), the "Cooking Spray" serving size is
5 slightly smaller than the 0.25-gram Reference Amount. However,
6 Defendant argues that the listed serving size is a proper
7 translation of the Reference Amount pursuant to the regulation,
8 id., which provides that "[m]anufacturers are required to covert
9 the [Reference Amount] to the label serving size in a household
10 measure most appropriate to their specific product," 21 C.F.R. §
11 101.12(b) n.3.

12 Plaintiffs' main contention here is that the "spray types"
13 category does not apply to ICBINBS. Opp'n at 7. First, to support
14 this point, they claim that FDA Guidance provides that "spray
15 types" are limited to "nonstick cooking sprays." Id. at 7 & n.11.
16 Second, Plaintiffs claim that ICBINBS is not a "true non-stick
17 cooking spray," which should be "nearly 100% oil," and should use
18 gas as a propellant to emit a continuous spray of lubricant for
19 cookware -- as opposed to ICBINBS's partial oil content and pump
20 mechanism. Id. Third, Plaintiffs allege that the major intended
21 use of ICBINBS is not for non-stick cooking purposes, but rather as
22 a food topping or alternative to butter, rendering it subject to
23 different serving size requirements. See id. at 8-9. Finally,
24 along these lines, Plaintiffs claim that ICBINBS did not use the
25 appropriate reference amount, since it should have used the butter-
26 alternative reference amount of one tablespoon (or forty sprays).
27 Id. at 9. Plaintiffs state that even if this sounds like a lot for
28 a spray bottle, Defendant was still obliged to follow the FDA's

1 rules or to ask for a new product sub-category. Id. at 9-10.

2 The Court is not convinced by any of these arguments, which
3 mostly restate rejected arguments from Defendant's motion to
4 dismiss the FAC. See July 9 Order at 9-10 (rejecting the argument
5 that ICBINBS cannot be a "nonstick cooking spray" because of its
6 fat content and means of propulsion), 10 (rejecting the argument
7 that sprays and toppings are exclusive categories).

8 First, Plaintiffs never cite any authority suggesting that the
9 FDA's scant examples of spray-type fats and oils are exclusive.
10 The Court is not convinced that Plaintiffs' arguments prove that
11 the FDA meant to restrict the "spray type" category as far as
12 Plaintiffs claim.

13 Second, and more broadly, Plaintiffs fail to give a plausible
14 account of how ambiguous labels and advertisements, alongside one
15 consumer's apparently unscrewing the spray cap to dump out the
16 product, show that ICBINBS is not a spray-type fat or oil.
17 Plaintiffs contend that consumers use ICBINBS as a topping, that
18 they generally use "more than five sprays [for toppings] to achieve
19 a buttery flavor," that consumers don't really use ICBINBS as a
20 lubricating cooking spray, and that images on ICBINBS's label (corn
21 on the cob) and recipes on Defendant's website all support a
22 conclusion that the product should be categorized as a topping, not
23 a spray. See SAC ¶¶ 39-57. The Court finds that the examples
24 Plaintiffs plead do not plausibly support Plaintiffs' conclusion.

25 The Court finds it far more plausible in this case that, as
26 Plaintiffs themselves state, "Manufacturers must use the defaulted
27 serving size of one tablespoon for any 'Fat and Oil' unless the
28 product fits within a more specific subcategory." Id. ¶ 36

(emphasis added). The subcategory here, according to the regulations and the face of Plaintiffs' complaint, is "Fats and Oils: Spray Type." The FDA has calculated Reference Amounts based on national food consumption surveys -- and it is the agency, not the courts or consumers, who set these standards. 21 C.F.R. § 101.12(a)(1)(2). Indeed, products in a form for which there is an established reference amount in Table 2 of the regulations are required to use the listed amount. See 58 Fed. Reg. 44039, 44047 (Aug. 18, 1993). It is true that the food at issue is in the form of a liquid fat or oil, but more specifically it is a spray-type fat or oil.⁴ The Court does not find that the fact that some consumers might choose to use more of a product means that the product is mislabeled. Plaintiffs' pleadings stretch plausibility too far, suggesting a state of regulatory affairs in which any consumer could overcome a motion to dismiss in a case like this one by insisting that people consume more (or less) of a product these days, rendering all sorts of products mislabeled at a consumer's whim.

