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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JANINE SUGAWARA,

No. 2:08-cv-01335-MCE-JFM

Plaintiff,

v.

MEMORANDUM AND ORDER

PEPSICO, INC.,

Defendant.

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Plaintiff initiated this putative class action on June 9, 2008, and, on September 23, 2008, filed the operative First Amended Complaint ("FAC") alleging causes of action arising under California Business & Professions Code §§ 17200, et seq., and 17500, et seq., for Intentional Misrepresentation, Breach of Express Warranty, Breach of Implied Warranty, and violation of the Consumer Legal Remedies Action, California Civil Code § 1770. Presently before the Court is Defendant's Motion to Dismiss the FAC. For the following reasons, Defendant's Motion is granted.<sup>1</sup>

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<sup>1</sup> Because oral argument will not be of material assistance, the Court ordered this matter submitted on the briefing. E.D. Cal. Local Rule 78-230(h).

**BACKGROUND<sup>2</sup>**

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3 Plaintiff is an individual consumer and resident of  
4 California. Defendant manufactures, markets, and promotes "Cap'n  
5 Crunch with Crunchberries" cereal ("the Product"). Defendant  
6 merged with The Quaker Oats Company ("Quaker") in 2001, and  
7 Quaker is now a unit of Defendant.

8 In addition to the use of the word "berries" in the Product  
9 name, the Product's principal display panel ("PDP"), the portion  
10 of the Product box designed to face consumers as they shop in a  
11 market aisle, features the Product's namesake, "Cap'n Crunch"  
12 thrusting a spoonful of "Crunchberries" at the prospective buyer.

13 The Crunchberries are pieces of cereal in bright fruit  
14 colors, shaped to resemble berries. While close inspection  
15 reveals that the Crunchberries on the PDP are not really berries,  
16 Plaintiff contends that the colorful Crunchberries, combined with  
17 use of the word "berry" in the Product name, convey the message  
18 that Cap'n Crunch is not all sugar and starch, but contains  
19 redeeming fruit. This message is allegedly supplemented and  
20 reinforced by additional marketing that represents that "Crunch  
21 Berries is a combination of Crunch biscuits and colorful red,  
22 purple, teal and green berries."

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28 <sup>2</sup> The following facts are derived, primarily verbatim, from Plaintiff's FAC.

1 In actuality, the Product contains no berries of any kind.  
2 If the consumer takes the box from the shelf and examines the  
3 fine print of the ingredient list, he or she will discover that  
4 the only fruit content is a touch of strawberry fruit  
5 concentrate, twelfth in order on the ingredient list.

6 Accordingly, Plaintiff contends, *inter alia*, that  
7 Defendants' marketing of the Product is deceptive and likely to  
8 mislead and deceive a reasonable consumer. Indeed, during the  
9 past four years, Plaintiff alleges she purchased the Product in  
10 large part because she had been exposed to advertising and  
11 representations of Defendant. She was allegedly misled by the  
12 packaging and marketing, which she argues convey the message that  
13 the Product contains real, nutritious fruit. Plaintiff contends  
14 that she trusted Defendant's Quaker label because that company  
15 has a long history of producing wholesome breakfast cereals.

16 Since Plaintiff began purchasing the Product, the Strategic  
17 Alliance for Healthy Food and Activity Environments published the  
18 results of a study examining the ingredients of widely advertised  
19 foods with references to fruit on the packaging. The study  
20 concluded, among other things, that despite advertising and  
21 packaging that suggests the presence of fruit, more than half of  
22 the food products studied, including the Product at issue here,  
23 contain no fruit at all. According to Plaintiff, had she known  
24 that the Product contained no fruit, she would not have purchased  
25 it.

