

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-1442 PSG (MRWx)	Date	October 10, 2017
Title	In re Quaker Oats Maple & Brown Sugar Instant Oatmeal Litigation		

Present: The Honorable	Philip S. Gutierrez, United States District Judge		
	Wendy Hernandez		Not Reported
	Deputy Clerk		Court Reporter
	Attorneys Present for Plaintiff(s):		Attorneys Present for Defendant(s):
	Not Present		Not Present

**Proceedings (In Chambers): Order GRANTING Defendant’s motion to dismiss**

Before the Court is Defendant Quaker Oats Company’s motion to dismiss Plaintiffs Darren Eisenlord, Kevin Phung, Barbara Gates, Mario Aliano, Matthew Perkins, and Sophia Saenz’s consolidated class action complaint. *See* Dkt. # 36 (“*Mot.*”). Plaintiffs oppose the motion, *see* Dkt. # 47 (“*Opp.*”), and Defendant timely replied, *see* Dkt. # 49 (“*Reply*”). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. Having considered the moving papers, the Court GRANTS Defendant’s motion to dismiss.

I. Background

This action stems from alleged misrepresentations with respect to what is otherwise a most pleasant and inviting image: a piping hot bowl of oatmeal.

Defendant Quaker Oats Company (“Defendant”) has been, in its own phrase, “a staple of the breakfast table for over 130 years.” *Mot.* 2:10. In 1970, Defendant introduced its “Maple & Brown Sugar” flavoring, *id.* 2:10-12, which has since been attached to a line of products (“the Products”) now challenged in this litigation. *See Consolidated Class Action Complaint*, Dkt. # 28, ¶ 1 (“*Compl.*”).<sup>1</sup> Plaintiffs Darren Eisenlord, Kevin Phung, Barbara Gates, Mario Aliano, Matthew Perkins, and Sophia Saenz (“Plaintiffs”) allege that, although Defendant markets the Products with “the claim that maple syrup or maple sugar . . . is an ingredient,” the Products “do

<sup>1</sup> The Products consist of the following products produced by Defendant: Maple & Brown Sugar Instant Oatmeal (Classic Recipe), Maple & Brown Sugar High Fiber Instant Oatmeal, Maple & Brown Sugar Gluten Free Instant Oatmeal, Maple & Brown Sugar Lower Sugar Instant Oatmeal, Maple & Brown Sugar Weight Control Instant Oatmeal, and Maple & Brown Sugar Organic Instant Oatmeal. *See id.* ¶ 1 n. 1.

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not contain maple syrup” and hence “[t]he representations on the Products’ labeling and packaging are false, misleading, and deceptive.” *Id.* ¶¶ 2, 4.

Maple syrup, Plaintiffs explain, is derived from the sap of maple trees through a process of drilling and heating, while maple sugar is what remains after the water in maple sap has been boiled off. *Id.* ¶¶ 19-20. Plaintiffs allege that the Products’ labeling “states in bold type that [they] are ‘Quaker Instant Oatmeal, Maple & Brown Sugar’” and “also prominently includes images of a glass pitcher of maple syrup.” *Id.* ¶ 20. Plaintiffs claim that “[t]hese representations convey to consumers that the Products contain maple syrup”—which allows the Product to “command a premium in the marketplace”—when in fact they do not. *Id.* ¶¶ 22-24.

As a consequence of this alleged false advertising, Plaintiffs claim that they purchased the Products believing that they contained maple syrup when they actually did not. *Id.* ¶ 5. Specifically, certain of the Products were purchased by Plaintiffs Eisenlord and Phung in California, *id.* ¶¶ 10-11; by Plaintiff Gates in New Jersey, *id.* ¶ 12; by Plaintiffs Aliano and Saenz in Illinois, *id.* ¶¶ 13-14; and by Plaintiff Perkins in Massachusetts, *id.* ¶ 15. Each of these Plaintiffs claims that they “purchased the Product[s] believing [they] contained maple syrup” and “did not receive that which [they were] promised.” *Id.* ¶¶ 10-15. As a result, Plaintiffs conclude that they “were damaged on account of receiving a Product that did not contain maple syrup as represented by [Defendant] and which was fundamentally different and less valuable than labeled and represented.” *Id.* ¶ 28.

On May 30, 2017, Plaintiffs’ cases were consolidated, *see* Dkt. # 27, and two weeks later the consolidated class action complaint was filed. That complaint included the following ten causes of action:

Count I: Violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 et seq. *Compl.* ¶¶ 38-53.

Count II: Violation of California’s Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 et seq. *Compl.* ¶¶ 54-62.

Count III: Violation of California’s False Advertising Act, Cal. Civ. Code §§ 17500 et seq. *Compl.* ¶¶ 63-71.

Count IV: Violation of the California Commercial Code § 2313 (breach of express warranty). *Compl.* ¶¶ 72-79.

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Count V: Violation of Illinois’s Deceptive Practices and Consumer Fraud Act, 815 Ill. Comp. Stat. 505/1 et seq. *Compl.* ¶¶ 80-89.

Count VI: Violation of New Jersey’s Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1 et seq. *Compl.* ¶¶ 90-94.

Count VII: Untrue and misleading advertising under Massachusetts law, Mass. Gen. Laws ch. 266, § 91. *Compl.* ¶¶ 95-99.

Count VIII: Unfair and deceptive conduct in violation of Massachusetts law, Mass. Gen. Laws ch. 93A, § 2. *Compl.* ¶¶ 100-10.

Count IX: Breach of express warranty under Massachusetts law, Mass. Gen. Laws ch. 106, § 2-313. *Compl.* ¶¶ 111-17.

Count X: Unjust enrichment. *Id.* ¶¶ 118-23.