In any event, Plaintiffs continue to fail to state definitively how ICBINBS should be classified and what its serving sizes should be (except to say that it is misclassified and its serving sizes are, regardless of the measurements given, artificially low). The Court specifically asked Plaintiffs to account for these issues, and it finds that Plaintiffs again fail

⁴ Plaintiffs again raise the issues of whether a "spray" is a serving size under FDA regulations, and whether Defendant's serving size being .2 grams (as opposed to the Reference Amount's .25 grams) means that Defendant mislabeled the product. The Court addressed these matters in its July 9 Order, and does not reopen the issues here: the Court's ruling is the same.

1 to do so. See July 9 Order at *5. The Court finds that
2 Plaintiffs' pleadings on this matter further suggest that the
3 requirements they contend are applicable actually differ from the
4 FDA's regulations, thereby preempting this argument.

5 Third, Plaintiffs' insistence that the serving size should be
6 listed as forty sprays remains implausible. See July 9 Order at
7 *4. This finding further supports the finding that ICBINBS is
8 properly labeled as a spray type.

9 Along those lines, Plaintiffs contend that even if ICBINBS is
10 a spray type, it should have a second nutrition panel providing a
11 topping serving size of ten sprays. See Opp'n at 11-12. According
12 to Plaintiffs, consumers customarily use ten sprays of ICBINBS when
13 using it as a topping. Opp'n at 12. There are two problems with
14 this argument. First, Plaintiffs never actually pled this. They
15 assert it in a proposed third amended complaint, so it is not the
16 operative pleading. The Court rejects the argument on those
17 grounds. Second, even if the proposed complaint controlled here,
18 the Court rejects Plaintiffs' arguments for the same reasons as
19 above. The serving size suggested by Plaintiffs appears nowhere in
20 the regulations. Plaintiffs are substituting their own desires for
21 the FDA's considered regulations, which the Court has found apply
22 to this case, so this line of argument is preempted. In any event,
23 the regulation Plaintiffs cite -- 21 C.F.R. § 101(9)(b)(11) --
24 specifically states that products used for multipurposes (e.g.,
25 margarine or oils) are exempt from this requirement. ICBINBS, per
26 Plaintiffs' allegations, appears to fit that requirement (though
27 Plaintiffs contend that it is more a spread than a topping).
28 Plaintiffs' proposal would be inconsistent with the regulation, so

1 it is preempted.

2 Finally, the Court is not convinced by Plaintiffs' assertion
3 that the idea that a consumer should get 1700 servings from a
4 single bottle is implausible. Plaintiffs do not support this
5 contention with any regulatory, factual, or legal authority.

6 For these reasons, the Court finds that Plaintiff's serving
7 size claim is preempted by 21 C.F.R. § 101.12(b). The claim is
8 DISMISSED WITH PREJUDICE.

9 **2. Plaintiffs' "Nutrient Content" Claim**

10 Because Plaintiffs' serving size claims are dismissed, as
11 above, Plaintiffs' nutrient content claim is likewise DISMISSED,
12 this time WITH PREJUDICE. Plaintiffs refer, in their opposition,
13 to some non-binding FDA guidance that the Court does not find
14 compelling. Defendant's rounded figures were appropriate, and the
15 Court does not find that section of the front label to be
16 misleading under section 343(a) because, in context of the
17 statements on the label, Plaintiffs' allegations that Defendant
18 makes a "fat free" representation is clearly incorrect and
19 implausible.

20 **3. Plaintiffs' "Asterisk" Claim**

21 In its July 9 Order, the Court held that Plaintiffs' "asterisk
22 claim" was not preempted, because that claim aligned with 21 C.F.R.
23 § 101.62(b). Now Defendant contends that this regulation is
24 inapplicable, and that the Court should have evaluated Plaintiffs'
25 claims and Defendant's label according to a different regulation,
26 which Defendant argues controls here and preempts Plaintiffs'
27 asterisk claim.

28 Plaintiffs' asterisk claim is based on a small statement on

1 ICBINBS's front label: "*Contains 0 g fat (0 g saturated fat), and
2 0 g trans fat per serving, see nutrition information for serving
3 size." This statement appears in small type below a statement in
4 large type: "0 g Trans Fat* Per Serving," with the asterisk next to
5 "Trans Fat" directing the reader to the statement in smaller type.
6 SAC ¶¶ 23-25 & Figure 2.

