

1 GREENBERG TRAUIG, LLP
 2 RICK L. SHACKELFORD (SBN 151262)
 3 Email: *ShackelfordR@gtlaw.com*
 4 VICTORIA J. IANNI (SBN 266583)
 5 Email: *IanniV@gtlaw.com*
 6 2450 Colorado Avenue, Suite 400E
 7 Santa Monica, California 90404
 8 Telephone: (310) 586-7700
 9 Facsimile: (310) 586-7800
 10 Attorneys for Defendant
 11 PEPSICO, INC.

12
 13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA**

15 ROY WERBEL, individually and on
 16 behalf of all others similarly situated,

17 Plaintiff(s),

18 vs.

19 PEPSICO, INC., a Northern
 20 California corporation; and DOES 1
 21 through 10, inclusive,

22 Defendant(s).

CASE NO. CV 09 4456-SBA

**DEFENDANT PEPSICO, INC. ‘S
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION TO DISMISS COMPLAINT
 PURSUANT TO FEDERAL RULES
 OF CIVIL PROCEDURE 9(b) AND
 12(b)(6)**

**[Filed, Served and Lodged Concurrently
 with Notice of Motion and Motion to
 Dismiss; Request for Judicial Notice and
 [Proposed] Order]**

DATE: June 22, 2010
 TIME: 1:00 p.m.
 DEPT: Courtroom 1, 4th Floor
 JUDGE: Hon. Sandra Brown
 Armstrong

DATE ACTION FILED: Sept. 22, 2009
 TRIAL DATE: None Set

Table of Contents

Page

I. INTRODUCTION 1

II. DISMISSAL STANDARDS UNDER RULE 12(B)(6) AND RULE 9(B). 4

III. DISCUSSION. 6

 A. Summary Of Plaintiff’s Complaint. 6

 B. Plaintiff’s False Advertising And Unfair Competition Claims Fail To State A Cognizable Legal Theory, As A Matter Of Law..... 6

 1. A Reasonable Consumer Could Not be Misled by Cap’n Crunch’s Packaging. 7

 2. The FDCA Authorizes Cap’n Crunch’s Packaging. 13

 C. Plaintiff’s Common Law Fraud Claims Are Deficient And Are Not Supported By Particularized Averments..... 14

 D. Plaintiff’s Express And Implied Warranty Claims Are Deficient. 16

 E. Plaintiff’s CLRA Claim Is Deficient. 18

 F. Plaintiff’s Complaint Is Preempted By The FDCA. 19

IV. CONCLUSION. 23

Table of Authorities

Page

Federal Cases

Anderson v. Clow (In re Stac Elecs. Sec. Litig.),
89 F.3d 1399, 1403 (9th Cir. 1996)..... 5

Balistreri v. Pacifica Police Dep't,
901 F.2d 696, 699 (9th Cir. 1988)..... 5, 6

Bly-Magee v. California,
236 F.3d 1014, 1019 (9th Cir. 2001)..... 6

Buckman Co. v. Plaintiffs' Legal Comm.,
531 U.S. 341, 349 n.4, 352 (2001)..... 23

Buick v. World Savings Bank,
637 F. Supp. 2d 765 (E.D. Cal. 2008)..... 25

Cooper v. Pickett,
137 F.3d 616, 627 (9th Cir. 1997)..... 6

Crosby v. National Foreign Trade Council,
530 U.S. 363,
372 120 S.Ct. 2288 (2000)..... 22

Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.),
42 F.3d 1541, 1548 (9th Cir. 1994)..... 6

Fidelity Federal Savings & Loan Assn. v. de la Cuesta,
458 U.S. 141, 153-54
102 S.Ct. 3014 (1982)..... 23

Fraker v. KFC Corp.,
Case No. 06-CV-01284,
2007 U.S. Dist. LEXIS 32041,
at *5 (S.D. Cal. April 27, 2007)..... 5

1 *Freeman v. Time, Inc.*,
68 F.3d 285, 289 (9th Cir. 1995)..... 9

2

3 *Hal Roach Studios, Inc. v. Richard Feiner & Co.*,
896 F.2d 1542, 1555 n.19 (9th Cir. 1989)..... 10

4

5 *Haskell v. Time, Inc.*,
857 F. Supp. 1392, 1399 (E.D. Cal. 1994)..... 9

6

7 *In re Burlington Coat Factory Sec Litig.*,
114 F.3d 1410, 1424 (3d Cir.1997)..... 18

8

9 *Kearns v. Ford Motor Co.*,
567 F.3d 1120 (9th Cir. 2009)..... 3

10

11 *Laster v. T-Mobile USA, Inc.*,
407 F. Supp. 2d 1181, 1196 (S.D. Cal. 2005) 21

12

13 *Mylan Labs, Inc. v. Matkari*,
7 F.3d 1130, 1139 (4th Cir. 1993)..... 24

14

15 *Pacific Trading Co. v. Wilson & Co., Inc.*,
547 F.2d 367, 370 (7th Cir. 1976)..... 23

16

17 *Reddy v. Litton Indus., Inc.*,
912 F.2d 291, 296 (9th Cir. 1990)..... 5

18

19 *Sandoz Pharms. Corp. V. Richardson-Vicks, Inc.*,
902 F.2d 222, 231 n.10 (3d Cir. 1990)..... 24

20

21 *Summit Tech., Inc. v. High-Line Medical Instruments Co, Inc.*,
922 F. Supp. 299, 316 (C.D. Cal. 1996)..... 24

22

23 *Utility Consumers’ Action Network v. Spring Solutions, Inc.*,
Case No. C07-CV-2231-W (RJB),
2008 WL 1946859, at *5
(S.D. Cal. Apr. 25, 2008)..... 21

24

25

26 *Vess v. Ciba-Geigy Corp. USA*,
317 F.3d 1097, 1106 (9th Cir. 2003)..... 6

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Von Grabe v. Sprint PCS,
312 F. Supp. 2d 1285, 1304 (S.D. Cal. 2003) 21

W. Mining Council v. Watt,
643 F.2d 618, 624 (9th Cir. 1981)..... 5

Williams v. Gerber Prods. Co.,
552 F.3d 934 (9th Cir. 2008) 9

State Cases

American Suzuki Motor Corp. v. Superior Court,
37 Cal. App. 4th 1291, 1296,
44 Cal. Rptr. 2d 526 (1995) 19

Bardin v. DaimlerChrysler Corp.,
136 Cal. App. 4th 1255, 1274-76,
39 Cal. Rptr. 2d 634 (2006) 9

Brockey v. Moore,
107 Cal. App. 4th 86,
100, 131 Cal. Rptr. 2d 746 (2003) 10

Californians For Disability Rights v. Mervyn’s, LLC,
39 Cal. 4th 223, 227-29,
138 P.3d 207 (2006) 17

Consumer Advocates v. Echostar Satellite Corp.,
113 Cal. App.4th 1351, 1360 (2003)..... 9

