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THE HERSHEY COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOWARD CLARK, TODD HALL, ANGELA PIRRONE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THE HERSHEY COMPANY, a Delaware corporation,

Defendant.

Case No. 4:18-cv-06113-WHA

DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO RULE 12(b)(1) AND 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: January 10, 2019
Time: 8:00 a.m.
Judge: Hon. William Alsup
Ctrm: 12, 19th Floor

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on January 10, 2019 at 8:00 a.m., in Courtroom 12 of the above captioned Court, located at 450 Golden Gate Avenue, Courtroom 12, 19th Floor, San Francisco, CA 94102, Defendant The Hershey Company ("Defendant") will and hereby does move this Court for an order dismissing the claims asserted by Plaintiffs Howard Clark Todd Hall, and Angela Pirrone ("Plaintiffs") against The Hershey Company in the above-captioned action.

This Motion to Dismiss is made pursuant to Federal Rule of Civil Procedure 12(b)(1) on the grounds that this Court lacks subject matter jurisdiction over Plaintiffs' claims and 12(b)(6) on the grounds that Plaintiffs fail to state a claim upon which relief can be granted.

The motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities in support of the Motion, the Declaration of Matthew Borden in Support of the Motion, and the files and records in this action and any further evidence and argument that the Court may consider.

Dated: December 5, 2018

BRAUNHAGEY & BORDEN LLP

By: /s/ Matthew Borden, Esq.
Matthew Borden, Esq.
Attorneys for Defendant The Hershey Company

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STATEMENT OF REQUESTED RELIEF

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), The Hershey Company requests that the Court dismiss with prejudice all of Plaintiffs' claims.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether this Court lacks subject matter jurisdiction because Plaintiffs have not suffered any injury-in-fact and therefore lack standing under Article III of the U.S. Constitution to bring their claims. In particular, Defendant contends that Plaintiffs have not suffered any cognizable injury because (1) Plaintiffs continued to purchase the accused products after being aware of the supposedly offending ingredient; and/or (2) Plaintiffs purchased the accused products only at the behest of their lawyers and the purchase occurred after their lawyers sent solicitations to consumers recruiting individuals to serve as "plaintiffs" in this lawsuit.

2. Whether the First Amended Complaint should be dismissed with prejudice because Plaintiffs have not plausibly alleged that they were misled by the presence of malic acid as a supposed "artificial flavor" in the accused products.

3. Whether Plaintiffs' claims under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), Consumers Legal Remedies Act ("CLRA"), and common law claims for fraud and negligent misrepresentation (collectively, "fraud based claims") should be dismissed for failure to satisfy Rule 9(b).

4. Whether Plaintiffs' other sundry claims should be dismissed for the same reasons above and for the additional reasons that Plaintiffs have not plausibly pled that the accused products are unfit for consumption.

Defendant The Hershey Company ("Hershey") respectfully submits this Memorandum in Support of its Motion to Dismiss Plaintiffs' First Amended Complaint (Dkt. 16, the "FAC") pursuant to Rule 12(b)(1) and Rule 12(b)(6).

INTRODUCTION

In the original complaint (Dkt. No. 1), serial "class action" Plaintiff Howard Clark alleged that he was misled into purchasing Hershey's BROOKSIDE® Products in July 2018 – after his lawyers served Hershey with a demand letter.[1] Hershey promptly moved to dismiss (Dkt. 14) because Clark could not have been injured by the Products' labeling and therefore lacked standing under Article III.

Instead of withdrawing the case, Clark and his lawyers emailed a new set of solicitations searching for people to act as plaintiffs and then amended the Complaint to add Todd Hall and Angela Pirrone as parties. In addition to adding two new claimants, it removed certain product flavors from the case and presented a new explanation for Plaintiffs' claims, that the name "BROOKSIDE" and the use of leafy imagery on the packaging somehow is misleading. As shown below, those new parties and revised allegations only make Plaintiffs less capable of satisfying Article III standing. The allegations also undermine the plausibility of the claims and raise new Rule 9(b) concerns regarding the "who, what, when, where and how" of Plaintiff's purchases and supposed reasonable reliance.

SUMMARY OF ARGUMENT

The FAC does not cure the fatal defects in the original complaint for the following four reasons.

First, the FAC effectively confirms that Plaintiff Clark could not have suffered any cognizable injury and adds additional facts that suggest the newly added plaintiffs also purchased the products with the intent to manufacture litigation. Clark apparently knew about the presence of

[1] Plaintiffs contend that the Products are mislabeled as having "no artificial flavors" because they use a synthetically derived form of malic acid – an ingredient often used in confectionary goods as a "pH control agent." 21 C.F.R. § 184.1069(c). Hershey provided Plaintiffs and their lawyers with scientific information and a sworn declaration showing that the only reason it uses malic acid in the Products is for precisely this functional purpose, to "set" the fruit-flavored pectin center and form a pannable ball; without it the product would be a gooey mess.

malic acid and its supposed role as an "artificial flavor" but continued to purchase the Products. He cannot therefore have been injured by purchasing Products he already knew contained the offending ingredient. *See, e.g., Guttmann v. Nissin Foods, Co., Inc.*, No. 15-cv-00567-WHA, 2015 WL 4881073, at *2 (N.D. Cal. Aug. 14, 2015) (dismissing complaint after plaintiff was found to have express prior knowledge of the alleged product mislabeling). The FAC does not fix that problem. It still admits that Clark's most recent purchase of the Products was in "July 2018" (FAC ¶ 63), *after* his lawyers sent a June 29, 2018 demand letter to Hershey contesting the presence of malic acid.

Similarly, new plaintiffs Hall and Pirrone allege to have purchased the products five to seven years ago. Then, apparently at some point after publication of counsel's advertisements on August 1, 2018, decided to purchase the Products again.[2] In particular, the only non-time-barred purchase alleged by plaintiff Angela Pirrone was in "August 2018" (FAC ¶ 67), after her lawyer sent solicitation emails looking for people to serve as plaintiffs in this case. Hall, for his part, does not plead with any specificity when in 2018 he purchased the products. Because Plaintiffs appear to have known about the Products' supposed mislabeling prior to purchasing them, they too cannot logically have suffered any cognizable injury for purposes of Article III standing and their claims should be dismissed.

Second, just like the original complaint, the FAC fails to plausibly explain how malic acid could function as the flavor of six distinct products. Under FDA regulations, malic acid has three prescribed uses in food: as a flavor, a flavor enhancer or to help control pH. 21 C.F.R. § 184.1069(c). The FAC makes only conclusory, cut-and-pasted allegations that Hershey used malic acid as an "undisclosed artificial flavor" without alleging facts showing that the ingredient was included in *these Products* as an artificial flavor, as opposed to some other purpose, namely to balance pH. (FAC ¶ 7.)