7 Whether or not this claim is preempted turns on 21 C.F.R. §
8 101.62(b), which governs "fat content claims." Section 101.62(b)
9 provides that the terms "no fat" or "zero fat" may be used "on the
10 label or in labeling of foods," provided that:

11 (i) The food contains less than 0.5 gram (g) of fat
12 per reference amount customarily consumed and per
13 labeled serving or, in the case of a meal product or
14 main dish product, less than 0.5 g of fat per labeled
serving; and

15 (ii) The food contains no added ingredient that is a
16 fat or is generally understood by consumers to contain
17 fat unless the listing of the ingredient in the
18 ingredient statement is followed by an asterisk that
refers to the statement below the list of ingredients,
which states "adds a trivial amount of fat," "adds a
negligible amount of fat," or "adds a dietarily
insignificant amount of fat;"

19
20 21 C.F.R. § 101.62(b)(1)(i)-(ii). In other words, a product that
21 contains less than 0.5 grams of fat per serving may be labeled as
22 "zero fat" so long as (1) the product contains no ingredient that
23 is a fat or contains fat, or (2) the nutrition panel denotes the
24 ingredients that are fat or contain fat with an asterisk and an
25 explanatory statement. Plaintiffs essentially allege that because
26 the ICBINBS packaging makes a "zero fat" nutrient content claim,
27 the nutrition label must include an asterisk next to "soybean oil"
28 and "buttermilk" and a notation indicating that these ingredients

1 contain some amount of fat.

2 In the July 9 Order, the Court carefully considered all of
3 Defendant's arguments and rejected them. The Court declines to
4 restate its findings on those contentions here, but notes that to
5 the extent Defendant replicates any of its failed arguments, they
6 are rejected again.

7 Defendant's main argument is that 21 C.F.R. § 101.13(i)(3),
8 which regulates quantity claims -- a type of nutrient content claim
9 -- governs the statements in question, so Defendant's label does
10 not have to comply with section 101.62(b). Section 101.13(i)(3)
11 exempts from the disclaimer requirement nutrient content claims
12 that do not "in any way implicitly characterize the level of the
13 nutrient in the food and [are] not false or misleading in any
14 respect (e.g., '100 calories' or '5 grams of fat'), in which case
15 no disclaimer is required." As in the July 9 Order, the Court
16 finds no support for the contention that section 101.62(b) only
17 applies when a label makes claims about an entire product having
18 zero fat. July 9 Order at *7. Moreover, section 101.62(b)(i)(3)
19 refers to nutrient claims per serving size, "suggesting that the
20 regulation's requirements extend to nutrient content claims that
21 are expressed per serving." Id. And again, it appears that the
22 regulation's clear intent is to provide consumers with a warning
23 that a product contains at least some fat, regardless of a "fat
24 free" label (in whatever form). Id. The Court finds that the
25 statement is subject to section 101.62, the more specific
26 regulation that requires disclaimers when a food label claims that
27 the product contains no fat.

28 Accordingly, the Court finds that Plaintiffs' asterisk claim

1 is not preempted.

2 **B. Other Claims**

3 Defendant argues that, even if Plaintiffs' claims are not
4 preempted, they must be dismissed because: (1) Plaintiffs have
5 failed to plead their fraud-based claims with the requisite
6 particularity, (2) Plaintiffs' Missouri Merchandising Practices Act
7 is barred, (3) Plaintiffs' New Jersey Consumer Fraud Act Claim
8 fails, and (4) Plaintiffs' breach of express warranty claim fails.
9 Since the Court has found that Plaintiffs' serving size and
10 nutrient content claims are preempted, see Section IV.A supra, only
11 Plaintiffs' asterisk claim can support their causes of action.

12 **1. Fraud Claims**

13 Defendant argues that Plaintiffs fail to plead their fraud
14 claims -- fraud by concealment, intentional misrepresentation, UCL,
15 CLRA, MMPA, and NJCFA -- with sufficient particularity.⁵ See
16 Kearns, 567 F.3d at 1125 (state law claims grounded in fraud must
17 satisfy the particularity requirements of Rule 9(b)). Previously,
18 the Court dismissed those claims with leave to amend, because
19 Plaintiffs did not plead that they had read or relied on ICBINBS's
20 label or nutrition panel. Now Plaintiffs plead that they read the
21 fat and calorie claims on the front label, as well as the back
22 label and nutritional panel, and that they relied on those

23 ⁵ Defendant also argues that Plaintiffs' UCL and CLRA claims are
24 barred by the "safe harbor" doctrine, which provides that a
25 defendant is not liable for conduct that is permitted by another
26 law. Mot. at 19 (citing Knevelbaard Dairies v. Kraft Foods, Inc.,
27 232 F.3d 979, 994 (9th Cir. 2000)). The Court finds that
28 Plaintiffs' UCL and CLRA claims are not barred by the safe harbor
doctrine to the extent that they are predicated on Defendant's
failure to include an asterisk in the ingredients list and a
notation that certain ingredients add some amount of fat, since
such labeling practices are not expressly permitted by FDA
regulations.