In re Farm Raised Salmon Cases,
42 Cal. 4th 1077 (2008)..... 25

Mead v. Sanwa Bank Cal.,
61 Cal. App. 4th 561, 567-68,
71 Cal. Rptr. 2d 625 (1998) 10

Mexicali Rose v. Superior Court,
1 Cal. 4th 617, 619, 631 n.5 (1992) 20

1 *Mix v. Ingersoll Candy Co.*,
2 6 Cal. 2d 674, 681
3 59 P.2d 144 (1936) 20

4 *Peterson v. Cellco Partnership*,
5 164 Cal. App. 4th 1583,
6 80 Cal. Rptr. 3d 316 (2008) 17

7 *Plotkin v. Sajahtera, Inc.*,
8 106 Cal. App. 4th 953, 966
9 131 Cal.Rptr. 2d 303 (2003) 14

10 *Robinson Helicopter Co., Inc. v. Dana Corp.*,
11 34 Cal. 4th 979, 990
12 102 P.2d 268 (2004) 16

13 *Shvarts v. Budget Group, Inc.*,
14 81 Cal. App. 4th 1153, 1158-60,
15 97 Cal. Rptr. 2d 722 (2000) 9

Federal Statutes

16 21 U.S.C. § 301 22
17 21 U.S.C. § 337(a) 23
18 Fed. R. Civ. P. 9(b) 6

Federal Regulations

19 21 C.F.R § 10 1.3 (a)-(d)..... 14
20 21 C.F.R § 101.3(d) 15
21 21 C.F.R § 101.4(a)(1)..... 15
22 21 C.F.R §§ 101.2, 101.4(a)(I) 15

State Statutes

23
24 Cal. Bus. & Prof. Code § 17200 8
25 Cal. Bus. & Prof. Code § 17500 8
26 Cal. Civil Code § 1770 8
27 Cal. Civil Code § 1782(a) 20

1 **I. INTRODUCTION.**

2 There is nothing deceptive, misleading or unlawful about the manner in which
3 defendant PepsiCo, Inc. (“PepsiCo”) labels and packages “Cap’n Crunch’s Crunch
4 Berries” (“Cap’n Crunch”), a breakfast cereal popular with Americans since its
5 introduction in 1968. Plaintiff Roy Werbel (“Plaintiff”), however, brings this action on
6 behalf of himself and a putative class of California consumers, claiming that PepsiCo’s
7 use of the word “Berries” in the cereal’s name and the fanciful depiction of brightly-
8 colored red, purple, green and teal cereal balls on the product’s box deceived him. He
9 claims that he “was misled by the packaging and marketing, which by design and intent
10 convey the message that the Product contains nutritional fruit content.” [Amended
11 Complaint (“Compl.”), ¶ 19.] Plaintiff further avers that “[h]e trusted the Quaker label
12 because of the company’s long history of producing other wholesome breakfast cereals.”
13 [Id.] Plaintiff avers that PepsiCo’s packaging of Cap’n Crunch violates the federal Food,
14 Drug and Cosmetics Act (“FDCA”) and California’s Sherman Food, Drug and Cosmetics
15 Act, a violation which, according to Plaintiff, gives rise to a host of state law claims,
16 including false advertising, unfair competition, fraud, breach of express and implied
17 warranties and unjust enrichment.

18 There is a lot left out of Plaintiff’s Amended Complaint however. Mr. Werbel is
19 now the third consumer credulous enough to lead his name to a lawsuit advancing this
20 utterly absurd theory that the same lawyers have presented -- unsuccessfully -- twice
21 before, in different districts. Neither time has the claim advanced beyond the pleading
22 stage. The first case was styled *McKinness v. PepsiCo, Inc.*, United States District Court
23 for the Central District of California, Case No. 07 CV-2609-JFW (the “*McKinness*
24 *Action*”). That case was dismissed with prejudice when plaintiff failed timely to file a
25 response to a motion to dismiss.

1 The second case made it one step further: i.e., PepsiCo's motion to dismiss was
2 actually decided on the merits in *Sugawara v. PepsiCo, Inc.*, United States District Court
3 for the Eastern District of California, Case No. 2:08 CV-01335-MCE (the "Sugawara
4 Action"). Judge Morrison England III granted PepsiCo's motion to dismiss, and the
5 Court's concluding statement should have been deterrent enough to prevent any more
6 sequels:

7 For the reasons just stated, Defendant's Motion to Dismiss
8 is Granted without leave to amend.

9 Under normal circumstances, when this Court grants a
10 Motion to Dismiss, the Plaintiff is given a reasonable period of
11 time, usually twenty (20) days, in which to file an amended
12 complaint. In this case, however, it is simply impossible for
13 Plaintiff to file an amended complaint stating a claim based on
14 these facts. The survival of the instant claim would require this
15 Court to ignore all concepts of personal responsibility and
16 common sense. The Court has no intention of allowing that to
17 happen.

18 [May 20, 2009 Minute Order, at 12. A true and correct copy of Judge England's
19 complete Minute Order is attached hereto as Exhibit 1.] Notably, on April 19, 2010, the
20 Ninth Circuit Court of Appeals entered final judgment dismissing Ms. Sugawara's
21 appeal. [A true and correct copy of the Judgment is attached as Exhibit 2.]

22 Rather than challenging Judge England's ruling directly, the plaintiffs lawyers
23 merely moved west to this district and found a new plaintiff. The only substantive
24 difference between Werbel's complaint and the two that preceded it is that someone
25 dusted off a 40 year old file from the patent and trademark office and found one
26 preliminary comment from one staffer to the effect that berries might be confused for
27

1 fruit. The reality, however -- as revealed by the balance of Exhibit B to the Amended
2 Complaint -- is that the trademark application was approved in short order and has been
3 renewed multiple times since without so much as a whimper of protest from any quarter
4 that reasonable people were foolish enough to believe that Crunch Berries came from
5 crunchberry trees.

6 The notion that any reasonable consumer would pour over a 40 year old trademark
7 application before heading out to buy groceries is ridiculous on its face. Inasmuch as the
8 only “improvement” in this twice-rejected legal theory is the overruled rumination of a
9 trademark examiner made before man walked on the moon, this new effort should meet
10 the same fate as the other cases.

11 *As a matter of pleading*, Plaintiff fails to state his claims with the level of
12 particularity required in federal court. Plaintiff does not identify where, when or how
13 many times he saw and was misled by the Cap’n Crunch packaging. Nor does Plaintiff
14 identify where, when or how many times he purchased Cap’n Crunch. Indeed, Plaintiff
15 fails even to identify the impact the Cap’n Crunch package had on his or on the all-
16 important “reasonable consumer.” Although the Amended Complaint also refers to
17 marketing, there are no details whatsoever alleged about anything other than the actual
18 cereal box. These shortcomings all render the Amended Complaint susceptible to
19 dismissal for failure to satisfy Rule 9, which the Ninth Circuit held in *Kearns v. Ford*
20 *Motor Co.*, 567 F.3d 1120 (9th Cir. 2009) applies to Plaintiff’s claims.