[2] Plaintiffs' lawyer recruits people to serve as plaintiffs in food labeling cases through a website called "Class Action Rebates", www.classactionrebates.com. The website promises that users will be able to earn cash or refunds on class settlements. When an individual signs up for notices, lawyers send emails seeking to recruit purported representatives to bring class action lawsuits.

Plaintiffs also fails to plausibly allege how malic acid could ever "simulate[], resemble[] or reinforce[]" the "characterizing flavor" for each of the competing varieties of Products in suit, *e.g.*, acai and blueberry, goji and raspberry, chardonnay grape and peach, crunchy clusters berry medley, merlot grape and black currant, and pomegranate. (*Id.*) Plaintiffs' conclusory allegations fail to address this issue which further underscores their inability to deny that malic acid is, in fact, used in the Products for a specific functional purpose, namely to set the fruit-flavored pectin center, as opposed to some kind of flavor.

Third, Plaintiffs' attempt to salvage their claims by describing pictures of a tree and fruit on the label. (FAC ¶¶ 22-24.) But there is nothing deceptive about these images – which Plaintiffs do not expressly allege they relied on – or BROOKSIDE®'s trademarked name, which existed long before Hershey bought the brand. These are simply attempts to buttress obviously defective allegations.

Fourth, the FAC also intentionally omits when each Plaintiff made his or her supposed purchases, what products he or she allegedly bought, what representations on each product label he or she relied upon, or how he or she contends they were misled. Nor does it allege which version of the many iterations of the Products' labels he or she purchased. These vague and nonspecific allegations fall far short of Plaintiffs pleading requirements under Rule 9(b), *viz*, which requires them to allege the "who, what, when, where, and how" of each alleged cause of action. Pirrone, for example, does not state what products she allegedly purchased. Hall does not identify any date within the limitation period when he purchased the product, alleging instead that it was sometime "earlier this year." Under the strictures of Rule 9(b), each Plaintiff is required, at minimum, to state with specificity what products they actually purchased, when and where they purchased the products, what in specific they relied on in making their purchase decision, and how they were supposedly misled. For this independent reason, the FAC fails to state a claim.

For these reasons and others which follow, the FAC should be dismissed.

PROCEDURAL HISTORY AND FACTS

The facts pertinent to this Motion are summarized below from the FAC, from judicially noticeable documents attached to Hershey's Request for Judicial Notice ("RJN"), and from other materials the Court may consider under Rule 12(b)(1).

A. The Products

The Hershey Company has been making delicious candies and snacks for over a century. In 2012, Hershey purchased BROOKSIDE® Dark Chocolates, a brand that sells small ball-shaped confections coated in dark chocolate.

Some, but not all BROOKSIDE® Dark Chocolate products have a soft fruit-flavored center. (Declaration of Matthew Borden ("Borden Decl."), Ex. 5.) In those products, the soft center is formed using fruit juice concentrates, natural flavors and pectin. (*Id*.) Malic acid is used to lower the pH of the mixture of pectin and fruit juice and to enable the product to set and form the ball shapes that allow it to be coated with dark chocolate. (*Id*.) The Products could not exist without the use of malic acid to trigger the gelling action of the pectin; the center would remain a soft, unpannable liquid. (*Id*.) Using malic acid to lower pH in similar pectin-based gelled confections is a well-known use of the ingredient. (*Id*.) On October 12, 2018 and again on December 3, 2018, Hershey provided a sworn declaration to Plaintiffs explaining the foregoing. (*Id*.)

B. Plaintiffs' Allegations

The FAC alleges that Plaintiffs were deceived by the "No Artificial Flavors" statement on the label of BROOKSIDE® Dark Chocolate products because the Products contain a synthetic form of malic acid. (FAC ¶¶ 27-38.) Plaintiffs contend they were injured because they would not have purchased the product or somehow would have paid less for it. (FAC ¶¶ 72-73.) Clark contends that he purchased BROOKSIDE® Dark Chocolate - Acai & Blueberry between April and July 2018 with his "most recent purchase" in *July 2018* (FAC ¶¶ 62-63) – which is ***after*** his lawyer sent Hershey an initial demand letter on *June 29, 2018*.

After Hershey filed a motion to dismiss explaining that Mr. Clark's claims appeared to have been manufactured by his lawyers, his counsel put out a new advertisement looking for people to

act as plaintiffs via the website classactionrebates.com. (Borden Decl., Ex. 6.) Later that same day, he sent Hershey another demand letter. (Borden Decl., Ex. 7.) His letter claims that Hall had purchased the product in 2014 and that Pirrone had bought it in 2012. (Borden Decl., Ex. 7.) On November 21, 2018, he filed the FAC adding Plaintiffs Pirrone and Hall. (Dkt. 16.)

In the FAC, Pirrone changed her claim to allege that she most recently purchased the Products in "August 2018" (FAC ¶¶ 66-67), which is after her lawyer sent solicitation emails to recruit individuals to lend their name to this lawsuit. (Borden Decl., Ex. 3.) Hall changed his claim to contend that he purchased the Product at some unspecified date "earlier this year." (FAC ¶¶ 64-65.)

The FAC asserts claims under California Consumer Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), New York's False Advertising and Unfair Trade Practices Law and claims for fraud, negligent misrepresentation, and breach of warranty. In doing so, it accuses six BROOKSIDE® Dark Chocolate products of being misleading and incorporates by reference each's product label. (FAC ¶¶ 6; 7 (referring to labeling of the Products); 20 (pasting images of products); 21 (same); 26 (referring to labeling of the Products); 57 (same); 59 (same); 69 (same); 71 (same); 76 (same).)

C. Procedural History

On June 29, 2018, Plaintiffs' lawyer, Scott Ferrell, Esq., sent Hershey a letter on behalf of an unnamed client, complaining that he had purchased "Brookside Dark Chocolate – Acai and Blueberry Flavors" and that the product contained malic acid. (Borden Decl., Ex. 1.) This is the same product variety which Clark alleges he continued to purchase up through July 2018. (FAC ¶¶ 62-63.) No later than August 1, 2018, Mr. Ferrell's co-counsel, Mr. Marron, began an email campaign designed to recruit individuals to serve a purported "plaintiffs" in this lawsuit. (Borden Decl., Ex. 4.) On September 13, 2018, Mr. Marron sent another Consumer Legal Remedies Act ("CLRA") letter identifying the previously unnamed client as Howard Clark, the original Plaintiff in this case. (*Id.*, Ex 3.) Then, Plaintiffs' lawyers jointly commenced this action by filing a complaint, dated October 4, 2018. (Dkt. 1.)