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**STANDARD**

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3 On a motion to dismiss for failure to state a claim under  
4 Rule 12(b)(6), all allegations of material fact must be accepted  
5 as true and construed in the light most favorable to the  
6 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,  
7 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and  
8 plain statement of the claim showing that the pleader is entitled  
9 to relief" in order to "give the defendant fair notice of what  
10 the...claim is and the grounds upon which it rests." *Bell Atl.*  
11 *Corp. v. Twombly*, --- U.S. ----, 127 S. Ct. 1955, 1964 (2007)  
12 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a  
13 complaint attacked by a Rule 12(b)(6) motion to dismiss does not  
14 need detailed factual allegations, a plaintiff's obligation to  
15 provide the "grounds" of his "entitlement to relief" requires  
16 more than labels and conclusions, and a formulaic recitation of  
17 the elements of a cause of action will not do. *Id.* at 1964-65  
18 (internal citations and quotations omitted). Factual allegations  
19 must be enough to raise a right to relief above the speculative  
20 level. *Id.* at 1965 (citing 5 C. Wright & A. Miller, *Federal*  
21 *Practice and Procedure* § 1216, pp. 235-36 (3d ed. 2004) ("The  
22 pleading must contain something more...than...a statement of  
23 facts that merely creates a suspicion [of] a legally cognizable  
24 right of action")).

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1 A court granting a motion to dismiss a complaint must then  
2 decide whether to grant leave to amend. A court should "freely  
3 give" leave to amend when there is no "undue delay, bad faith[,]  
4 dilatory motive on the part of the movant, . . . undue prejudice  
5 to the opposing party by virtue of . . . the amendment, [or]  
6 futility of the amendment...." Fed. R. Civ. P. 15(a); Foman v.  
7 Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is  
8 denied only when it is clear the deficiencies of the complaint  
9 cannot be cured by amendment. DeSoto v. Yellow Freight Sys.,  
10 Inc., 957 F.2d 655, 658 (9th Cir. 1992).

#### 11 ANALYSIS

##### 12 1. Plaintiff's Unfair Competition, False Advertising, and 13 Consumer Legal Remedies Act Causes of Action 14

15 Plaintiff's First, Second, and Sixth Causes of Action fail  
16 as a matter of law. First, "California's Unfair Competition Law  
17 ('UCL') prohibits any 'unlawful, unfair or fraudulent business  
18 act or practice.'" Williams v. Gerber Products Co., 552 F.3d  
19 934, 938 (9th Cir. 2008), quoting Cal. Bus. and Prof. Code §  
20 17200. Additionally, "[t]he false advertising law prohibits any  
21 'unfair, deceptive, untrue, or misleading advertising.'" Id.,  
22 quoting Cal. Bus. and Prof. Code § 17500. Finally, "California's  
23 Consumer Legal Remedies Act ('CLRA') prohibits 'unfair methods of  
24 competition and unfair or deceptive acts or practices.'" Id.,  
25 quoting Cal. Civ. Code § 1770.

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1 Plaintiff's "claims under these California statutes are  
2 governed by the 'reasonable consumer' test." Id., citing Freeman  
3 v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995), Lavie v. Procter  
4 & Gamble Co., 105 Cal. App. 4th 496, 506-07 (1st Dist. 2003).

5 "Under the reasonable consumer standard, [Plaintiff] must show  
6 that members of the public are likely to be deceived. The  
7 California Supreme Court has recognized that these laws prohibit  
8 not only advertising which is false, but also advertising which,  
9 although true, is either actually misleading or which has a  
10 capacity, likelihood or tendency to deceive or confuse the  
11 public." Id. (internal citations and quotations omitted).

12 "[P]rimary evidence in a false advertising case is the  
13 advertising itself." Id., quoting Brockey v. Moore, 107 Cal.  
14 App. 4th 86, 100 (3d Dist. 2003). Thus, "whether a business  
15 practice is deceptive will usually be a question of fact not  
16 appropriate for decision on demurrer." Id. However,  
17 "[d]ecisions granting motions to dismiss claims under the Unfair  
18 Competition Law have occasionally been upheld." Id. This Court  
19 believes that the instant case falls into that "rare" category of  
20 cases in which dismissal is appropriate. See Id. at 939.

21 The leading Ninth Circuit case in this area, and the case on  
22 which Plaintiff primarily relies, is Williams, 552 F.3d 934.  
23 Nevertheless, that case is factually distinguishable from the  
24 instant action.

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1 In Williams, the Ninth Circuit determined that the district  
2 court had improperly granted a motion to dismiss because, in that  
3 case, the "packaging Gerber used for its Fruit Juice Snacks  
4 product...could likely deceive a reasonable consumer. The  
5 product [was] called 'fruit juice snacks' and the packaging  
6 picture[d] a number of different fruits, potentially suggesting  
7 (falsely) that those fruits or their juices [were] contained in  
8 the product. Further, the statement that Fruit Juice Snacks  
9 [were] made with 'fruit juice and other all natural ingredients'  
10 could easily [have been] interpreted by consumers as a claim that  
11 all the ingredients in the product were natural, which appear[ed]  
12 to be false. And finally, the claim that Snacks [was] 'just one  
13 of a variety of nutritious Gerber Graduates foods and juices that  
14 have been specifically designed to help toddlers grow up strong  
15 and healthy' add[ed] to the potential deception." Id. at 939.