21 *As a matter of law*, Plaintiffs entire Amended Complaint, and each of its causes of
22 action, is deficient for two separate and distinct reasons. *First*, no reasonable consumer
23 could have been misled to believe that Cap’n Crunch contains any type or amount of real
24 fruit from the mere use of the phrase “Crunch Berries” and the depiction of brightly-
25 colored balls of cereal that: (i) are not shaped like any recognizable fruit; (ii) are not
26 pictured together with any fruit; and (iii) are not claimed to taste like any real fruit - they
27

1 are merely colored balls of cereal that have no discernable “characterizing flavor.” In
2 fact, the Cap’n Crunch box conspicuously proclaims on its front, top and side panels, that
3 it is a “**SWEETENED CORN & OAT CEREAL**,” which is confirmed by the listing of
4 the cereal’s ingredients on the side panel. [PepsiCo’s Request for Judicial Notice
5 (“RJN”), Ex. 1.] *Second*, Plaintiff’s entire Complaint is preempted by the FDCA, which
6 mandates that only a governmental body has the authority to enforce the FDCA and its
7 regulations.

8 *As a result*, Plaintiff fails to state a cognizable legal theory against PepsiCo. This
9 theory has not improved with time or repetition. Just because plaintiff’s counsel have
10 identified one more person willing to lend his name to this absurd claim should not
11 produce a different outcome. No one -- not even Mr. Werbel himself -- can credibly
12 claim to have perused ancient trademark files for comments from bureaucrats that certain
13 proposed trademarks might be misleading. Therefore, any claimed reliance upon
14 overruled objections with respect to a trademark in use now for over 40 years is
15 unreasonable as a matter of law. Merely changing venue from Sacramento to San
16 Francisco should not produce a different result. Werbel’s claim -- like that of Ms.
17 Sugawara and the McKinness family before him -- is frivolous, and should be dismissed
18 with prejudice without leave to amend.

19 **II. DISMISSAL STANDARDS UNDER RULE 12(B)(6) AND RULE 9(B).**

20 Rule 12(b)(6) of the Federal Rules of Civil Procedure calls for the dismissal of a
21 complaint “where a plaintiff’s complaint lacks a ‘cognizable legal theory’ or sufficient
22 facts to support a cognizable legal theory.” *Fraker v. KFC Corp.*, Case No. 06-CV-
23 01284, 2007 U.S. Dist. LEXIS 32041, at *5 (S.D. Cal. April 27, 2007), quoting *Balistreri*
24 *v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). Although a court must
25 accept as true the material factual averments in the complaint, “[c]onclusory allegations
26 of law and unwarranted inferences are insufficient to defeat a motion to dismiss for
27
28

1 failure to state a claim.” *Anderson v. Clow (In re Stac Elecs. Sec. Litig.)*, 89 F.3d 1399,
2 1403 (9th Cir. 1996) (internal quotation omitted). The Court should not “assume the
3 truth of legal conclusions merely because they are cast in the form of factual allegations.”
4 *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). If a complaint falls short
5 of these standards, the complaint should be dismissed, and the dismissal should be with
6 prejudice if amendment would be futile. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296
7 (9th Cir. 1990).

8 Here, not only does Plaintiff fail to state a cognizable legal theory, but he fails to
9 aver facts sufficient to support any legal theory. As such, Plaintiffs Complaint should be
10 dismissed, and dismissal should come with prejudice.

11 Furthermore, Plaintiff s fraud-based claims fail to satisfy federal court pleading
12 requirements. Rule 9(b) of the Federal Rules of Civil Procedure requires that “[i]n all
13 averments of fraud or mistake, the circumstances constituting the fraud or mistake shall
14 be stated with particularity.” Fed. R. Civ. P. 9(b). *Kearns Ford Motor Co.*, 567 F.3d at
15 1125. “Averments of fraud must be accompanied by ‘the who, what, when, where, and
16 how’ of the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106
17 (9th Cir. 2003), quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997); see also
18 *Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.)*, 42 F.3d 1541, 1548 (9th Cir.
19 1994) (to aver fraud with particularity, a plaintiff must set forth an explanation as to why
20 the statement complained of was false or misleading). When a claim’s averments fail to
21 satisfy the heightened pleading requirements of Rule 9(b), dismissal of the claim is
22 appropriate. See, e.g., *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001);
23 *Balistreri*, 901 F.2d at 701.

24 ///

25 ///

26 ///

1 **III. DISCUSSION.**

2 **A. Summary Of Plaintiff's Complaint.**

3 Plaintiff's Amended Complaint, and each of its causes of action, is premised upon
4 Plaintiff's claim that PepsiCo's use of the word "Berries" and the depiction of brightly-
5 colored red, purple, green and teal cereal balls on Cap'n Crunch's packaging deceived
6 Plaintiff, and all other purchasers of Cap'n Crunch, into believing that the cereal
7 contained some nutritional value derived from real fruit. [Amended Compl., ¶12.]

8 The core legal theory espoused in the Complaint is that PepsiCo's averred
9 deception violates the FDCA and its regulations, as well as California's "me too"
10 Sherman Food, Drug and Cosmetic Act. Based on this claimed violation of the FDCA
11 and its regulations, Plaintiff asserts that PepsiCo has violated California Business and
12 Professions Code Section 17200 (California's Unfair Competition Law ("UCL"));
13 California Business and Professions Code Section 17500 (California's false advertising
14 statute); and California's Consumer Legal Remedies Act ("CLRA"), another California
15 false advertising statute. Plaintiff further asserts that PepsiCo has made intentional
16 misrepresentations, has breached express and implied warranties to consumers and has
17 been unjustly enriched by selling Cap'n Crunch. Plaintiff therefore seeks injunctive
18 relief, restitution, disgorgement, damages, punitive damages and, of course, attorneys'
19 fees and costs. [Amended Compl., Prayer for Relief.] Standing in the way of this
20 recovery, however, are the essential facts, which are either contained in the Amended
21 Complaint or judicially recognizable, and the applicable law.

22 **B. Plaintiff's False Advertising And Unfair Competition Claims Fail To**
23 **State A Cognizable Legal Theory, As A Matter Of Law.**

24 In his First, Second and Sixth Causes of Action, Plaintiff avers violations of: (1)
25 the UCL; (2) California Business and Professions Code Section 17500; and (3) the
26
27
28

1 CLRA.¹ Like the rest of the Complaint, each of Plaintiff's false advertising and unfair
2 competition claims are premised on the same averment: that PepsiCo's use of the word
3 "Berries" and the depiction of colorful red, purple, teal and green cereal balls on its
4 Cap'n Crunch packaging is misleading because Crunch Berries are not real fruit, and
5 Cap'n Crunch's "only fruit content is a touch of strawberry fruit concentrate." [Amended
6 Complaint, ¶ 15.] This conclusory assertion, however, fails for two separate and
7 independent reasons: (1) no reasonable person could be misled into believing Crunch
8 Berries are actually fruit or that Cap'n Crunch is anything other than a "**SWEETENED**
9 **CORN & OAT CEREAL**," as conspicuously proclaimed on the product's labeling; and
10 (2) the FDCA authorizes the manner in which PepsiCo labels Cap'n Crunch.