On October 12, 2018, Hershey provided Clark and his lawyers a sworn declaration from Hershey's food scientist explaining that the function of the malic acid used in the products is not to impart flavor but rather to standardize the pH so the pectin-juice center can properly set. (Borden Decl., Ex. 5.) Clark did not respond to the October 12, 2018 letter, forcing Hershey to bring a motion to dismiss the complaint, which was filed on November 13, 2018. (Dkt. 14.) Less than 24 hours after Hershey's motion to dismiss was filed, Mr. Marron sent out an email solicitation looking for additional persons to lend their name to the lawsuit. (Borden Decl., Ex. 6.) Then, on November 14, 2018, Mr. Marron sent Hershey another CLRA letter identifying Hall and Pirrone as new "clients" and identifying purchase dates "since 2012 and 2014, respectively."

Rather than respond to the motion to dismiss, Plaintiffs filed their FAC on November 21, 2018 adding Hall and Pirrone as plaintiffs. (Dkt. 16.) On December 3, 2018, Hershey provided Hall and Pirrone the sworn declaration of its food scientist explaining that the malic acid used in the product is used to standardize pH. (Borden Decl., Ex. 8.) Plaintiffs have not responded to Hershey's December 3, 2018 letter, forcing Hershey to bring this motion to dismiss the FAC.

Mr. Clark has sought to be named as a lead plaintiff representative in at least seven putative class action lawsuits, four of which are currently pending against food companies. (RJN, Exs. 1-6.) In *Clark v. Perfect Bar*, Case No. 18-cv-06006-WHA (N.D. Cal.), which is also pending before this Court, Clark asserts that he was misled into purchasing a protein bar because the product contains "excessive sugar" (even though honey was disclosed in the same sentence and sugar content disclosed in the Nutrition Facts). (RJN., Ex. 1.) In *Clark v. Nuttzo*, No. CGC-17-563438 (San Francisco Super. Ct.), Clark contends that he was misled into purchasing a "protein fuel nut butter" because the product did not disclose that it was not a low-calorie or low-fat food (even though the calorie count and fat content were disclosed on the Nutrition Facts as required by law). (RJN, Ex. 2.) Clark also recently sued Justin's Nut Butter in this Court alleging its products contain "slack fill" and less of the product in the package than he had hoped. *Clark v. Justin's Nut Butter, LLC*, No. 18-cv-6193-JD (N.D. Cal.). (RJN, Ex. 3.)

Additionally, Clark previously filed three "class action" complaints against beauty product manufacturers contending that he was misled into purchasing products due to alleged technical

violations of labeling laws (even though the product's ingredients were properly listed on the packaging).[3] (RJN, Exs. 4-6.) Clark also has, at least once, moved to intervene and was appointed lead plaintiff in a securities class action, *Clark v. Advanced Micro Devices Inc.*, Case No. 18-cv-21-EJD (N.D. Cal.), and at least once has objected to the final approval of another class action settlement, *Choi v. Mario Badescu Skin Care*, Case No. BC501173, LA Superior Court.

D. Plaintiffs' Lawyers' Serial Malic Acid Litigation

Plaintiffs' lawyer, Ronald Marron, Esq., has filed virtually the same cut-and-paste complaint alleging a plaintiff was deceived by the presence of malic acid at least six times in federal court. (RJN, Exs. 7-12, *Allred v. Kellogg*, Case No. 17-cv-1354-AJB (S.D. Cal.); *Allred v. Frito-Lay North Am.*, Case No. 17-cv-1345-JLS (S.D. Cal.); *Hilsley v. Ocean Spray Cranberries, Inc. et al*, Case No. 17-cv-2335-GPC (S.D. Cal.); *Hilsley v. General Mills*, Case No. 18-cv-00395-L (S.D. Cal.); *Branca v. Bai Brands, LLC*, Case No. 18-cv-00757 (S.D. Cal.); *Hunt et al. v. Sunny Delight Beverages Co.*, Case No. 18-cv-00557-JLS-DFM (C.D. Cal.).) Rule 11 motions are pending against him in at least two of the proceedings. (*Id.*, Exs. 13-14.)

Before this case was filed, Hershey learned that Mr. Marron was advertising for plaintiffs to sue Hershey through emails from a website called Class Action Rebates. (Borden Decl., Ex. 3.) Hershey sent a cease-and-desist letter, to which Mr. Marron did not respond. (Borden Decl., Ex. 4.) Other clients of Mr. Marron suing over malic acid have admitted in their depositions that they signed up for emails from this website because they wanted to receive money from class action settlements, but became interested in bringing litigation after responding to Mr. Marron's advertisement. (*Id.* ¶ 7.)

The other lawyer representing Plaintiffs, Mr. Ferrell, is currently the defendant in a long running RICO action in the Central District of California. The complaint in that case alleges that he engaged in fraud and malicious prosecution by, among other things: (1) paying college students

[3] *Clark v. Kendo Holdings, Inc.*, Case No. CGC-17-562492, SF Superior Court; *Clark v. Beauty Solutions, Ltd*, Case No. 18-cv-04663-SK (N.D. Cal.); and *Clark v. Andalou Naturals, Inc.*, Case No. CGC-18-571012, SF Superior Court.

to serve as plaintiffs; (2) submitting knowingly false affidavits from these "plaintiffs"; and (3) filing false pleadings. (RJN, Ex. 15.)

ARGUMENT

The FAC should be dismissed because Plaintiffs suffered no injury as a result of any alleged mislabeling, and therefore lack Article III standing under Rule 12(b)(1). Alternatively, the FAC's cut-and-pasted conclusory allegations are implausible and should be dismissed under Rule 12(b)(6). Plaintiffs have failed to state particularized facts to the allegations with specificity that the Products use malic acid as an "artificial flavor" for many distinctly flavored products rather than for its actual use as a pH control aid. The FAC's allegations also fail to satisfy Rule 9(b) because they do not allege the who, what, when, where, and how of the supposed fraud. Finally, the FAC's smattering of other claims (breach of express and implied warranty) should be dismissed for additional reasons.