Defendant premises its motion to dismiss on three main arguments: that Plaintiffs’ claims are preempted by federal law, that Plaintiffs fail to state a plausible claim of deception or reasonable reliance, and that Plaintiffs lack standing to bring claims for injunctive relief. *See generally Mot.*

## II. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *Turner v. City & Cty. of S.F.*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

## III. Judicial Notice

Both parties have requested judicial notice. *See Defendant’s Request for Judicial Notice*, Dkt. # 37 (“DRJN”); *Plaintiffs’ Request for Judicial Notice*, Dkt. # 48 (“PRJN”).

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“Generally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *see also Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (“Ordinarily, a court may look only at the face of the complaint to decide a motion to dismiss.”). Courts may also, however, consider “attached exhibits, documents incorporated by reference, and matters properly subject to judicial notice.” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014), *cert. denied sub nom. Cohen v. Nvidia Corp.*, 135 S. Ct. 2349 (2015).

Defendant requests judicial notice of the following materials: the complete label for Quaker Classic Recipe Maple & Brown Sugar flavored instant oatmeal (“the Label”), *see Declaration of Kristin Walters*, Dkt. # 38, Ex. A; the FDA’s September 21, 2016 document titled *FDA Consumer Update: What’s in a Name? What Every Consumer Should Know About Foods and Flavors* (“the FDA Consumer Update”), *see Declaration of Jason Meltzer*, Dkt. # 39, Ex. 1 (“*Meltzer Decl.*”); and a July 26, 2016 letter from the FDA to the Vermont Maple Sugar Makers’ Association (“the FDA Letter”), *see Meltzer Decl.* Ex. 2. The Court concludes that the Label and the FDA Consumer Update are properly subject to judicial notice, but the FDA Letter is not.

Under Federal Rule of Evidence 201, the court “can take judicial notice of ‘[p]ublic records and government documents available from reliable sources on the Internet,’ such as websites run by governmental agencies.” *Gerritsen v. Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-1166-IEG (POR), 2009 WL 6598891, at \*2 (S.D. Cal. Dec. 23, 2009)); *see also L’Garde, Inc. v. Raytheon Space & Airborne Sys.*, 805 F. Supp. 2d 932, 937-38 (C.D. Cal. 2011) (noting that public records from the Internet are “generally considered not to be subject to reasonable dispute”) (internal quotation marks omitted). The FDA Consumer Update is a government document readily available on a government website, and so judicial notice is proper. The FDA Letter, however, does not appear to be readily accessible on a website, and even though a court in this District took notice of the same letter in prior litigation, *see Stiles v. Trader Joe’s Co.*, No. CV 16-04318 TJH (KSx), 2017 WL 3084267, at \*2 (C.D. Cal. Apr. 4, 2017), Plaintiffs here have disputed its authenticity. *See Opp.* 12:24-13:3 (“[Defendant] asks the court to take judicial notice of a letter sent to The Vermont Maple Sugar Makers’ Association from someone appearing to be an FDA employee who had a private meeting with the maple industry. The Court should reject the request because the letter and its contents are not subject to judicial notice as they are subject to reasonable dispute, are not generally known within the Court’s jurisdiction and cannot be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”). The Court is not entirely convinced that Plaintiffs’ opposition to the FDA Letter constitutes “reasonable dispute,” as they give no further arguments challenging its authenticity. However, unlike the FDA Consumer Update, it is not readily

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available on a government website, and although “a court may take judicial notice of and consider the public records of the FDA,” *Eidson v. Medtronic, Inc.*, 981 F. Supp. 2d 868, 879 (N.D. Cal. 2013) (internal quotation marks omitted), there is no indication that the FDA Letter was intended for public distribution or consumption. The Court will therefore deny judicial notice to the FDA Letter.

The Court can, however, grant judicial notice to the Label. The Products’ labels, of which the Label is one, are central to Plaintiffs’ allegations of misrepresentation, and on a 12(b)(6) motion, the Court may “consider documents that are incorporated by reference but not physically attached to the complaint if they are central to plaintiffs’ claim and no party questions their authenticity.” *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 882 (C.D. Cal. 2013) (citing *Marder*, 450 F.3d at 448). Plaintiffs have not questioned the authenticity of the Label submitted by Defendant, and given that it is central to their claims, the Court concludes that judicial notice is proper.

The Court therefore GRANTS Defendant’s request for judicial notice as to the Label and the FDA Consumer Update but DENIES judicial notice as to the July 26, 2016 letter from the FDA to the Vermont Maple Sugar Makers’ Association.

Plaintiffs request judicial notice of two additional labels: the label for Defendant’s Apples & Cinnamon instant oatmeal, *see Declaration of David Parisi*, Dkt. # 48-1, Ex. A, and the label for Defendant’s Original instant oatmeal, *see id.* Ex. B.<sup>2</sup> Unlike the Label offered by Defendant above, these additional labels were not incorporated by reference into Plaintiffs’ complaint. However, given that these labels are produced by Defendant and that Plaintiffs’ request for judicial notice has not been opposed, the Court feels that these images “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Accordingly, the Court GRANTS Plaintiffs’ request for judicial notice as to the labels for Defendant’s Apples & Cinnamon instant oatmeal and Original instant oatmeal.

#### IV. Discussion

Each of Defendant’s three main arguments will be considered in turn.

##### A. Federal Preemption

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<sup>2</sup> Plaintiffs also request judicial notice of a January 20, 2011 press release from former Vermont governor Peter Shumlin, *see PRJN 2:8-9*, but since the Court does not feel that this document is helpful or dispositive at this stage, it will not address that particular request at this time.

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Defendant asserts that Plaintiffs' claims are "squarely preempted" by the federal Food, Drug, and Cosmetic Act ("FDCA") and Nutritional Labeling and Education Act ("NLEA"), which "preempt[] any state law claim that would impose labeling requirements 'not identical' to the requirements imposed by the" Food and Drug Administration ("FDA"). *Mot.* 6:13-16.