11 **1. A Reasonable Consumer Could Not be Misled by Cap'n Crunch's**
12 **Packaging.**

13 Plaintiff's false advertising and unfair competition claims fail as a matter of law.
14 Viewing the Cap'n Crunch labeling in its entirety and in context, a reasonable consumer
15 could not be misled to believe that Cap'n Crunch is anything other than a
16 "**SWEETENED CORN & OAT CEREAL**."

17 To state a deceptive advertising claim under the UCL, Section 17500 or the CLRA,
18 Plaintiff must allege that PepsiCo made statements *likely to deceive a reasonable*
19 *consumer*. *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App.4th 1351,
20

21 ¹The UCL defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice
22 and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1
23 (commencing with Section 17500) of Part 3 of Division 7. . . " Cal. Bus. & Prof. Code § 17200. Under
24 Section 17500, it is unlawful for any person or entity "with intent directly or indirectly to dispose of real
25 or personal property . . . or to induce the public to enter into any obligation relating thereto, to make or
26 disseminate . . . many newspaper or other publications or any advertising device . . . any statement,
27 concerning that real or personal property . . . which is untrue or misleading . . . " Cal. Bus. & Prof. Code
28 § 17500. The Consumer Legal Remedies Act, enacted in 1970, established a nonexclusive statutory
remedy for "unfair methods of competition and unfair or deceptive acts or practices undertaken by any
person in a transaction intended to result or which results in the sale or lease of goods or services to any
consumer " Cal. Civil Code § 1770.

1 1360 (2003) (applying the reasonable consumer test to claims under the UCL, Section
2 17500 and the CLRA). The term “likely” means probable, not just possible. *Freeman v.*
3 *Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). If the alleged misrepresentation is such that
4 it is not probable for a reasonable consumer to be misled, then the cause of action should
5 be dismissed. *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1274-76, 39
6 Cal.Rptr.2d 634 (2006) (affirming dismissal of UCL and CLRA claims premised on
7 allegedly deceptive statements); *Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153,
8 1158-60, 97 Cal. Rptr. 2d 722 (2000) (affirming dismissal of UCL claims premised on
9 allegedly deceptive statements); *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D.
10 Cal. 1994) (whether statements are misleading “may be determined on a motion to
11 dismiss.”).

12 Plaintiff no doubt will argue that, notwithstanding Judge England’s resounding
13 rejection of the same claim a year ago, his claim cannot be dismissed at the pleading
14 stage because the Ninth Circuit re-wrote California law on food labeling two years ago in
15 *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008). The *Gerber* case was
16 another UCL/False Advertising case filed by the same plaintiff lawyers here in the
17 Southern District of California. The district court finally granted Rule 12(b)(6) motion
18 dismissing the plaintiffs’ third amended complaint. Fearing that the *Gerber* district court
19 had painted with too broad a brush, the California Attorney General and a consumer
20 advocacy group filed amicus briefs in the appeal and helped obtain a reversal of the
21 district court’s opinion, thus allowing that specific case to move beyond the pleading
22 stage on its unique facts.

23 But *Gerber* did not constitute a wholesale re-write of California state law of unfair
24 competition and false advertising.² The test remains whether the advertising at issue is

25 _____
26 ²The Ninth Circuit likewise expressly did not decide the issue whether the FDCA preempted the claims
27 against Gerber, concluding the issue was not properly before the court. As set forth below in the FDCA
28 does preempt any effort by a consumer like Plaintiff here to enforce alleged violations of the Act.

1 likely to confuse a reasonable consumer - i.e., an objective test. And the actual
2 advertising or package at issue remains the best thing to look at in determining whether a
3 reasonable consumer is likely to be confused.³ In examining the Crunch Berries package
4 - and comparing it to the Gerber package which the Ninth Circuit held could potentially
5 state a claim - the contrast could not be more stark, and it is clear that no reasonable
6 consumer likely would believe that Crunch Berries are fruit. Indeed, Judge England
7 pointed out that these differences in packaging made claims about Cap'n Crunch
8 “factually distinguishable” from *Gerber*. (See Ex. 1, at (order p.6:23.))

9 To begin with, the Cap'n Crunch packaging contains no picture of any fruit of any
10 kind. [RJN, Ex. 1.] There is no fanciful depiction of any sort of fruit. [*Id.*] The “berries”
11 themselves are merely round, crunchy, brightly colored cereal balls; the front of the
12 package plainly informs the consumer that the box contains “**SWEETENED CORN &**
13 **OAT CEREAL,**” and that the cereal balls themselves are “**ENLARGED TO SHOW**
14 **TEXTURE.**” [*Id.*] They do not look like a naturally occurring berry. [*Id.*] There is no
15 picture of a “Crunch Berry” tree shown on the package. [*Id.*] The colors of the “Crunch
16 Berries” - deep purple, chartreuse green, bright red and teal - are not those of any
17 naturally-occurring spherical berries, and certainly do not look like strawberries, as
18 Plaintiff apparently believes. [*Id.*] The package contains no direct or indirect association
19 with any recognizable fruit whatsoever. [*Id.*] Moreover, the box contains exactly what
20 the outside of the box shows - brightly-colored cereal balls which, with other cereal,
21 comprise a “**SWEETENED CORN & OAT CEREAL.**” [*Id.*] The product and its
22

23
24 ³Allegedly false advertising must be viewed in context and “the primary evidence is the advertisement
25 itself.” *Brockey v. Moore*, 107 Cal. App. 4th 86, 100, 131 Cal. Rptr. 2d 746 (2003). A court should
26 consider copies of the allegedly deceptive advertising when it is appended to a complaint; moreover, if
27 the facts evident from the face of the attached advertising contradict the descriptions or factual
28 averments in the complaint, the actual advertising material takes precedence. *Hal Roach Studios, Inc. v.*
Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); *Mead v. Sanwa Bank Cal.*, 61 Cal.
App. 4th 561, 567-68, 71 Cal. Rptr. 2d 625 (1998).

1 packaging have been essentially unchanged for over 30 years, and millions of children
2 have grown up eating Cap'n Crunch unencumbered by any notion that they were eating
3 the real fruit of the Crunch Berry tree or any other tree, bush, shrub or plant.⁴ Against
4 this fruit-free back drop, even the ancient objections of the trademark examiner were
5 unfounded, so it is little wonder that those objections went nowhere and the trademark
6 application was quickly approved. Moreover, as Plaintiff's own Exhibit B conclusively
7 establishes, the Crunch Berries trademark was renewed time after time since 1967, and
8 no one has raised an objection to renewal based even on potential consumer confusion,
9 much less any claim of actual confusion. [See Amended Complaint, Ex. B, at pp. 7, 14,
10 22.]