I. PLAINTIFFS LACK ARTICLE III STANDING

As discussed at length in Section II, *infra*, none of Plaintiffs' claims can plausibly allege that malic acid was used as a flavor in Hershey's six distinct (and very different) BROOKSIDE® Dark Chocolate flavor varieties. More critical at the outset of this case, Plaintiffs also cannot satisfy the constitutional requirement of Article III standing because they did not suffer any real injury. By Clark's own admission, he purchased BROOKSIDE® Dark Chocolate – Acai & Blueberry *after* his lawyers sent Hershey a demand letter. Because he was willing to buy the Products regardless of whether they contain what he supposedly believes to be an artificial flavoring ingredient (which it is not), Clark could not have sustained any injury and therefore has no standing. Hall and Pirrone similarly appear to have purchased the products after receiving email solicitations from their lawyer. Because it appears that Plaintiffs purchased the products to manufacture litigation, they could not have sustained any injury and therefore have no standing.

A. Legal Standard

"Federal Courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They exist for people who are actually injured and need the judicial power of the United States to help them. Thus, to satisfy the requirements of Article III

standing, a plaintiff must show: (1) "an injury in fact" that is both "concrete and particularized" and "actual or imminent"; (2) that the injury is "fairly traceable to the challenged action of the defendant"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In ruling on a motion to dismiss for lack of standing under Rule 12(b)(1), the Court is not limited to the pleadings and "may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegations." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (internal citation omitted). In such circumstances, the Court must weigh the evidence and determine the facts. *See Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Plaintiffs bear the burden of establishing that they have Article III standing. *Takhar v. Kessler*, 76 F.3d 995, 1000 (9th Cir. 1996).

Plaintiffs cannot meet the requirements for standing for at least two reasons. First, Clark alleges that he continued to purchase BROOKSIDE® Dark Chocolate – Acai & Blueberry after he apparently became aware that it contained a supposed artificial flavor, and therefore cannot have suffered any injury. *See Guttmann v. Nissin Foods, Co., Inc.*, No. 15-cv- 00567-WHA, 2015 WL 4881073, at *2 (N.D. Cal. Aug. 14, 2015). Second, all Plaintiffs were recruited to bring this case by their lawyers. Plaintiffs who are acting in that capacity have not suffered a justiciable injury.

B. Plaintiffs Have Not Suffered Any Injury

Plaintiffs allege that they were injured because if they had known that BROOKSIDE® Dark Chocolate products contained "artificial flavors" they would not have bought the products. (FAC ¶ 73 ("Plaintiffs would not have purchased the Product in the absence of Defendant's misrepresentations and omissions.").) This allegation of injury, however, is contradicted by their lawyers' demand letters, by the allegations in the FAC and by their lawyers' efforts to manufacture claims against Hershey.

On June 29, 2018, Plaintiffs' lawyer, Scott Ferrell, Esq., sent Hershey a demand letter complaining that an unnamed client had purchased BROOKSIDE® Dark Chocolate - Acai & Blueberry Dark Chocolate and had been misled into believing that it did not contain artificial malic acid. (Borden Decl., Ex. 1.) In the FAC, however, Clark admits that he continued to buy this very same product, BROOKSIDE® Dark Chocolate - Acai & Blueberry, ***after*** his lawyer's letter to Hershey. (FAC ¶ 63 ("Plaintiff's most recent purchase was in July 2018").) Because he was willing to buy the Products regardless of whether they contained "artificial" malic acid, Clark cannot have incurred any injury. Similarly, Hall and Pirrone appear to have purchased the BROOKSIDE® Dark Chocolate products in 2018, after their lawyer sent out plaintiff solicitations.[4]

Courts have dismissed similar cases in analogous situations. In *Guttmann v. Nissin Foods, Co., Inc.*, No. 15-cv-00567-WHA, 2015 WL 4881073, at *2 (N.D. Cal. Aug. 14, 2015), this Court dismissed UCL claims by a plaintiff because he previously had filed a lawsuit alleging that he was misled by the same term over which he was suing. The Court explained that plaintiff "is not a typical consumer but is a self-appointed inspector general roving the aisles of our supermarkets. He continues on a five-year litigation campaign against artificial trans-fat and partially hydrogenated oil and has admitted that he has inspected products for those ingredients before." *Id.* at *3.

The same is true here. Plaintiffs cannot continue buying the product, believing that it supposedly uses malic acid as an artificial flavor and then claim some type of injury. *Id.*; *Thomas v. Costco Wholesale Corp.*, No. 12-cv-02908-EJD, 2014 WL 1323192 (N.D. Cal. March 31, 2014) (dismissing claims for lack of standing where plaintiff understood the product's ingredients and received what he bargained for); *cf. also Starbucks Corp. v. Superior Court*, 168 Cal. App. 4th 1436, 1447, (2008) ("[t]here are practical reasons why [plaintiffs'] actual understanding is critical. Without it, there would be nothing to stop them from freely roaming throughout the state as knights errant amici searching for deficiencies ... where no harm has been caused them or anyone else as a result....") (action concerning question on employment application); *Buckland v. Threshold*

[4] Pirrone's only identified purchase during the statute of limitation was *after* her lawyers sent the email solicitation seeking individuals to serve as plaintiffs. Hall has not identified when in 2018 he purchased the products and his claims should be dismissed for failure to adhere to Rule 9(b).

Enterprises, Ltd., 155 Cal. App. 4th 798, 808 (2007) (no injury under § 17200 because plaintiff purchased product at the request of her lawyer "solely to pursue litigation," and therefore was not misled); *Stathakos v. Columbia Sportswear Co.*, No. 15-cv-04543-YGR, 2017 WL 1957063, at *8 (N.D. Cal. May 11, 2017) (dismissing claims concerning items plaintiffs bought after the complaint was filed since "plaintiffs would have had notice of the allegedly deceptive practice" and therefore "could not have actually relied" on the allegedly misleading statements).

Additional evidence casts further doubt on Plaintiffs' ability to demonstrate standing. Rather than bringing the case because they suffered an injury and then sought legal counsel, the circumstances suggest that Plaintiffs were sought out by their lawyers, who routinely solicit people to act as plaintiffs in food labeling cases. (Borden Decl.¶ 5.) These solicitations occur through an email list serve and website called "Class Action Rebates." (*Id.*) The website promises people that they will be able to cash in on class settlements, but when they sign up for notices of settlements, Plaintiffs' lawyer instead sends out email blasts looking for volunteers to act as named plaintiffs. (*Id.* ¶ 5.) Clark, for example, has now filed four purported "class actions" against four different food companies on distinct alleged labeling issues (and three additional complaints asserting labeling violations of beauty products). These additional facts, showing that Plaintiffs likely were recruited to lend their names to this case, is further evidence that they did not suffer any actual injury.