The Supremacy Clause grants Congress the power to preempt state law. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000)). The Supreme Court has identified "two cornerstones" of its preemption jurisprudence: first, "the purpose of Congress is the ultimate touchstone in every pre-emption case," and second, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (international quotation marks and ellipses omitted). The latter cornerstone mandates that courts give an express preemption provision a "narrow reading," *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992), and, when there is a "plausible alternative reading," that courts "accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *see also Stengel v. Medtronic Inc.*, 704 F.3d 1224, 1227 (9th Cir. 2013) (quoting *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997)) ("Parties seeking to invalidate a state law based on preemption 'bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law.'") (internal quotation marks omitted). Furthermore, courts have found that "[l]aws regulating the proper marketing of food, including the prevention of deceptive sales practices, are [] within states' historic police powers." *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (2008) (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144 (1963)).

Congress enacted the FDCA in 1938 as a "comprehensive regulatory scheme of branding and labeling of food products." *Fraker v. KFC Corp.*, No. 06-CV-01284-JM (WMC), 2007 WL 1296571, at \*4 (S.D. Cal. Apr. 30, 2007). In 1990, Congress passed the NLEA, amending the FDCA in order to establish "uniform food labeling requirements, including the familiar and ubiquitous Nutrition Facts Panel found on most food packages." *Reid v. Johnson & Johnson*, 780 F.3d 952, 959 (9th Cir. 2015). The NLEA includes an express preemption provision, under which no state "may directly or indirectly establish . . . any requirement for the labeling of food . . . that is not identical to the requirement" of relevant federal regulations. 21 U.S.C. §§ 343-1(a), (a)(2), (a)(3); *see also Dvora v. General Mills, Inc.*, No. CV 11-1074-GW(PLAx), 2011 WL 1897349, at \*3 (C.D. Cal. May 16, 2011) ("Section 343-1(a) expressly preempts state regulation of specific topics related to food labeling and provides that states may not establish any requirement respecting these specified topics 'that is not identical' to the requirements in the FDCA in certain categories."). Judge Richard Posner articulated the rationale for the NLEA's

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preemption provision: “It is easy to see why Congress would not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide. Manufacturers might have to print 50 different labels, driving consumers who buy food products in more than one state crazy.” *Turek v. General Mills, Inc.*, 662 F.3d 423, 426 (7th Cir. 2011). Noting that the preclusive effect of the express provision extends “beyond positive enactments, such as statutes and regulations, to embrace common-law duties,” Defendant argues that Plaintiffs’ claims “thus fall within the purview of the express preemption provision.” *Mot.* 7:20-28 (quoting *Bates*, 544 U.S. at 443).

*i. Maple Exception*

As a threshold matter, Plaintiffs argue that the NLEA’s preemption provision does not apply to their particular claims because they note—correctly—that the provision specifically excepts state laws that are “applicable to maple syrup.” 21 U.S.C. §§ 343-1(a)(1)-(3). They assert that the “provision allows states to regulate the standard of identity (which includes the common or usual name) when maple syrup is represented as an ingredient in a product”—which is the case here. *Opp.* 6:17-19. The Court, however, disagrees with Plaintiffs’ reading of the preemption provision. Each of the three subsections that include exceptions for maple syrup does so in the context of *other* statutory sections that provide content to these exceptions. Sections 343-1(a)(1) and (a)(3) permit states to set forth “a reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container” for maple syrup. 21 U.S.C. § 341; *see also id.* §§ 343(g), (h)(1). Section 343-1(a)(2) permits the maple syrup exception only in the context that state law governs “imitation” products. *Id.* § 343(c). When considering this full picture, the Court agrees with Defendant that the maple syrup exceptions to the preemption provision “were implemented to enable states . . . to set standards for what can be sold as maple syrup,” not to permit *any* claim relating to maple syrup. *Mot.* 13:8-12. While it is true, as Plaintiffs note, that the presumption against preemption extends both to its existence *and* its scope, *see Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)), here the Court is persuaded by the plain language of § 343-1 that Defendant’s narrower reading is correct.

*ii. Flavoring or Sweetener?*

There is another threshold matter that the Court must address: whether to consider the preemptive effect of federal *flavoring* regulations or *sweetener* regulations. Defendant analyzes preemption only from the flavoring standpoint. *See Mot.* 8:1-13:20. Plaintiffs challenge this assumption, arguing that “Quaker has not met its burden of demonstrating that the FDA flavoring regulations apply here, where the Complaint alleges that the maple syrup is a sweetening ingredient in the Product.” *Opp.* 9:20-27. The Court disagrees with Plaintiffs’

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characterization of the complaint. Only once is maple syrup referred to as a sweetener, *see Compl.* ¶ 3 (“Maple syrup is a natural sweetener that is healthier and more nutritious than cane sugar.”), and it is not clearly alleged that any Plaintiffs purchased the Products because of the promise of maple *sweetener* as opposed to maple *flavoring*. Furthermore, Plaintiffs address Defendant’s compliance with federal flavoring requirements on the merits, *see Opp.* 9:1-14:12, and relegate the sweetener-versus-flavoring argument to a single footnote. Lastly, Plaintiffs compare Defendant’s “Maple & Brown Sugar” Products with its “Apple and Cinnamon” Oatmeal, *id.* 11:7-10, the label for which has been judicially noticed. The Court does not conclude that Plaintiffs would make this comparison on the premise that apples and cinnamon were used as *sweeteners* rather than *flavors*, and so by comparing these different products, the Court is left with the conclusion that Plaintiffs are treating maple as a flavor and not as a sweetener. Accordingly, the Court reads the complaint as alleging that Defendant misrepresented the presence of maple syrup in the context of flavoring, not sweetening.