11 In contrast, the package at issue in the *Gerber* case contained images of oranges,
12 peaches, cherries and pineapples. *Gerber*, 552 F.3d at 936. In reality, however, the
13 product itself contained none of the pictured fruit, and instead was merely sweetened
14 with a small amount of white grape juice from concentrate, which was not pictured. *Id.*
15 In addition, the product was named "Fruit Juice Snacks," further reinforcing the visual
16 images of different fruits on the package. *Id.* Finally, the box claimed that the product
17 was "one of a variety of nutritious Gerber Graduates foods and juices." *Id.* at 936-37.

18 Nevertheless, the ingredient panel on each Gerber package listed the contents of its
19 "Fruit Juice Snacks," and made clear that the pictured fruits were not contained in the
20 actual product. The district court had found that the side panel ingredients and other
21 federally-mandated nutritional information controlled, and defined what a "reasonable
22 consumer's" expectations about the product could be as a matter of law. The Ninth
23 Circuit disagreed, stating:

24 _____
25 ⁴According to Webster's Ninth New Collegiate Dictionary: the word "berry" also includes within its
26 definition "The egg of a fish or lobster." No claim is made here that Plaintiff thought Crunch Berries
27 were actually fish or lobster eggs, but, as a practical matter, a reasonable consumer would be as likely to
28 be confused on that point as to believe Crunch Berries were real fruit.

1 Here, there are a number of features of the packaging Gerber used
2 for its Fruit Juice Snacks product which could likely deceive a
3 reasonable consumer. The product is called “fruit juice snacks”
4 and the packaging pictures a number of different fruits, potentially
5 suggesting (falsely) that those fruits or their juices are contained in
6 the product. Further, the statement that Fruit Juice Snacks was
7 made with “fruit juice and other all natural ingredients” could
8 easily be interpreted by consumers as a claim that all the
9 ingredients in the product were natural, which appears to be false.
10 And finally, the claim that Snacks is “just one of a variety of
11 nutritious Gerber Graduates foods and juices that have been
12 specifically designed to help toddlers grow up strong and healthy”
13 adds to the potential deception.

14 *Gerber*, 552 F.3d at 939.

15 The Cap’n Crunch package has none of these troubling attributes. What is
16 pictured on the outside of the box (save for Cap’n Horatio Crunch himself) is on the
17 inside of the box. There are no pictures of fruit; just brightly colored cereal balls that are
18 enlarged to show texture. [RJN, Ex. 1.] There is no reference to fruit on the package;
19 instead it is plainly labeled as a “**SWEETENED CORN & OAT CEREAL.**” [*Id.*]
20 Finally, there is no express nutrition claim made on the front panel. [*Id.*] Instead, all of
21 the federally-mandated nutritional information is on the side panel, where the federal
22 government requires it. *Gerber*, 552 F.3d at 939-40. Simply put, there is nothing on the
23 Cap’n Crunch package to lead any reasonable consumer, looking at the package as a
24 whole, to be misled into thinking that the brightly colored balls of cereal inside are real
25 fruit, or that the “**SWEETENED CORN & OAT CEREAL**” provides any nutritional
26 value from fruit.

27 **a) Cap’n Crunch’s packaging clearly and accurately**
28 **communicates its contents and ingredients.**

29 PepsiCo does not leave even the most confused consumer to wonder where
30 “Crunch Berries” really came from. The Cap’n Crunch labeling affirmatively and clearly

1 describes the cereal's contents and ingredients. Indeed, the side panel of the Cap'n
2 Crunch box lists the product's nutritional value and each of the ingredients in detail.
3 [RJN, Ex. 1.]

4 With nothing more than a quick glance at a Cap'n Crunch box a reasonable
5 consumer is made aware of Cap'n Crunch's contents and ingredients. Indeed, by his own
6 admission, Plaintiff was able to read the ingredient declaration and recite it in the
7 Amended Complaint. None of those ingredients reasonably could be mistaken for
8 "fruit," whether of the crunchberry tree or otherwise. These disclosures, by themselves,
9 defeat Plaintiff's false advertising and unfair competition claims. *Shvarts*, 81 Cal. App.
10 4th at 1160 (concluding that the defendant's rental car refueling policy could not be
11 deceptive, as a matter of law, because the policy was "clearly printed, in boldface, in the
12 rental agreement."). Dicta from the Ninth Circuit's opinion in *Gerber* does not suggest
13 any other conclusion. Simply put, PepsiCo does not rely on the side panel information to
14 "correct" any "misinterpretations" a reasonable consumer would form in looking at the
15 Crunch Berries package. *Gerber*, 552 F.3d at 940. Rather, the side panel expressly
16 reaffirms in greater detail exactly what the front panel states: namely, that the box
17 contains a "**SWEETENED CORN & OAT CEREAL**," some of which is in the shape of
18 brightly colored cereal balls. [RJN, Ex. 1.]

19 It is hard to imagine how the front of the package could be any more explicit in
20 proclaiming Cap'n Crunch is a "**SWEETENED CORN & OAT CEREAL**." California
21 courts have specifically held that, under the UCL, Section 17500 and the CLRA, "there is
22 no requirement that reasonable notice has to be the best possible notice." *Plotkin v.*
23 *Sajahtera, Inc.*, 106 Cal. App. 4th 953, 966, 131 Cal. Rptr. 2d 303 (2003). Not only does
24 Cap'n Crunch's packaging give reasonable notice of the cereal's contents and
25 ingredients, it gives notice legally required by the FDA, as discussed below. This being
26 the case, Cap'n Crunch's labeling is not misleading, as a matter of law.
27
28

2. The FDCA Authorizes Cap'n Crunch's Packaging.

Through detailed and meticulous regulations implementing the FDCA, the FDA directs the manner in which food is to be labeled. Specifically, the regulations mandate that a product's "principal display panel," contain a "statement of identity" describing the "common or usual name of the food." 21 C.F.R. § 101.3 (a)-(d). Here, PepsiCo clearly and expressly describes the Cap'n Crunch product as a "**SWEETENED CORN & OAT CEREAL**." [RJN, Ex. 1.] In further compliance with the FDA regulations, PepsiCo's statement of identity is presented in bold type, in a reasonable size and in lines generally parallel to its base as it is designed to be displayed. 21 C.F.R. § 101.3(d).

The FDCA also regulates what is known as the "information panel," which is the right-hand panel of a box that contains the product's nutritional information, including ingredients. 21 C.F.R. §§ 101.2, 101.4(a)(I). The regulations require that ingredients be "listed by common or usual name in descending order of predominance." 21 C.F.R. § 101.4(a)(1). Here, PepsiCo clearly and expressly lists the Cap'n Crunch ingredients in descending order of predominance on the information panel. [RJN, Ex. 1.] Plaintiff makes no claim that these labels are deficient in any respect.