II. PLAINTIFFS' CLAIMS ARE IMPLAUSIBLE AND FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Regardless of whether Plaintiffs have technical standing, their claims themselves are implausible. A complaint should be dismissed unless it "contain[s] 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)). Under *Twombly/Iqbal*, a Court must use its common sense to determine whether the claims are plausible under the facts and circumstances of the case. The purpose of this inquiry is to protect courts and parties from needless and expensive discovery and trials. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F. 3d 990, 995 (9th Cir. 2014) (*Twombly/Iqbal* standard recognizes "the need

to prevent 'a plaintiff with a largely groundless claim' from 'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of settlement value'") (quotations omitted); *see also Twombly*, 550 U.S. at 558 ("So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.'" (quoting 5 Wright & Miller, FED. PRACTICE & PROC. § 1216 at 233-34 (quotation omitted)).

Here, Plaintiffs have failed to satisfy their pleading burden to allege particularized facts – namely, that the Products actually use malic acid as a characterizing "flavor" for a diverse range of products, as opposed to its actual use as a pH control aid.

A. The Court Should Consider the Totality of Circumstances in Determining Whether Plaintiffs' Claims Are Plausible

As detailed in Perfect Bar's Motion to Dismiss, *another* case Plaintiff Clark filed and is pending before this Court, *Clark v. Perfect Bar*, No. C 18-6006-WHA, Dkt. No. 15, an onslaught of food lawsuits ensued after other sources of "class action" litigation began drying up. Vanessa Blum, "Welcome to the Food Court," *The Recorder* (Mar. 01, 2013). As a result, there has been an 850% rise in food litigation in the federal courts since 2008. Cary Silverman and James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation* at 1, 5 (Feb. 2017). This increase does not include the proliferation of extortive demand letters and state court suits. *Id*.

Many of the food cases pending in federal court bear some or all of the same hallmarks of illegitimacy, which cast doubt on whether the case involves genuine claims by a truly injured individual or is litigation manufactured by lawyers, for lawyers. Such factors include whether: (1) the plaintiff has sought to serve as a "class" representative multiple times, (2) the plaintiff has brought similar claims in the past, (3) the claims themselves are copied verbatim from other pleadings, (4) the plaintiff was recruited by his or her lawyer, (5) the pleadings contain inaccurate statements of fact, and (6) the claims themselves make little common sense.

Some courts have dismissed claims on some of the above, or similar grounds. *See, e.g.*, *Guttman*, 2015 WL 4881073, *2 (Alsup, J.) (dismissing trans-fat claims because plaintiff had filed

multiple, identical claims previously and could not have been misled); *Savalli v. Gerber Prods. Co.*, No. 15-61554-CIV, 2016 WL 5390223, at *1 (S.D. Fla. Sept. 20, 2016) (dismissing claims that plaintiffs understood the term "whole grains" to mean that the products contained fruits and vegetables, noting that "to understand what they are purchasing, reasonable consumers should—well, read the label").

Defending putative food class actions is expensive and burdensome. Silverman and Muehlberger, *The Food Court*, *supra*, at 45 ("While it takes minutes for plaintiffs' lawyers to cut-paste-and-file a complaint, the cost of defending against a 'routine' class action typically costs a company between $1 million and $17.5 million dollars, and can run far higher."). Thus, in the context of cases like this one, courts should be vigilant gatekeepers. Where some or all the markers of doubtfulness are present, courts should look carefully at whether the claims, taken as a whole, are plausible.

B. Plaintiffs Do Not Plausibly Allege that Malic Acid Is Used to Simulate, Resemble or Reinforce the Characterizing Flavor for Six Diverse Products

Because they sound in fraud, the heightened pleading requirements of Rule 9 apply to Plaintiffs' claims that they were deceived by the "no artificial flavors" statement on the labels of the Products. *See Becerra v. Coca-Cola Co.*, No. 17-cv-05916-WHA, 2018 WL 1070823, *3 (N.D. Cal. Feb 27, 2018) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)) ("State law consumer protection claims that sound in fraud must therefore be 'accompanied by the who, what, when, where, and how of the misconduct charged.") (Alsup J.). Here, Plaintiffs have alleged no facts whatsoever to support theory theory that Hershey uses malic acid as an artificial flavor, as opposed to its actual function: to set the pectin in the fruit centers of some of the Products. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a complaint does not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement'"). Plaintiffs do not and cannot allege any facts that, taken as true, would substantiate their theory that Hershey uses malic acid to create the characterizing flavor for six disparate fruit-flavored products.

1. Plaintiffs Do Not Allege Any Facts Showing that Malic Acid Is Used as a Flavor

Under federal regulations, malic acid has three recognized uses: "as a flavor enhancer," as a "flavoring agent and adjuvant" and as a "pH control agent." 21 C.F.R. § 184.1069(c). The FAC simply assumes, without any basis in fact, that malic acid serves as a flavor enhancer or flavoring agent, as opposed to a pH control agent, in the Products. Such groundless, counterfactual speculation is insufficient as a matter of law to satisfy *Twombly/Iqbal*, let alone the heightened pleading requirements of Rule 9(b).

Where an ingredient has more than one function, conclusory allegations about that function are inadequate; a plaintiff must allege facts establishing what function the ingredient actually serves in the products at issue. In *Hu v. Herr*, 251 F. Supp. 3d 813 (E.D. Pa. 2017), the Court confronted a similar situation to the one here. The plaintiff made conclusory allegations that the citric acid in a dry snack food product labeled as "No Preservatives Added" functioned as a preservative. Citric acid, however, has many functions. In dismissing the claims, the Court held that plaintiff had not alleged facts showing that citric acid served as a preservative in the product, as opposed to a flavor. *Id*. at 821-22.

The same result should obtain here. Malic acid has multiple functions, and Plaintiffs has not alleged any facts establishing that it is used as an artificial flavor in BROOKSIDE® Dark Chocolate. To the contrary, the facts alleged in this action show that malic acid is used to control (or lower) pH and not as an artificial flavor. The original Complaint accused eight distinct products, all of which included fruit and other exotic flavors. (Dkt. 1 ¶ 6.) Six of those accused products had a gel-center with pectin. (Borden Decl. ¶ 2.) Those products contain malic acid. (*Id*.) Two of the named products in the original complaint, however, do not contain soft centers. (Borden Decl., Ex. 5.) Those two products do not contain any malic acid. (*Id*.) The only plausible inference from these facts (which Plaintiffs' lawyers then deleted from the FAC) is that malic acid is used as a pH control agent to form the gel-center, not to provide multiple different characterizing fruit flavors. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746, n.6 (9th Cir. 2006) (court may take judicial notice of court filings).