*iii. Imposition of Non-Identical Requirements*

Having dispensed with the two threshold matters, the Court can now address Defendant’s primary contention that “Plaintiffs in this case seek to impose requirements on the challenged [P]roducts that directly conflict with [] federal requirements” relating to labeling for food flavoring. *Mot.* 8:3-7.

*a. The FDCA’s Requirements*

“The FDA, through the FDCA and its accompanying regulations, has implemented a comprehensive scheme governing the labeling of flavors and flavorings in food products.” *Dvora*, 2011 WL 1897349, at \*4. Specifically, the FDCA requires that a food label include “the common or usual name of each . . . ingredient . . . except that spices, flavorings, and colors . . . may be designated as spices, flavorings, and colorings without naming each.” 21 U.S.C. § 343(i). The FDA’s regulations provide additional content to the flavoring requirements; specifically, by permitting labels to describe *and* depict the “characterizing flavor” of the product:

If the label, labeling, or advertising of a food makes any direct or indirect representations with respect to the primary recognizable flavor(s), by word, vignette, e.g., depiction of a fruit, or other means, or if for any other reason the manufacturer or distributor of a food wishes to designate the type of flavor in the food other than through the statement of ingredients, such flavor shall be considered the characterizing flavor and shall be declared in the following way . . .



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21 C.F.R. § 101.22(i). The regulation goes on to describe when and how “natural” and “artificial” flavorings should be designated, including the requirement that “[i]f none of the natural flavor used in the food is derived from the product whose flavor is simulated, the food in which the flavor is used shall be labeled either with the flavor of the product from which the flavor is derived or as ‘artificially flavored.’” *Id.* § 101.22(i)(1)(ii). The flavor disclosures must “immediately and conspicuously precede or follow” the name of the characterizing flavor. *Id.* § 101.22(i)(3).

The FDA Consumer Update released in September 2016 and judicially noticed in this proceeding explicitly confirmed that “[c]urrent regulations allow use of terms like ‘maple,’ ‘maple-flavored,’ or ‘artificially maple-flavored’ on the food label without having any maple syrup in the product, as long as it contains maple flavoring.” *Meltzer Decl.*, Ex. 1 at 3; *see also id.* at 4 (“[I]f the name of the food is accompanied by terms such as ‘artificial flavors,’ or ‘natural and artificial flavors,’ it is a signal that the original source of the flavor may not have been used in the food.”). The FDA encouraged consumers that, “[i]f you want a maple food that is made with maple syrup, look for the words ‘maple syrup’ in the ingredient list.” *Id.* at 4.

*b. Defendant’s Labeling*

The Court agrees with Defendant that “Plaintiffs’ lawsuit here ‘seek[s] to enjoin exactly what federal law expressly permits.’” *Mot.* 9:20-21 (quoting *Red v. Kroger Co.*, No. CV 10-01025 DMG (MANx), 2010 WL 4262037, at \*6 (C.D. Cal. Sept. 2, 2010)). Plaintiffs seek to prohibit Defendant from labeling the Products with the flavor name “Maple & Brown Sugar” and an image of a glass pitcher of maple syrup, based on the assertion that the Products do not contain maple syrup or maple sugar and the allegation that Plaintiffs relied on this representation to their detriment. *See Compl.* ¶ 21 (“The labeling prominently states in bold type that the Products are ‘Quaker Instant Oatmeal, Maple & Brown Sugar.’ The Products’ packaging also prominently includes images of a glass pitcher of maple syrup.”); *id.* ¶ 49 (“Plaintiffs reasonably relied on and were deceived by Defendant’s representations as to whether the products contained maple syrup.”); *id.* ¶ 99 (“The injunctive relief would include an order directing Defendant to cease its false and misleading labeling and advertising.”). However, federal law expressly permits labeling to describe “the primary recognizable flavor(s), by word, [or] vignette,” even if the product “contains no such ingredient.” 21 C.F.R. § 101.22(i), (i)(1)(i). The Court finds no allegations in the complaint to suggest that Defendant has not abided by the FDCA in labeling and marketing the Products. It has described the primary recognizable flavor—maple—both by word and by the image of a pitcher of syrup. It is permitted to do this so long as the flavor is appropriately labeled as “naturally” or “artificially” flavored—which, based on the Label of

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which this Court has taken judicial notice and on the absence of any allegations contained in the complaint that suggest otherwise,<sup>3</sup> Defendant has done.

Consequently, the Court agrees with Defendant that Plaintiffs' "lawsuit seeks to impose novel labeling requirements that are 'not identical' to federal regulations." *Mot.* 11:9-10. Courts have regularly dismissed as preempted claims of this nature. *See, e.g., Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 F. App'x 113, 115 (9th Cir. 2012) (citing *Degelmann v. Advanced Med. Optics, Inc.*, 659 F.3d 835, 840-42 (9th Cir. 2011)) (affirming dismissal where plaintiff "seeks to enjoin and declare unlawful the very statement that federal law permits and defines" and "claims are therefore expressly preempted"); *Salazar v. Honest Tea, Inc.*, 74 F. Supp. 3d 1304, 1313 (E.D. Cal. 2014) ("Because plaintiff's allegations do not show a violation of the FDCA, plaintiff's state law claims are preempted; if allowed to proceed, the state law claims would impose liability inconsistent with the FDCA."); *Gustavson v. Wrigley Sales Co.*, 961 F. Supp. 2d 1100, 1123 (N.D. Cal. 2013) ("Because [defendant's] calorie-related claims appear to comply with all applicable federal regulations, any finding that these claims are unlawful and deceptive would impose requirements not identical to the FDA's regulations.").