Rather, Plaintiff's theory is that Cap'n Crunch is "misleading" under the FDA regulations because the package made him believe that Cap'n Crunch had nutritional fruit content. [Amended Complaint, ¶ 19.] But "Crunch Berries" are purely fictional; there is no claim made or implied that fruit provides any nutritional value. Quite the opposite, PepsiCo affirmatively states that Cap'n Crunch is a "**SWEETENED CORN & OAT CEREAL**" and clearly lists each Cap'n Crunch ingredient on the product's packaging. [RJN, Ex. 1.] Thus, the packaging that Plaintiff claims to be deceptive is, in fact, perfectly in conformity with the FDA regulations.

In sum, Plaintiff's false advertising claims under the UCL, Section 17500 and CLRA are deficient as a matter of law. No reasonable person could believe that Cap'n

1 Crunch is anything other than a “*SWEETENED CORN & OAT CEREAL*,” as
2 conspicuously proclaimed on the product’s labeling and the FDA authorizes the manner
3 in which PepsiCo labels Cap’n Crunch. As such, Plaintiff’s First, Second and Seventh
4 Causes of Action should be dismissed. And because Plaintiff cannot plead around the
5 manner in which PepsiCo labels and packages Cap’n Crunch, these claims should be
6 dismissed with prejudice.

7 **C. Plaintiff’s Common Law Fraud Claims Are Deficient And Are Not**
8 **Supported By Particularized Averments.**

9 Plaintiff’s Third Cause of Action for intentional misrepresentation is not supported
10 by the particularized averments required of fraud claims. [Amended Compl., ¶¶ 60-67.]
11 Moreover, Plaintiff fails to allege facts establishing several elements required to state
12 claims for negligent and intentional misrepresentation.

13 “The elements of fraud are: (1) a misrepresentation (false representation,
14 concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to
15 defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.”
16 *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990, 102 P.3d 268 (2004).
17 And Plaintiff’s intentional misrepresentation claim requires averments as to what
18 PepsiCo said in its advertisements or promotions and how Plaintiffs were impacted. All
19 this, Plaintiff has failed to do.

20 Further, Rule 9(b) of the Federal Rules of Civil Procedure requires federal court
21 plaintiffs to assert their fraud claims with particularity. *Kearns*, 567 F.3d at 1125; *Vess*,
22 317 F.3d at 1106, citing *Bly-Magee*, 236 F.3d at 1019. In other words, under Rule 9(b),
23 Plaintiff’s fraud claims must include averments regarding the “who, what, when, where
24 and how” of the actions Plaintiff complains about, and must also identify why Plaintiffs
25 contend the statements are false or misleading. *Id.* (emph. added).

1 The conclusory averments Plaintiff offers to support his fraud-based claims fall far
2 short of establishing “the who, what, when, where, and how” of the misconduct charged.
3 Plaintiff merely claims that he “had been exposed to advertising and representations of
4 PepsiCo and Quaker” and that he “was misled by the packaging and marketing, wherein
5 by design and intent convey the message that the Product contains nutritional fruit
6 content.” [Amended Complaint, ¶19.] That is it.

7 Plaintiff does not aver any *facts* concerning the circumstances under which he was
8 exposed to the Cap’n Crunch packaging - such as, when he saw the packaging or where
9 he saw the packaging. Similarly, Plaintiff does not aver any *facts* concerning the
10 circumstances surrounding his purchase(s) of Cap’n Crunch - for instance, when he
11 purchased the product, where he purchased the product or the number of times he
12 purchased the product.⁵ Most importantly, Plaintiff avers no specific *facts* regarding the

13 _____
14 ⁵ For similar reasons, Plaintiff’s claims under the UCL, Section 17500 and the CLRA are further
15 defective because Plaintiff does not aver facts showing that he “suffered an injury in fact” and “lost
16 money or property” as a result of PepsiCo’s averred misconduct. Proposition 64, which was approved
17 by the voters in the November 2004 General Election, amended certain sections of the UCL and Section
18 17500. *Californians For Disability Rights v. Mervyn’s, LLC*, 39 Cal. 4th 223, 227-29, 138 P.3d 207
19 (2006). Under current law, only persons who have been injured in fact and have lost money or property
20 as a result of the alleged unfair competition or false advertising have standing to bring actions for relief
21 under the UCL and Section 17500. *Id.* Here, Plaintiff avers that he purchased this product because he
22 had been exposed to the advertising and representations of PepsiCo and Quaker. [Compl., ¶10.] All that
23 can be said about this averment is that he got exactly what he paid for. Plaintiff never sets forth specific
24 facts to support this conclusory averment or that he lost other money or property as a result of the
25 averred misconduct. As such, Plaintiff does not have standing to pursue his UCL and Section 17500
26 claims. Plaintiff’s CLRA claim is likewise deficient because the CLRA has always required that a
27 plaintiff demonstrate traditional standing (i.e., injury-in-fact caused by the defendant’s misconduct). A
28 recent California Court of Appeal decision highlights that the allegations in the complaint fail to set
forth any injury in fact. In *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 80 Cal. Rptr. 3d 316
(2008), the plaintiffs sought to recover certain insurance premiums included with the sale of
communication equipment on the ground that a portion of the premium was retained by a person who
was not properly licensed to sell insurance. The court held that such claims did not satisfy either the
injury in fact requirement under the UCL, nor state a viable claim for unjust enrichment. *Id.* at 1593.
The bottom line conclusion was quite simple: plaintiffs had gotten the benefit of their bargain. *Id.*
There was no allegation that the plaintiffs had paid more for the insurance from defendants, or could
have gotten it cheaper from a licensed broker. *Id.* The mere fact that they paid money and received a
product in return is simply not actionable absent an allegation that they paid more due to the UCL

1 effect the Cap'n Crunch packaging had on him, other than to say (in purely conclusory
2 terms) that he was "misled." He says nothing at all about any "marketing" other than the
3 box. In short, Plaintiff provides no details on "the who, what, when, where, and how" of
4 the averred deception. Not only does such a paucity of averments fail under Rule 9(b),
5 but in a case like this, factual detail regarding the claimed deception is even more
6 important because the art work and other non-FDCA required contents of PepsiCo's
7 packaging and labeling of Cap'n Crunch frequently change in order to capitalize on new
8 promotions and marketing efforts. Where, as here, a complaint is deficient for a pure lack
9 of factual averments regarding the averred deception, dismissal of the complaint is
10 appropriate. *Vess*, 317 F.3d at 1107, citing *Bly-Magee*, 236 F.3d at 1019; *In re*
11 *Burlington Coat Factory Sec Litig.*, 114 F.3d 1410, 1424 (3d Cir. 1997) (dismissal under
12 Rule 9(b) proper even if it would not have been under Rule 12(b)(6) alone).

13 But what is more, the facts Plaintiff does aver demonstrate that PepsiCo has made
14 no representations that are untrue, false or deceptive. As demonstrated above, each
15 affirmative representation made on the Cap'n Crunch labeling is accurate and true. Put
16 simply, Plaintiff's factual averments do not establish the requisite elements of fraud and
17 should therefore be dismissed. And here too, because Plaintiff cannot plead around the
18 manner in which PepsiCo packages and labels Cap'n Crunch, Plaintiff's
19 misrepresentation claim should be dismissed with prejudice.