2. Plaintiffs' Allegations that Malic Acid Imparts at Least Six Different Flavors Are Implausible

Further, Plaintiffs' assertion that malic acid is somehow a primary driver that "simulates, resembles, and reinforces" the "characterizing flavor" of six dissimilar flavors renders their claims even more implausible. According to Plaintiffs, malic acid functions to impart blueberry or acai flavor in BROOKSIDE® Dark Chocolate – Acai & Blueberry, goji or raspberry flavor in BROOKSIDE® Dark Chocolate - Goji & Raspberry, chardonnay grape or peach flavor in BROOKSIDE® Dark Chocolate – Chardonnay Grape & Peach, pomegranate flavor in BROOKSIDE® Dark Chocolate - Pomegranate, merlot grape and black currant flavors in BROOKSIDE® Dark Chocolate - Merlot Grape & Black Currant, and the flavor of multiple berries in BROOKSIDE® Dark Chocolate - Crunchy Cluster Berry Medley. That one ingredient could have so many different flavor simulations is also implausible.[5]

Other courts have dismissed claims in analogous situations. For example, in *Osborne v. Kraft Foods Group, Inc.*, Judge Chhabria addressed a situation, where, as here, plaintiff attempted to rely on unsubstantiated conclusions in a complaint to overcome a more plausible legal use of the ingredient. In addressing a claim that citric acid used in an accused product was artificial, as opposed to derived through fermentation, Judge Chhabria stated:

> [T]he problem I have with your complaint is that you complain a lot about citric acid generally in the complaint, but you don't really have any – you don't really specify whether all – in the complaint, you don't really specify whether all citric acid is unnatural or some types of citric acid is unnatural, and you don't specify what type of citric acid [Defendant] uses … you know, I wonder if you've created a bit of a Rule 11 problem for yourself …
>
> You can't just file a lawsuit without having actual reason to believe that the ingredient is not all natural and then say, "I need discovery to see if my guess is correct."

Osborne v. Kraft Foods Group, Inc., No. 15-cv-02653-VC (N.D. Cal. 2015), October 15, 2015 hearing transcript at 5:13–6:2, 11:20–23 (attached as RJN, Ex. 16.). Like the plaintiff in *Kraft*, Plaintiffs here have provided nothing more than an uninformed "guess" that Hershey uses malic acid for the undisclosed purpose of flavoring the Products. Given the contradictory facts in their

[5] Plaintiffs allege that Smart Labels indicates that malic may be used as a flavor enhancer. (FAC n.9.) That statement is not product specific and refers to use as a flavor enhancer, not an "artificial flavor."

pleading and the outlandish nature of their assertions about the function of malic acid in a vast range of products, it is all the more incumbent upon Plaintiffs here to set forth facts that support their unsubstantiated theory.

Plaintiffs are likely to cite two other malic acid cases that their lawyers filed for the proposition that, at the pleading stage, they need only make conclusory allegations that malic acid is a flavor, rather than a "flavor enhancer" (which is not itself a "flavor" under FDA regulations). Those decisions are inapposite. In *Allred v. Kellogg*, 2018 WL 1158885, *2 (S.D. Cal. Feb. 23, 2018), and in *Allred v. Frito-Lay*, 2018 WL 1185227, * (S.D. Cal. Mar. 7, 2018), the courts rejected the argument that the complaint had to offer facts about whether malic acid was a "flavor" or a "flavor enhancer." While those Courts held that that complex and nuanced factual distinction might not be appropriate to draw at the pleading stage, the question here is different and much simpler: whether or not Hershey uses malic acid as a pH control agent to help form the gelled center. As with the possibility of innocent parallel conduct at issue in *Twombly*, and the potentially allowable function and nature of the ingredients at issue in *Herr* and *Kraft*, Plaintiffs must put forth at least some plausible factual allegations that support their theory of wrongdoing.[6] They have not done so, and the FAC should accordingly be dismissed.

C. Plaintiffs' Complaints about Hershey's Packaging Are Not Actionable

In an attempt to address the obvious failures in the original complaint, Plaintiffs add allegations about the packaging of the Products. (FAC ¶¶ 22-24.) These allegations do not somehow render Plaintiffs' claims plausible for at least two reasons.

First, Plaintiffs do not expressly allege that they relied on any of the new features cited in the FAC. While they make conclusory allegations of reliance, none of the Plaintiffs allege that he or she relied on the tree depicted on the label or the "chunks of raw dark chocolate and mouthwatering fruit in a clear glass" in the Vineyard-inspired products – which Plaintiffs do not

[6] Other indicia of implausibility are noted above, including Plaintiff Clark's attack on Products that do not even contain malic acid, his status as a serial food label litigant, and his use of cut-and-pasted claims from other suits brought by his counsel predating his supposed injuries.

even claim to have purchased. The FAC does not explain what these images meant to any of the Plaintiffs (if, in fact, any of the Plaintiffs saw and relied on them) or why.

Second, there is nothing misleading about pictures of chocolate or fruit (which are in the Products) or trees (which are obviously not in the Products). Nor is the brand name BROOKSIDE®, which is a trademarked name with secondary meaning, somehow improper. Courts have refused to find brand names deceptive, even when they expressly contain terms such as "natural." *See, e.g.*, *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prod. Liab. Litig.*, 288 F. Supp. 3d 1087, 1236 (D.N.M. 2017) (dismissing claims re "Natural American cigarette tobacco" as a brand name and not an objective representation).

D. The Products Properly Use the Common Name of Malic Acid

The FAC also attempts to set forth an alternative claim that Hershey's labels "violate federal and state law because they identify, misleadingly, the malic acid only as the general 'malic acid' instead of using the specific non-generic name of the ingredient." (FAC ¶ 31 (citing 21 C.F.R. § 101.4).) This claim fails because Hershey properly identifies malic acid according to its common name.

Pursuant to 21 C.F.R. § 101.4(a)(1), ingredients in a food product "shall be listed by common or usual name." In turn, 21 C.F.R. § 184.1069(a) provides that "[m]alic acid…is the common name for 1-hydroxy-1, 2-ethanedicarboxylic acid." Accordingly, Hershey's use of the term "malic acid" on its product labels comports with applicable federal regulations and, for that matter, the vast majority of food labels in the United States. *See* 21 C.F.R. § 184.1069.

Plaintiffs allege that although "malic acid" is the proper common name of the ingredient, Hershey is somehow required to list the ingredient by some other "non-generic" name rather than its common name. (FAC ¶ 31.) They apparently rely on 21 C.F.R. § 101.4(b) for this proposition, which provides that "[t]he name of an ingredient shall be a specific name and not a collective (generic) name."