*Dvora*, a case from this District, is particularly instructive. There, the plaintiff challenged the labeling of General Mills's "Total Blueberry Pomegranate" cereal as false and misleading (through causes of actions that included, as here, violations of UCL and CLRA and breach of express warranty) based on the lack of actual blueberries or pomegranates in the product. *See Dvora*, 2011 WL 1897349, at \*1. The plaintiff pointed specifically, as Plaintiffs here do, to words and images contained on the label. *See id.* However, the court noted that General Mills, like Defendant, labeled the product with the phrase "Naturally and Artificially Flavored," and observed that "[s]ection 101.22(i) permits a manufacturer to use the name and image of a fruit on a product's packaging to describe the characterizing flavor of the product even where the product does not contain any of that fruit, or contains no fruit at all." *Id.* at \*4. The court determined that "it is impossible to see how Plaintiff's lawsuit does not seek to impose limitations on Defendant's manner of packaging its products that are different from what federal regulations currently require/permit" and concluded that the claims were preempted. *Id.* at \*6. In doing so, the *Dvora* court joined others that have found similar flavor claims preempted. *See, e.g., Henry v. Gerber Prods. Co.*, No. 3:15-cv-02201-HZ, 2016 WL 1589900, at \*7 (D. Or. Apr. 18, 2016) (quoting *McKinnis v. Sunny Delight Beverages Co.*, No. CV 07-02034-RGK (JCx), 2007 WL 4766525, at \*4 (C.D. Cal. Sept. 4, 2007)) ("The wisdom of the FDA's regulations on this topic is a different question for a different day. The law, as applied to the situation presented to this Court, is clear: 'FDA regulations permit illustrations of fruit on product labels to indicate that product's "characterizing flavor," even where the product contains no ingredients

<sup>3</sup> In opposition, Plaintiffs claim that Defendant did *not* comply with the FDCA at the time they purchased the Products, but the Court is not persuaded by this argument. *See Part IV.A.iii.c.*

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derived from the depicted fruit.”); *Samet v. Procter & Gamble Co.*, No. 5:12-CV-01891 PSG, 2013 WL 3124647, at \*6 (N.D. Cal. June 18, 2013) (noting that defendant’s labeling “complies with [the FDCA’s] requirements” and determining that plaintiffs’ “claim goes beyond what is required by the FDCA and therefore is expressly preempted”); *Viggiano*, 944 F. Supp. 2d at 891-92 (collecting cases and concluding that “[c]ourts have repeatedly found that state law claims challenging ‘natural flavors’ labels, accompanied by images or names of fruit, are preempted, because such labeling references the characterizing flavor of the food and is permitted by § 101.22”).

In response to Defendant’s preemption argument, Plaintiffs point out that the FDCA and state laws contain identical prohibitions on false or misleading labeling. *See Opp.* 8:2-8 (citing *Zupnik v. Tropicana Prods., Inc.*, No. CV 09-6130 DSF (RZx), 2010 WL 6090604, at \*2 (C.D. Cal. Feb. 1, 2010)). Indeed, the Ninth Circuit has noted that the language in California’s Sherman Law—the basis for one of Plaintiffs’ causes of action—“is virtually identical to the language in the FDCA” in the analogous context of cosmetics. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016). Plaintiffs conclude that the various state statutes that prohibit false or misleading labeling and are invoked in the complaint “impose requirements identical to the FDCA, and are, therefore, not preempted.” *Opp.* 8:17-27. However, while this observation is correct, Plaintiffs’ conclusion is not. The Court does not find that the state statutes themselves are preempted, but rather that their *application* to Defendant’s Products is preempted because it places requirements on Defendant that go beyond the mandates of the FDCA. Plaintiffs’ *claims*, not the statutes themselves, are preempted because Defendant is in compliance with the FDCA and Plaintiffs seek causes of action on the basis of this conduct.<sup>4</sup>

<sup>4</sup> It is for this reason that the case here is distinguishable from *Zupnik*. There, the court rejected the defendant’s “logical” argument that “if a food producer has otherwise complied with the provisions of § 343 and its implementing regulations, no ad hoc claim for a ‘false or misleading’ label can be brought.” *Zupnik*, 2010 WL 6090604, at \*2. The court found that this argument was “undercut by the lack of any indication that the FDA could not sue under § 343(a) for a ‘false or misleading’ label where the label does not violate another, more specific food labeling statute or regulation. In fact, the authority that exists strongly suggests the opposite.” *Id.* (citing *United States v. 45/194 Kg. Drums of Pure Vegetable Oil*, 961 F.2d 808, 811 (9th Cir. 1992)). This is a fair point, and the Court agrees that the federal statute—and hence, given the similarity in language, the corresponding California statute invoked by Plaintiffs here—*can*, on some occasions, permit actions for misrepresentation against products that comply with the FDCA. However, the hypothetical envisioned by the court in *Zupnik* that led to this conclusion is distinguishable from the case here because Plaintiffs’ claims for misrepresentation are premised on labeling that is compliant because it is *expressly permitted* by federal statute, not compliant simply because it does not run afoul of federal statute.

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*c. Defendant's Prior Compliance*

Plaintiffs raise an additional argument against preemption: that preemption does not shield Defendant because the Products were *not*, in fact, in compliance with the FDCA at the time Plaintiffs made their purchases. *See Opp.* 9:1-22. The Court disagrees.