20 **D. Plaintiff's Express And Implied Warranty Claims Are Deficient.**

21 For good measure, Plaintiff includes claims for breach of an express warranty and
22 breach of an implied warranty of merchantability in his Amended Complaint. [Amended
23 Compl., ¶¶ 68-72; 73-78.] Without alleging any specific statements or representations, in
24

25 violation, *Id.* The same logic holds true here. Plaintiff has not alleged that Cap 'n Crunch cereal would
26 have sold for less if it bore the package label he seeks, nor does he claim that PepsiCo was able to
27 charge premium prices for Cap'n Crunch by tricking consumers into thinking they were buying fruit.
28 Absent such allegations, he fails to allege any injury in fact, and his claims fail.

1 his Fifth Cause of Action, Plaintiff claims PepsiCo expressly warranted that Cap'n
2 Crunch "contains berries," and he is suing for breach of that express warranty.
3 [Amended Compl., ¶ 69.] And in his Sixth Cause of Action, Plaintiff claims that Cap'n
4 Crunch is not "merchantable" because it "does not have the characteristics, qualities and
5 uses represented," because it is not a "substantially fruit based product deriving
6 nutritional value from fruit." [Amended Compl., ¶ 74.] Neither of these claims are
7 supported by the facts alleged or the law of express and implied warranties.

8 Under California Commercial Code Section 2313(1), "[a]ny affirmation of fact or
9 promise by the seller to the buyer which relates to goods and becomes part of the basis of
10 the bargain creates an express warranty that the goods shall conform to the affirmation or
11 promise." Here, as demonstrated above, PepsiCo simply did not make any affirmation of
12 fact or promise in the marketing of Cap'n Crunch that Cap'n Crunch had any fruit
13 content. And a review of Plaintiff's Fifth Cause of Action reveals that Plaintiff has
14 averred none. To the contrary, the packaging of each Cap'n Crunch box expressly lists
15 the cereal's ingredients and contents and affirmatively proclaims that the product is a
16 "**SWEETENED CORN & OAT CEREAL.**" [RJN, Ex. 1.] Thus, any claim for breach
17 of express warranty is fatally defective and must be dismissed.

18 Plaintiff's breach of the implied warranty of merchantability should meet the same
19 fate. The implied warranty of merchantability does not impose the general requirement
20 that goods precisely fulfill buyers' subjective expectations. *American Suzuki Motor*
21 *Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1296, 44 Cal. Rptr. 2d 526 (1995).
22 Instead, the implied warranty requires that goods meet the "**minimum level of quality.**"
23 *Id.* (emph. added). In order for food to be below the minimum level of quality it must be
24 unfit for human consumption, which means that the food includes dangerous, foreign
25 substances such as "glass, stones, wires or nails" or consists of "tainted, decayed,
26 diseased, or infected meats and vegetables." *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674,
27

1 681, 59 P.2d 144 (1936); *Mexicali Rose v. Superior Court*, 1 Cal. 4th 617, 631 n.5, 4 Cal.
2 Rptr. 2d 145 (1992). Plaintiff avers no facts - and, indeed, cannot - claiming that Cap'n
3 Crunch is unfit for human consumption or that it contains any foreign, hazardous
4 substance. Rather, Plaintiff merely avers that the product is not substantially fruit based;
5 other than that, he has no complaints, and, indeed, alleges that he has been eating Cap'n
6 Crunch for at least the past 4 years. [Compl., ¶¶ 9-10; ¶ 19.] This does not state a claim
7 for breach of the implied warranty of merchantability .

8 **E. Plaintiff's CLRA Claim Is Deficient.**

9 The CLRA provides that in order to maintain any action for damages, a plaintiff
10 basing claims upon alleged CLRA violations must provide notice of those violations at
11 issue to the prospective defendants at least thirty (30) days prior to commencing the
12 action. Cal. Civil Code § 1782(a). If a plaintiff fails to give the required notice, the
13 CLRA claims must be dismissed. *Id.* Notice must be sent prior to commencement of the
14 action, even if the plaintiff seeks to delay in asserting damage claims until a subsequent
15 amended pleading. *Id.*, § 1782(d). Here, the original complaint was filed on September
16 22, 2009, but was never served. The Amended Complaint was not served until March
17 2010. However, neither the Complaint nor the Amended Complaint had a copy of
18 Plaintiff's notice letter attached. Plaintiff fails to show that he provided any notice, much
19 less timely and proper notice.

20 In *Utility Consumers' Action Network v. Spring Solutions, Inc.*, Case No. C07-CV-
21 2231-W (RJB), 2008 WL 1946859, at *5 (S.D. Cal. Apr. 25, 2008), the plaintiffs claimed
22 they had given notice of their CLRA claims one day before they filed their original
23 complaint. In the original complaint, the plaintiffs alleged that they were giving notice
24 and that, if the defendant failed to provide adequate relief in thirty days, plaintiffs would
25 amend to seek damages. *Id.* Indeed, the plaintiffs filed an amended complaint seeking
26
27
28

1 such damages on January 2, 2008. *Id.* at *1. The court dismissed the plaintiffs' CLRA
2 claims, holding:

3 The CLRA requires a pre-filing notice before a plaintiff files a
4 civil complaint seeking damages under the CLRA. The notice is
5 required so that the parties can, in good faith, attempt to resolve
6 the issues by settlement, thus obviating the need to pursue claims
7 by means of a civil action ... The pre filing notice serves to avoid
8 litigation, not to put additional pressure on a defendant during the
9 course of litigation ... Threatening to sue for damages in a
10 complaint, and then doing so in an amended complaint, does not
11 serve the purposes of [a] prefiling notice.

12 *Id.* at *6 (emphasis in original). See also *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d
13 1181, 1196 (S.D. Cal. 2005) (dismissing CLRA damage claims with prejudice, and
14 stating that “[s]trict adherence to the statute’s notice provision is required to accomplish
15 the Act’s goals of expeditious remediation before litigation”), *aff’d*, 252 F. App’x 777
16 (9th Cir. 2007); *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1304 (S.D. Cal. 2003)
17 (dismissing premature CLRA claims with prejudice).

18 Here, Plaintiff failed to establish that he provide the requisite notice before he filed
19 suit. This is not what the CLRA requires, and has been routinely condemned as deficient.
20 This Court should do the same, and dismiss with prejudice Plaintiff’s claims based upon
21 alleged CLRA violation.