1 statements when making their purchases. SAC ¶¶ 65-72.

2 Defendant asserts that Plaintiffs are impermissibly vague
3 about their inspection of the nutritional panel in the context of
4 their asterisk claim. Defendant notes that Plaintiffs do not
5 allege that they read the list of ingredients. This, according to
6 Defendant, renders their claims implausible: no reasonable consumer
7 would read an ingredient list, note the presence of liquid soybean
8 oil and buttermilk, and then conclude that the entire product
9 contained no fat. Defendant adds that if it were true that
10 Plaintiffs did not read the ingredients list, they could not have
11 been misled by a disclaimer they did not see.

12 The Court finds Plaintiffs' pleadings acceptable under Rule
13 9(b). First, the Court declines to require Plaintiffs to plead a
14 magic phrase -- "ingredients list" -- when they have made
15 sufficiently clear that they read the back label of the product,
16 including the ingredients list. Second, whether Plaintiffs were
17 actually misled and harmed by the placement of the asterisk or the
18 list of ingredients and whether a reasonable consumer would have
19 been misled by these facts are all questions not suitable for
20 resolution at the motion to dismiss stage. And as a pleading
21 matter, it is not inconceivable that a customer would examine the
22 nutrition panel of a product and would decline to purchase that
23 product if it contained even a "trivial" or "insignificant" amount
24 of fat per serving.⁶ The ingredient list does state that sweet

25 ⁶ In Williams v. Gerber Products Co., 552 F.3d 934, 939 (9th Cir.
26 2008), the Ninth Circuit held that "reasonable consumers should
27 [not] be expected to look beyond misleading representations on the
28 front of the box to discover the truth from the ingredient list in
small print on the side of the box." Plaintiff's asterisk claim is
distinct from the claim at issue in Williams since the governing
FDA regulation here, 21 C.F.R. § 101.62(b), expressly allows food

1 cream buttermilk "adds a dietarily insignificant amount of
2 cholesterol," but it makes no such disclosure about liquid soybean
3 oil, which Plaintiffs allege to be a fat. See 21 C.F.R. § 101.62;
4 see also SAC Figures 1, 2. Plaintiffs have sufficiently alleged
5 fraud-based claims based on this allegation, and the truth of those
6 claims -- as well as whether a reasonable consumer would be misled
7 -- are fact disputes not appropriate for resolution at this stage.

8 As the Court stated in the July 9 Order, Plaintiffs' tort
9 claims based on violations of the FDCA alone or on preempted
10 theories are precluded, but causes of action premised on the
11 asterisk claim may proceed.

12 **2. Breach of Express Warranty**

13 Plaintiffs' claim for breach of express warranty is predicated
14 on the allegation that Defendant expressly warranted that ICBINBS
15 is "0 Fat" and "0 Calories." SAC ¶¶ 103-08. The Court held in the
16 July 9 Order that Plaintiffs' express warranty claim could only be
17 based on the asterisk claim, but since that claim was not
18 predicated on any kind of affirmative representation, the Court
19 dismissed the warranty claim with leave to amend. Plaintiffs have
20 now pled reliance as to the asterisk claim -- i.e., that they
21 relied on the absence of a clarifying asterisk on ICBINBS's back
22 label -- but the problem with this theory as to their warranty
23 claim is that it relies on the absence of a statement, whereas a
24 warranty is necessarily an affirmative statement about a product.
25 This cannot be the basis of a warranty claim. Further, Plaintiffs'
26 other bases for the claim are preempted. Plaintiffs' breach of
27

28 manufacturers to clarify representations on the front label through
the use of fine print disclosures on the nutrition panel.

express warranty claim is DISMISSED with prejudice.

3. Other States' Consumer Protection Statutes

Finally, Defendant argues that Plaintiffs' non-California claims must be dismissed because the alleged misconduct was either permissible by law or occurred outside the target state, depriving Plaintiffs of standing.