There is no doubt that Defendant's use of the phrase "Naturally and Artificially Flavored" satisfies the FDCA. *See, e.g., Miller v. Ghirardelli Chocolate Co.*, No. C 12-04936 LB, 2013 WL 1402682, at \*13 (N.D. Cal. Apr. 5, 2013) ("21 C.F.R. § 101.22 (the 'flavoring regulation') requires products to be labeled as, for example, 'artificial,' 'artificially flavored,' or 'naturally flavored,' depending on their content."); *Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097, 1102-03 (N.D. Cal. 2012) ("[U]nder 21 C.F.R. § 101.22(i), a product may be labeled as 'fruit flavored' or 'naturally flavored,' even if it does not contain fruit or natural ingredients."). However, Plaintiffs allege that the *old* labels on the Products, which existed at the time of their purchases, did *not* say "Naturally and Artificially Flavored," but instead "Natural and Artificial Flavors." *Opp.* 3:14-4:6. They claim, therefore, that these old labels did not comply with the FDCA. Courts, however, have deemed preempted similar claims based on a range of different labeling options that convey the same basic idea. *See, e.g., Viggiano*, 944 F. Supp. 2d at 891 ("Courts have repeatedly found that state law claims challenging 'natural flavors' labels, accompanied by images or names of fruit, are preempted, because such labeling references the characterizing flavor of the food and is permitted by § 101.22."); *Savalli v. Gerber Prods. Co.*, No. 15-61554-CIV-ZLOCH, 2016 WL 5390223, at \*1, 3-4 (S.D. Fla. Sept. 20, 2016) (finding claims challenging label including "naturally flavored with other natural flavors" statement preempted); *Henry*, 2016 WL 1589900, at \*1, 5-9 (same). Defendant notes that these consistent conclusions "make[] sense, given that the FDA's own flavor regulations use various iterations of the words 'natural[,] 'artificial,' and 'flavor' interchangeably." *Reply* 6:2-3. Indeed they do. *Compare* 21 C.F.R. § 101.22(i)(1)(i) (specifying use of "natural") and *id.* § 101.22(i)(1)(ii) (specifying use of "artificially") *with id.* § 101.22(i)(1)(iii) (specifying use of "natural flavor") and *id.* § 101.22(i)(2) (specifying use of the "word(s) 'artificial' or 'artificially flavored'"). Because both the FDA and courts have accepted various permutations of "artificial," "natural," and "flavor," the Court concludes that claims based on the older, slightly altered labels are no less preempted than claims based on the current form of the Products' labeling.

*d. Summary*

The Court concludes that Plaintiffs' causes of action that are premised on allegedly unlawful or fraudulent conduct and that seek to enjoin Defendant from continuing its current labeling practices—specifically, Plaintiffs' first (California UCL), second (California CLRA), third (California false advertising), fifth (Illinois Consumer Fraud and Deceptive Business

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Practices Act), sixth (New Jersey Consumer Fraud Act), seventh (Massachusetts untrue and misleading advertising), and eighth (Massachusetts unfair and deceptive conduct) counts—are preempted by federal law.

Therefore, the Court GRANTS Defendant’s motion to dismiss Plaintiffs’ first, second, third, fifth, sixth, seventh, and eighth causes of action.

**B. Failure to State a Claim**

Three of Plaintiffs’ causes of action remain: breach of express warranty under California and Massachusetts laws (fourth and ninth counts) and unjust enrichment (tenth count).

*i. Breach of Express Warranty*

“To plead an action for breach of express warranty under California law, a plaintiff must allege: (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff’s injury.” *Baltazar v. Apple, Inc.*, No. CV-10-3231-JF, 2011 WL 588209, at \*2 (N.D. Cal. Feb. 10, 2011) (citing *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986)). Defendant argues that Plaintiffs have neither “describe[d] the exact terms of the warranty” as required, *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at \*4 (N.D. Cal. June 5, 2009), nor properly alleged that they reasonably relied on the warranty’s terms.

Under both California and Massachusetts laws, an express warranty is created by “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain” or “[a]ny description of the goods which is made part of the basis of the bargain.” Cal. Com. Code § 2313(1)(a)-(b); Mass. Gen. Laws ch. 106, § 2-313(a)-(b). Such an express warranty can be made by an illustration, *see Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Cavanaugh*, 217 Cal. App. 2d 492, 512-13 (1963), or by a food label, *see Martin v. Tradewinds Beverage Co.*, No. CV 16-9249 PSG (MRWx), 2017 WL 1712533, at \*9 (C.D. Cal. Apr. 27, 2017). “Not every statement in an [advertisement], however, constitutes an express warranty.” *Hannon v. Original Gunite Aquatech Pools, Inc.*, 385 Mass. 813, 823 (1982).

Plaintiffs argue that the Products’ labeling, emblazoned with the words “Maple & Brown Sugar” and the image of a pitcher of maple syrup, “convey the message that maple syrup is a key ingredient in the Products.” *Opp.* 21:18-24; *see also Compl.* ¶¶ 2, 21. The Court disagrees. Nowhere on the Products’ labels does Defendant assert that maple syrup is an ingredient within. The Court joins others that have determined that labels like the Products’, which only indicate

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flavor rather than composition, cannot serve as the basis for an express warranty. *See Dvora*, 2011 WL 1897349, at \*9; *McKinniss v. General Mills, Inc.*, No. CV 07-2521 GAF (FMOx), 2007 WL 4762172, at \*5 (C.D. Cal. Sept. 18, 2007) (rejecting breach of express warranty where, as here, “Defendant truthfully disclosed the ingredients . . . Plaintiffs’ selective reading or alleged misunderstanding cannot give rise to an express warranty claim”). Had Plaintiffs alleged that the Products did not *taste* like maple syrup, a breach of an express warranty might be plausible. But the complaint does not allege that the Products contained an express assertion that maple syrup was an *ingredient*, which would be required for an express warranty claim under these alleged facts.

Because Plaintiffs have not established an express warranty that was allegedly breached, they have not satisfied the first element of this cause of action, and so both their California and Massachusetts claims for breach of express warranty cannot be maintained. The Court therefore GRANTS Defendant’s motion to dismiss Plaintiffs’ fourth and ninth causes of action.