22 **F. Plaintiff’s Complaint Is Preempted By The FDCA.**

23 Even if Plaintiff’s Complaint otherwise was adequately pled and based upon viable
24 legal theories - which it fails in both respects - the Complaint still is subject to dismissal.
25 Although Plaintiff has attempted to camouflage it, the fact is his claim is predicated upon
26 an alleged violation of the Food, Drug & Cosmetics Act (“FDCA”). 21 U.S.C. § 301 et
27 seq. These averred violations are set forth in paragraph 18 of the Amended Complaint
28 and the accompanying footnotes. However, in an actual act of “false advertising,”

1 Plaintiff tries to pass off his claim as one arising solely under state law. So Plaintiffs
2 claims present a paradox: on the one hand, there can be no violation of any state law
3 claim that is not predicated upon a violation of the FDCA and its underlying regulations.
4 On the other hand, there is no private right of action for an individual to enforce
5 violations of the FDCA, either directly or indirectly under the guise of state law.
6 Enforcement of the FDCA and its regulations is reserved for the federal government and,
7 in limited circumstances, state governments, in order to ensure uniformity in the required
8 labeling of food sold in interstate commerce. Thus federal law of preemption bars
9 Plaintiff s claims here.

10 The Supremacy Clause of the United States Constitution grants Congress the
11 power to preempt state law. *Crosby v. National Foreign Trade Council*, 530 U.S. 363,
12 372 120 S.Ct. 2288 (2000). Among other things, the doctrine of preemption requires that
13 state-law causes of action be preempted when they conflict with federal laws or ““stand[]
14 as an obstacle to the accomplishment and execution of the full purposes and objectives of
15 Congress.”” *Id.* at 373. “Federal regulations have no less preemptive effect than federal
16 statutes.” *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153-54,
17 102 S.Ct. 3014 (1982).

18 The “FDCA presents a comprehensive regulatory scheme of branding and labeling
19 of food products.” *Fraker*, 2007 U.S. Dist. LEXIS 32041, at *10. Section 337(a) of the
20 FDCA mandates that a proceeding to enforce the FDCA or to restrain a violation must be
21 commenced by and in the name of the United States, except that a state may commence a
22 proceeding for the civil enforcement of, or to restrain a violation of, certain provisions
23 after giving notice to the federal government. 21 U.S.C. § 337(a) (“All such proceedings
24 for the enforcement, or to restrain violations, of this chapter shall be by and in the name
25 of the United States.”), (b). In light of this statutory mandate, the Supreme Court has
26 concluded that “[t]he FDCA leaves no doubt that it is the Federal Government rather than
27

1 private litigants who are authorized to file suit for noncompliance . . .” *Buckman Co. v.*
2 *Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 n.4, 121 S.Ct.1012 (2001). In *Buckman*, the
3 Supreme Court explained that centralization of enforcement power provides
4 administrative “flexibility” that is a “critical component of the statutory and regulatory
5 framework under which the FDA pursues difficult (and often competing) objectives.” *Id.*
6 at 349; see also *Pacific Trading Co. v. Wilson & Co., Inc.*, 547 F.2d 367, 370 (7th Cir.
7 1976) (“the statute does not provide a cause of action for private parties . . .”).

8 Courts have consistently prevented private litigants from attempting to “plead
9 around” the FDCA’s bar on private enforcement through state-law claims predicated on
10 violations of the FDCA. For example, in *Summit Tech., Inc. v. High-Line Medical*
11 *Instruments Co, Inc.*, 922 F. Supp. 299, 316 (C.D. Cal. 1996), the court dismissed claims
12 for unfair competition and false advertising under California law, where the predicate
13 unlawful conduct was alleged to be a violation of the FDCA. The court found that the
14 plaintiff’s claims represented an improper attempt to “circumvent [Section 337(a)’s]
15 denial of a private right of action to enforce violation of the FDCA.” *Id.* at 306.
16 Accordingly, the court granted the defendant’s motion to dismiss the plaintiff’s false
17 advertising claim because it “strayed too close to the exclusive enforcement of the FDA.”
18 *Id.* at 306,316. The unfair competition claim was also dismissed as “an attempt to assert
19 a private right of action where none exists.” *Id.* at 316; *Mylan Labs, Inc. v. Matkari*, 7
20 F.3d 1130, 1139 (4th Cir. 1993) (affirming dismissal of claims attempting to “enforce
21 independently the FDCA” through “ingenious pleading.”); *Sandoz Pharms. Corp. V.*
22 *Richardson-Vicks, Inc.*, 902 F.2d 222, 231 n.10 (3d Cir. 1990) (affirming finding of
23 preemption where private claims “require [ed] original interpretation of [the FDCA and
24 its] accompanying regulations”; “[plaintiff] is free to petition the FDA to investigate
25 these labeling violations.”).

1 The California Supreme Court recently sidestepped this line of federal authority
2 and held that food mislabeling claims are not preempted and may proceed under the
3 UCL. *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 175 P.3d 1170 (2008). In that
4 case, however, the plaintiffs expressly invoked provisions of the California Health &
5 Safety Code as the bases of their claims. *Id.* at 1095. Those requirements were identical
6 to the federal requirements, yet, in the court’s mind, amounted to independent, state law
7 requirements, which could be enforced by private plaintiffs in UCL claims, who cited
8 these “identical to federal” requirements as the basis for their claims. *Id.* at 1098-99.

9 Respectfully, the California Supreme Court’s opinion on the federal issues of
10 preemption does not bind this Court. *Fraker*, 2007 U.S. Dist. LEXIS 32041, at *12.
11 Moreover, the court’s analysis was fundamentally flawed. At the heart of the federal
12 cases is the realization that Congress left no room for private parties to enforce alleged
13 violations of the FDCA. See, e.g. *Fraker*, at 10-11 (“To overlay the state law tort system
14 over the FDCA would significantly increase the burdens on the FDA to ensure uniform
15 enforcement of its administrative duties.”)

16 Accordingly, to the extent Plaintiff contends that alleged violations of the FDCA
17 and Sherman Law give rise to viable state law claims, such claims are impliedly
18 preempted by the FDCA.”). *Cf. Buick v. World Savings Bank*, 637 F. Supp. 2d 765 (E.D.
19 Cal. 2008) (dismissing UCL claims on the ground that claims based upon violations of
20 the federal Truth in Lending Act are preempted). The court has no valid basis for
21 rejecting these federal cases. Indeed, the primary bases for the California Supreme
22 Court’s opinion are one legislator’s comments in the legislative debate regarding a
23 different statute. *Salmon*, 42 Cal. 4th at 1090-91.

24 ///

25 ///

26 ///

1 **IV. CONCLUSION.**

2 For the foregoing reasons, Plaintiff s false advertising, unfair competition and
3 misrepresentation claims should be dismissed pursuant to Rule 12(b)(6) and Rule 9(b).
4 Plaintiff s warranty and unjust enrichment claims should be dismissed pursuant to Rule
5 12(b)(6). And Plaintiff s entire Complaint should be dismissed as preempted by the
6 FDCA pursuant to Rule 12(b)(6). Dismissal should be without leave to amend as
7 amendment would be futile.

8
9 DATED: April 23, 2010

GREENBERG TRAURIG, LLP

10 By: //S//: Rick L. Shackelford
11 RICK L. SHACKELFORD
12 Attorneys for Defendant
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27