However, Section 101.4(b) only states that the name of an ingredient must be "specific" and not "collective (generic)." Plaintiffs do not cite any regulation or case law for the proposition that "malic acid" is a "collective" rather than "specific" name or that a product containing malic acid

must list the chemical name rather than the common name. Plaintiffs allege that the malic acid in BROOKSIDE® Dark Chocolate is d-l malic acid (FAC ¶ 33), but the type of malic acid is beside the point because, as noted above, "malic acid" is the common name for *both* dl- and l-malic acid. *See* 21 C.F.R. § 184.1069(a). Plaintiffs provide no plausible argument for what the "specific, non-generic" name of malic acid should be or how they were misled in any way by Hershey listing malic acid on its ingredient list exactly according to the FDA's regulations regarding the common name of malic acid.

Plaintiffs therefore fail to allege that Hershey's use of the common name "malic acid" as an ingredient is a violation of any federal regulation.

III. PLAINTIFFS' CLAIMS ARE NOT PLEADED WITH PARTICULARITY

Claims sounding in fraud are subject to the heightened pleading standard of Rule 9(b), which requires plaintiffs to "state with particularity the circumstances constituting fraud or mistake." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) ("Rule 9(b)'s particularity requirement applies to these [false advertising] state-law causes of action."). Plaintiffs' claims for fraud and negligent misrepresentation and under UCL, FAL, and CLRA fail to meet this heightened standard. *Romero v. Flowers Bakeries, LLC*, No. 14-cv-05189-BLF, 2015 WL 2125004, at *3 (May 6, 2015 N.D. Cal.) (holding that mislabeling claims including those under the UCL, FAL, and CLRA and for negligent misrepresentation, were based in fraud). Rule 9(b) requires Plaintiffs to plead the who, what, when, where and how of the misrepresentation as it relates to each defendant. *See Becerra v. Coca-Cola Co.*, No. 17-cv-05916-WHA, 2018 WL 1070823, *3 (N.D. Cal. Feb 27, 2018) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)) ("State law consumer protection claims that sound in fraud must therefore be 'accompanied by the who, what, when, where, and how of the misconduct charged.").

Plaintiffs' conclusory allegations do not satisfy the strictures of Rule 9(b). Due to the solicitation efforts of their lawyers, each of the Plaintiffs is intentionally vague about what products he or she actually purchased and when he or she purchased them. Plaintiff Clark for example, does not state how many times he allegedly bought the products or when. He simply asserts that "between April and July 2018" he purchased "a couple packages" of BROOKSIDE® Dark

Chocolate – Acai & Blueberry. (FAC ¶¶ 62-63.) Hall and Pirrone's allegations are similarly deficient. Hall contends he purchased the "Pomegranate Product," but also does not identify how many purchases or what actual date within the statute of limitations his alleged purchase was made, instead claiming that he purchased the product sometime "earlier this year." (FAC ¶ 65.) Pirrone also does not specify the number of purchases or precise dates. Instead, she claims that she made a purchase in August 2018 (after her lawyer sent out email solicitations) and one in 2012, but does not identify the products or dates, whether there were any intervening purchases, what products those were and when. (FAC ¶¶ 66-67.) These allegations fail to satisfy Rule 9(b).

Moreover, because the Plaintiffs know that each variety of the product has unique labels (each of which changed numerous times during the period they contend they purchased the products), the allegations are intentionally imprecise regarding what representations exactly the Plaintiffs relied on in making their purchase decision for each product and each purchase date. (*See e.g.*, FAC ¶¶ 20-21 (depicting multiple versions of the purported product label).) The FAC simply does not contain any allegations regarding "the particular circumstances surrounding such representations," which representations they "found material," or what representations they "relied on in making [their] decision to buy" as required by Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). At minimum, for each product and each purchase date, Plaintiffs must allege with specificity exactly what he or she relied on, why he or she bought the product, and how he or she was supposedly misled. *Romero v. Flowers Bakeries, LLC*, No. 14-CV-05189-BLF, 2015 WL 2125004, at *4 (N.D. Cal. May 6, 2015) ("Plaintiff cannot simply identify a list of products, allege a slew of problems with Defendant's labeling of those products, and then ask Defendant and the Court to mix and match. It is not the task of the Court or of Defendant to diagram the intersection between the challenged products and the mislabeling allegations.").

IV. PLAINTIFFS' CLAIMS ARISING OUTSIDE THE STATUTE OF LIMITATIONS SHOULD BE DISMISSED

Plaintiffs Hall and Pirrone allege claims for purchases dating back to 2012 and 2014, respectively. (FAC ¶¶ 64, 66.) All of Plaintiffs' claims, however, are subject to a three- or four-year statute of limitations – significantly shorter than the approximately seven years and five years,

respectively, that have passed since their supposed purchases. Because Plaintiffs do not allege sufficient grounds for tolling the statute of limitations, their claims must be dismissed to the extent they are based on conduct that took place prior to the applicable limitations period.

California and New York statutes of limitations and tolling rules apply to Plaintiffs' claims brought under each state's respective laws. *Bancorp Leasing & Fin. Corp. v. Agusta Aviation*, 813 F. 2d 272, 274 (9th Cir. 1987) ("In a federal diversity action brought under state law, the state statute of limitations controls."); *Seifi v. Mercedes-Benz USA, LLC*, No. C12-5493 TEH 2013 WL 2285339, at *6 n.4 (N.D. Cal. May 23, 2013) ("In cases brought under the CAFA, federal district courts apply state-law tolling rules.").

A. California Claims

Plaintiffs' UCL claim is subject to a four-year statute of limitations. *Karl Storz Endoscopy-America, Inc. v. Surgical Tech., Inc.*, 285 F.3d 848, 857 (9th Cir. 2002). The remainder of their claims under California law are subject to a three-year statute of limitations. *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1130 (C.D. Cal. 2010) (CLRA and FAL); *Graybill v. Wells Fargo Bank, NA*, No. 12-cv-05802 LB, 953 F. Supp. 2d 1091, 1110 (N.D. Cal. 2013) (fraud); *Fanucci v. Allstate Insurance Company*, No. 08-cv-2151 EMC, 638 F. Supp. 2d 1125, 1133 n.5 (N.D. Cal. 2005) (negligent misrepresentation).

Under the applicable statutes of limitations, Hall cannot assert any CLRA claims for whatever purchases he supposedly made before November 21, 2015, and he cannot assert any UCL claims for purchases before November 21, 2014. Plaintiff Hall alleges that he "has been purchasing Brookside's Dark Chocolate Pomegranate Product since 2014." (FAC ¶ 64.) Once Hall alleges the dates of his purchases, as required by Rule 9(b), any untimely purchases should be dismissed.