*ii. Unjust Enrichment*

“To allege unjust enrichment as an independent cause of action, a plaintiff must show that the defendant received and unjustly retained a benefit at the plaintiff’s expense.” *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1038-39 (9th Cir. 2016) (citing *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000)). However, the Ninth Circuit has held that, in light of the fact that California courts are “unsettled on the availability” of unjust enrichment as an independent cause of action, the claim is only available through a theory of quasi-contract. *ESG Capital Partners*, 828 F.3d at 1038. In other words, there must be an underlying claim “that a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015).

Here, the Court has concluded that Plaintiffs have not stated viable claims under theories of fraud, false advertising, or breach of contract. There is therefore no foundation upon which to base an independent cause of action for unjust enrichment. *See Stiles*, 2017 WL 3084267 (quoting *Hill v. Roll Int’l Corp.*, 195 Cal. App. 4th 1295, 1307 (2011)) (“There being no actionable wrong, there is no basis for the relief.”); *McKinnis v. Kellogg USA*, No. CV 07-2611 ABC (RCx), 2007 WL 4766060, at \*6 (C.D. Cal. Sept. 19, 2007) (“Plaintiffs have failed to state any substantive claim against Defendant. In the absence of an underlying substantive claim, Plaintiffs’ ‘claim’ for unjust enrichment fails.”).

Accordingly, the Court GRANTS Defendant’s motion to dismiss Plaintiffs’ tenth cause of action.

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C. Standing

Although the Court has disposed of all ten of Plaintiffs' claims, because it intends to grant leave to amend, *see* Part V, it will consider Defendant's arguments regarding standing.

*i. Injunctive Relief*

Defendant asserts that Plaintiffs lack standing to bring claims for injunctive relief. *See Mot. 20:16-21:24*. A plaintiff's standing to seek injunctive relief depends on whether she is "likely to suffer future injury" from the challenged conduct. *City of L.A. v. Lyons*, 461 U.S. 94, 105 (1983). The plaintiff must establish "sufficient likelihood that [s]he will again be wronged in a similar way." *Id.* at 111. Defendant therefore argues that Plaintiffs here have failed to meet this burden because they "do not allege any intention to purchase the challenged products in the future" and as a result "have failed to establish any, let alone a sufficient, likelihood that they will be wrong by [Defendant's] labeling practices in the future." *Mot. 20:23-26*.

Some courts, within and without this Circuit, have agreed with Defendant and determined that standing does not exist where a consumer is aware of a misrepresentation. *See, e.g., Garrison v. Whole Foods Mkt. Grp. Inc.*, No. 13-cv-05222-VC, 2014 WL 2451290, at \*5 (N.D. Cal. June 2, 2014) ("The named plaintiffs in this case allege that had they known the Whole Foods products they purchased contained SAPP, they would not have purchased them. Now they know. There is therefore no danger that they will be misled in the future."); *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 741 (7th Cir. 2014) ("Since Camasta is now aware of JAB's sales practices, he is not likely to be harmed by the practices in the future."); *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 225 & n. 13 (3d Cir. 2012) (dismissing injunctive relief claims because although "Appellants ask us to presume they will be fooled again and again," the law "accords people the dignity of assuming that they act rationally, in light of the information they possess"). Other courts in this Circuit, however, have developed a rival line of reasoning, based on the premise that consumer protection laws would be severely undermined by this approach to standing:

This Court must therefore answer the question of whether a plaintiff can ever have standing to seek an injunction against a product she knows to be mislabeled. This Court agrees with those decisions that have answered this question in the affirmative. To hold otherwise would effectively preclude consumers from ever obtaining prospective relief against mislabeling. As other courts have already recognized, [i]f the Court were to construe Article III standing for [false advertising] and UCL claims as narrowly as the Defendant advocates, federal courts would be precluded from enjoining false advertising under California

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consumer protection laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter (“once bitten, twice shy”) and would never have Article III standing.

*Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2015 WL 1248027, at \*3 (N.D. Cal. Mar. 18, 2015) (quoting *Henderson v. Gruma Corp.*, No. CV 10-04173 AHM (AJWx), 2011 WL 1362188, at \*7 (C.D. Cal. Apr. 11, 2011)); *see also Ries v. AriZona Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012) (“[W]ere the Court to accept the suggestion that plaintiffs’ mere recognition of the alleged deception operates to defeat standing for an injunction, then injunctive relief would never be available in false advertising cases, a wholly unrealistic result.”). A number of courts in this District have embraced this approach to standing in the consumer protection context. *See Chester v. TJX Cos., Inc.*, No. 5:15-cv-01437-ODW (DTB), 2016 WL 4414768, at \*8 (C.D. Cal. Aug. 18, 2016); *Russell v. Kohl’s Dep’t Stores, Inc.*, No. ED CV 15-1143 RGK (SPx), 2015 WL 12781206, at \*5-6 (C.D. Cal. Oct. 6, 2015); *Dean v. Colgate-Palmolive Co.*, No. EDCV 15-0107 JGB (DTBx), 2015 WL 3999313, at \*8-9 (C.D. Cal. June 17, 2015).

The Court previously grappled with this very issue three years ago. *See In re 5-hour ENERGY Mktg. & Sales Practices Litig.*, No. MDL 13-2438 PSG (PLAx), 2014 WL 5311272, at \*10-11 (C.D. Cal. Sept. 4, 2014). There, it concluded that “federal courts are not empowered to set aside the standing requirements of Article III in the name of public policy, even when that policy is laudable,” and so held that “[i]f Plaintiffs do not intend to purchase 5-hour ENERGY in the future, Defendants’ alleged misrepresentations cannot do them any injury, and injunctive relief will not provide them with any redress.” *Id.* at \*11. In the absence of contrary precedent from a higher court, the Court sees no reason to depart from its prior reasoning at this time.