The Ninth Circuit has held that "[e]ach class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place." Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 594 (9th Cir. 2012). Thus, "[w]here . . . a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal." Granfield v. NVIDIA Corp., C 11-05403 JW, 2012 WL 2847575, at *4 (N.D. Cal. July 11, 2012) (quotations omitted). In the July 9 Order, the Court dismissed Plaintiffs' non-California claims because Plaintiffs did not allege to have purchased ICBINBS outside California, so they did not have standing to assert claims under other states' consumer protection laws.⁷

Now Plaintiffs have added Plaintiff Wood, who alleges a violation of the MMPA based on her Missouri purchases of ICBINBS. The Court finds that Plaintiffs' MMPA claim may go forward at this stage, regardless of Defendant's contention that the alleged misconduct is authorized by law. As noted above, Plaintiffs' causes of action based on the asterisk claim are not authorized by

⁷ This is an issue suitable to determination at the motion to dismiss stage because the matter is plain on the face of the pleadings. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982).

1 any law. See supra, note 5; cf. Mot. at 19 (contending that the
2 allegedly deceptive practices are permissible).

3 As to Plaintiffs' NJCFA claim, Plaintiffs argue that
4 determination of class action standing should await a motion for
5 class certification. The Court finds otherwise: on the face of the
6 pleadings, Plaintiffs have no connection whatsoever to New Jersey.
7 Classes cannot bring claims on behalf of individuals they do not
8 represent, and if a representative plaintiff is lacking for a
9 particular state, claims based on that state's laws are subject to
10 dismissal. Granfield, 2012 WL 2847575, at *4; see also In re Flash
11 Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1164 (N.D. Cal.
12 2009).

13 Accordingly, Plaintiffs' NJCFA claim is DISMISSED. Plaintiffs
14 have leave to amend their complaint to join representative class
15 members, to the extent that doing so would be consistent with this
16 Order.

17 **C. Plaintiffs' Motion for Leave to Amend**

18 Plaintiffs include in their opposition brief a motion for
19 leave to amend their pleadings. They attached -- and, strangely,
20 cited throughout their opposition brief -- a proposed third amended
21 complaint. Having reviewed Plaintiffs' arguments in favor of
22 amendment, as well as the proposed third amended complaint, the
23 Court DENIES Plaintiffs' motion. It would be futile, because none
24 of Plaintiffs' proposed additional allegations, see Opp'n at 24-25,
25 would alter the Court's holdings. Plaintiffs customary consumption
26 argument is fully addressed here, as are Plaintiffs' contentions
27 about how many sprays should be measured as serving sizes. Id.
28 Claims based on fat-free representations on the front label are

1 either preempted as a matter of law, as discussed supra, or fall
2 under the permissible asterisk claim. Id. And the Court does not
3 find it necessary that Plaintiffs refer to the "ingredient list"
4 specifically, as noted supra.

5
6 **V. CONCLUSION**

7 As explained above, Defendant Unilever United States, Inc.'s
8 motion to dismiss is GRANTED in part and DENIED in part. The Court
9 finds that Plaintiffs Kym Pardini and Carrie Wood's claims are
10 preempted to the extent that they are based on the allegation that
11 Defendant uses illegal serving sizes and makes false nutrient
12 content claims. Plaintiffs' claims are not preempted to the extent
13 that they are predicated on Defendant's failure to provide a
14 notation on the nutrition panel that certain ingredients contain
15 fat (the "asterisk claim").

16 Plaintiffs' claims for intentional misrepresentation, fraud by
17 concealment, violation of the UCL, violation of the CLRA, breach of
18 express warranty, and violation of other states' consumer
19 protection statutes are undisturbed to the extent that they rely on
20 Plaintiffs' asterisk claim, but are otherwise DISMISSED WITH
21 PREJUDICE. Plaintiffs' express warranty claim is DISMISSED WITH
22 PREJUDICE. Plaintiffs' NJCFA claim is DISMISSED. Plaintiffs have
23 leave to amend their complaint, but only to add a representative
24 class member from New Jersey.

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If Plaintiffs choose to amend, they must file their amended complaint within thirty (30) days of this Order's signature date. Otherwise Plaintiffs' NJCFA claim will be dismissed with prejudice.

IT IS SO ORDERED.

Dated: January 22, 2014


UNITED STATES DISTRICT JUDGE