Hall attempts to invoke the delayed discovery exception to the statute of limitations by alleging that he did not discover the alleged "deception" until November 2018, when he "learned that the Brookside Dark Chocolate Products' characterizing flavors are deceptively created or reinforced using artificial flavoring even though Defendant fails to disclose that fact on the Products' labels." (*Id.* ¶ 69.) This argument fails. First, the delayed discovery exception does not

apply to, and thus cannot save, Plaintiffs' UCL claims. *Karl Storz*, 285 F.3d at 857. Second, to invoke the exception, Plaintiffs "must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Yumul*, 733 F. Supp. 2d at 1130 (internal quotation omitted). "The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer." *E-Fab, Inc. v. Accountants, Inc. Services*, 153 Cal. App. 4th 1308, 1319 (6th Cir. 2017.). This standard for pleading delayed discovery "applies even where plaintiff is prosecuting a class action." *Yumul*, 733 F. Supp. 2d at 1131.

Here, Hall "has not alleged the time and manner of [his] discovery of the facts giving rise to [his] claims." *Id.* He alleges only that he "learned" that BROOKSIDE® Dark Chocolates contain artificial flavoring in November 2018 but does not state *how* he discovered this alleged deception. (FAC ¶ 64.) Further, he alleges no facts regarding whether he exercised reasonable diligence to discover the alleged deception earlier. (*Id.*) Hall therefore fails to "plead sufficient facts to invoke the delayed discovery rule." *Yumul*, 733 F. Supp 2d at 1131; *see also Keilholtz v. Lennox Hearth Products Inc.*, 2009 WL 2905960, at *5-6.

B. New York Claims

A claim under GBL §§ 349 or 350 is subject to a three-year statute of limitations. *Corsello v. Verizon NY, Inc.*, 18 N.Y.3d 777, 789 (2012) (citing CPLR 214(2), which applies to actions "to recover upon a liability…created or imposed by statute"). The three-year period "runs from the time when the plaintiff was injured," *i.e.*, the time of the alleged deception – not from when the plaintiff learns that he or she has been deceived. *Id.* at 790. A cause of action for breach of express or implied warranty under New York law is subject to a four-year statute of limitations. *Ito v. Dryvit Systems, Inc.*, 16 AD 3d 554, 555 (2d Dept. 2005). Such a claim "accrues 'when tender of delivery is made.'" *Schwatka v. Super Millwork, Inc.*, 106 A.D. 3d 897, 899 (2d Dept. 2013) (quoting UCC 2-725(2)). "[T]he commencement of the limitations period does not depend on a plaintiff's knowledge of a defect." *Catalano v. BMW of N. Am.*, LLC,167 F. Supp. 3d 540, 558 (S.D.N.Y. 2016).

Pirrone alleges that she purchased the Products in New York and that she "has been purchasing various flavored Brookside Products since 2012." (FAC ¶ 66.) Like Hall, she alleges that she did not discover the alleged deception by Defendant until November 2018. (*Id.* ¶ 69.) The date that Plaintiff Pirrone learned of the alleged fraud is irrelevant, however, because the statute of limitations on her GBL and warranty claims does not run from the time of discovery but from the time of injury. Because Pirrone does not allege a basis for tolling the statute, her GBL claims based on purchases prior to the three-year statutory period and her breach of express and implied warranty claims based on purchases prior to the four-year statutory period are therefore time-barred.

V. PLAINTIFFS' OTHER CLAIMS SHOULD BE DISMISSED FOR THE SAME REASONS

The FAC also contains claims for breach of express, negligent misrepresentation, and implied warranty. These must fail for the same reasons given above, *viz.*, Plaintiffs have not plausibly alleged that they were misled by any statement on the label, that any such statement was inaccurate, or that they suffered any genuine injury. *See Chuang v. Dr. Pepper Snapple Group, Inc.*, 2017 WL 4286577, at *7 (dismissing express warranty claim when statements underlying the claim were true); *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d at 893-94 (C.D. Cal 2014) (dismissing express warranty claim to the extent that "all natural flavors" label accurately described product).[7]

The FAC's implied warranty claim is separately defective because Plaintiffs do not allege that BROOKSIDE® Dark Chocolate - Acai & Blueberry is unfit for human consumption. The implied warranty of merchantability "does not impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality." *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1296 (1995) (internal quotation

[7] Plaintiffs' other theory on breach of express warranty (i.e., the Products' front labels misleadingly claim by operation of law that the products are flavored only with the listed fruits) makes even less sense. To state a claim for express warranty, a plaintiff must "allege facts identifying the exact terms of the warranty" by providing "'specifics' about what the warranty statement was." *T&M Solar & Air Conditioning, Inc. v. Lennox Int'l Inc.*, 83 F. Supp. 3d 855, 875 (N.D. Cal. 2015). The alleged statement must be "specific and unequivocal" and make an "explicit guarantee[]." *Maneely v. Gen. Motors Corp.*, 108 F. 3d 1176, 1181 (9th Cir. 1997).

omitted). "A plaintiff who claims a breach of the implied warranty of merchantability must show that the product 'did not possess even the most basic degree of fitness for ordinary use.'" *Viggiano*, 944 F. Supp. 2d at 896 (quoting *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003)); *see also* Cal. Comm. Code § 2314(2).

In the context of food, to state an implied warranty claim, the plaintiff must allege that the food is unfit for consumption. *See Viggiano*, 944 F. Supp. 2d at 896. Here, Plaintiffs allege that BROOKSIDE® Dark Chocolate was "unsatisfactory" to them, because it did not have "the qualities Plaintiffs sought." (FAC ¶ 166.) But allegations that a product did not fulfill a buyer's expectations are not sufficient to state a claim for breach of implied warranty. *Am. Suzuki Motor Corp.*, 37 Cal. App. 4th at 1296. Plaintiffs also allege that the Products "were not of the same quality as other products in the category," "would not pass without objection in the trade," and "were not acceptable commercially." (*Id.* ¶¶ 145-146.) These boilerplate allegations, however, simply parrot the language of the subsections of § 2314, and are insufficient to state a claim. *See Viggiano*, 944 F. Supp. 2d at 896 (Plaintiffs "do[] not allege any facts suggesting that the [Products are] not merchantable or fit for use as a [citrus punch]; [they] ha[ve] not, for example, alleged that the beverage was not drinkable, that it was contaminated or contained foreign objects, etc."). Plaintiffs thus fail to state a claim for breach of the implied warranty of merchantability.

CONCLUSION

For the foregoing reasons, Hershey respectfully requests the Court to dismiss the FAC with prejudice for failure to state a claim and for lack of subject-matter jurisdiction.

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