There is, however, a “middle approach” that the Court acknowledged, based on the “reasoning that plaintiffs who are aware of defendants’ misrepresentations can still be harmed if those misrepresentations continue, because the plaintiffs cannot rely on defendants’ representations.” *Id.*; *see also, e.g., Ries*, 287 F.R.D. at 533-34 (“Should plaintiffs encounter the denomination ‘All Natural’ on an AriZona beverage at the grocery store today, they could not rely on that representation with any confidence. This is the harm California’s consumer protection statutes are designed to redress.”); *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-2724-LHK, 2014 WL 2191901, at \*9 (N.D. Cal. May 23, 2014)). Notably, these courts “have only taken this approach when plaintiffs have indicated that they are interested in purchasing the products-in-suit in the future.” *In re 5-hour ENERGY*, 2014 WL 5311272, at \*11.



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In short, although the Court continues to align itself with those courts that have denied standing in similar contexts because Article III cannot be trumped by policy concerns, it is nonetheless possible for plaintiffs in consumer misrepresentation cases to seek injunctive relief *if* they allege that they intend to purchase the products at issue in the future.

*ii. Unpurchased Products*

Defendant also argues that Plaintiffs lack standing as to unpurchased products. *See Mot.* 21:25-23:21. On this point, the Court disagrees.

To satisfy Article III, a plaintiff must demonstrate a “personal stake” so as to “warrant [] invocation of federal-court jurisdiction.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). “[S]tanding is not dispensed in gross. . . . [A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.” *Lewis v. Casey*, 518 U.S. 343, 358 n. 6 (1996) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)) (internal quotation marks omitted). Courts have regularly dismissed on standing grounds claims against unpurchased products. *See, e.g., Larsen v. Trader Joe’s Co.*, No. C 11-05188 SI, 2012 WL 5458396, at \*4-5 (N.D. Cal. June 14, 2012) (“The Court finds plaintiffs do not have standing to bring this claim because they did not purchase the Crescent Rolls and therefore, as a matter of law, could not have suffered a particularized injury as required by Article III.”); *Carrea*, 2011 WL 159380, at \*3; *Johns v. Bayer Corp.*, No. 09CV1935 DMS (JMA), 2010 WL 476688, at \*5 (S.D. Cal. Feb. 9, 2010).

Here, Plaintiffs purport to bring claims relating to six Products, *see Compl.* ¶ 1 n. 1, but have only alleged the purchase of three: Maple & Brown Sugar Instant Oatmeal, Maple & Brown Sugar Lower Sugar Instant Oatmeal, and Maple & Brown Sugar Organic Instant Oatmeal. *See Compl.* ¶¶ 10-15. They correctly note that some courts have found standing for unpurchased products “so long as the products and alleged misrepresentations are substantially similar.” *Dorfman v. Nutramax Labs., Inc.*, No. 13cv0873 WQH (RBB), 2013 WL 5353043, at \*7 (S.D. Cal. Sept. 23, 2013); *see also Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 890 (N.D. Cal. 2012) (same); *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 WL 2990766, at \*11 (N.D. Cal. July 20, 2012) (“[T]he critical inquiry seems to be whether there is sufficient similarity between the products purchased and not purchased.”). Adopting this approach, the Court finds that Plaintiffs have sufficiently pleaded the requisite level of similarity. Plaintiffs allege that “[t]he labeling prominently states in bold type that the Products are ‘Quaker Instant Oatmeal, Maple & Brown Sugar’” and “includes images of a glass pitcher of maple syrup,” and that “the Products no not contain maple syrup.” *Compl.* ¶ 21, 24. This is the extent of the alleged misrepresentation, and although brief, this

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language indicates that all of the Products had similar labels and that none contained maple syrup. Accordingly, the Court disagrees with Defendant that “[t]his is insufficient to pass muster even under the more lenient standard for standing followed by some district courts in this Circuit, as well as Rule 9(b) requirements.” *Mot.* 23:13-15, and finds that Plaintiffs’ complaint is distinguishable from those that were rejected by courts in the opinions that Defendant cites. *See Leonhart v. Nature’s Path Foods, Inc.*, No. 13-cv-00492-BLF, 2014 WL 6657809, at \*4 (N.D. Cal. Nov. 21, 2014) (finding plaintiffs had not satisfied Article III requirements where they had not “offer[ed] any details regarding the products’ ingredients, labeling, or packaging” and thus the court could not “determine whether the Unpurchased Products are substantially similar to the Purchased Products”); *Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp. 2d 1134, 1141 (N.D. Cal. 2013) (“[T]he Court cannot just assume that every one of the Non-Purchased Products’ labels is actionable in the same way as the more fully described Purchased Products’ labels are.”). Here, Plaintiffs claim that *all* of the Products’ labels were similarly misleading, including both those that were purchased and those that were not. Therefore, at this stage, the Court finds that Plaintiffs have sufficiently described the actionable similarities shared by the Products.

V. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The Court considers whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper “unless it is clear that the complaint could not be saved by any amendment.” *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

The Court finds that any misrepresentation or false advertising claim premised on Defendant’s federally compliant flavor labeling is preempted—a fundamental defect that cannot be remedied. However, the Court also finds insufficient pleading with regards to breach of express warranty and standing, which *could* possibly be cured by amendment. In addition, as discussed in Part IV.A.ii above, the Court considered preemption from the standpoint of maple as a *flavoring*, not a *sweetener*—the latter being a different approach that, if successfully pleaded by Plaintiffs, might possibly avoid preemption.

The Court therefore GRANTS Plaintiffs leave to amend.

VI. Conclusion

For the foregoing reasons, the Court GRANTS Defendant’s motion to dismiss.

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Because the Court also GRANTS leave to amend, Plaintiffs must file an amended complaint by November 10, 2017.

**IT IS SO ORDERED.**

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