16 In this case, to the contrary, while the challenged  
17 packaging contains the word "berries" it does so only in  
18 conjunction with the descriptive term "crunch." This Court is  
19 not aware of, nor has Plaintiff alleged the existence of, any  
20 actual fruit referred to as a "crunchberry." Furthermore, the  
21 "Crunchberries" depicted on the PDP are round, crunchy, brightly-  
22 colored cereal balls, and the PDP clearly states both that the  
23 Product contains "sweetened corn & oat cereal" and that the  
24 cereal is "enlarged to show texture." Thus, a reasonable  
25 consumer would not be deceived into believing that the Product in  
26 the instant case contained a fruit that does not exist.

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1           Additionally, contrary to the packaging in Williams, the  
2 instant packaging makes no claim to be particularly nutritious or  
3 to be designed specifically to meet the nutritional needs of  
4 toddlers or children, nor does it contain any images of actual  
5 fruit that would convince this Court the instant packaging was  
6 even potentially deceptive. In this case, there is no reference  
7 to fruit on the PDP unless one believes that a "Crunchberry" is  
8 some form of produce. Indeed, even though Plaintiff claims that  
9 the brightly-colored cereal balls are shaped to resemble berries,  
10 she acknowledges that "[c]lose inspection reveals that  
11 Crunchberries on the PDP are not really berries." Opposition,  
12 2:11. Accordingly, it is entirely unlikely that members of the  
13 public would be deceived in the manner described by Plaintiff.

14           For these same reasons, another California district court  
15 has previously rejected substantially similar claims directed  
16 against the packaging of Fruit Loops cereal, and brought by these  
17 same Plaintiff attorneys. See McKinnis v. Kellogg USA, 2007 WL  
18 4766060 (C.D. Cal. 2007) (rejecting each argument pursued here).  
19 Thus, because the instant facts are distinguishable from those in  
20 Williams, and are, to the contrary, more on par with those  
21 alleged in McKinnis, this Court now holds that Plaintiff has  
22 failed to state UCL, FAL, or CLRA claims as a matter of law.  
23 Defendant's Motion to Dismiss Plaintiff's First, Second, and  
24 Sixth Causes of Action is granted with leave to amend.

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1           **2. Plaintiff's Intentional Misrepresentation Cause of**  
2           **Action**

3           Plaintiff's Intentional Misrepresentation claim fares no  
4 better. Under California Law, "[t]he elements of intentional  
5 misrepresentation, or actual fraud, are: '(1) misrepresentation  
6 (false representation, concealment, or nondisclosure);  
7 (2) knowledge of falsity (scienter); (3) intent to defraud (i.e.,  
8 to induce reliance); (4) justifiable reliance; and (5) resulting  
9 damage." Anderson v. Deloitte & Touche, 56 Cal. App. 4th 1468,  
10 1474 (1st Dist. 1997). Plaintiff lodged only the most cursory  
11 opposition to Defendant's Motion to Dismiss the instant claim,  
12 and for good reason, namely that the above discussion supports  
13 granting Defendant's Motion as to this claim as well.

14           First, Plaintiff has made no allegations indicating that the  
15 challenged packaging is false or contains false statements.  
16 Moreover, she has wholly failed to show that reliance on the  
17 package to reach the conclusion that the Product contains actual  
18 fruit is justifiable. To the contrary, as previously discussed,  
19 the packaging is not misleading and is entirely unlikely to  
20 deceive. Accordingly, Plaintiff has failed to state a claim, and  
21 Defendant's Motion to Dismiss Plaintiff's Third Cause of Action  
22 is granted with leave to amend.

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1           **3. Plaintiff's Breach of Express and Implied Warranty**  
2           **Causes of Action**

3           Finally, Plaintiff made no arguments in opposition to  
4 Defendant's Motion to Dismiss her claims for breach of various  
5 warranties, and her Fourth and Fifth Claims are now rejected as  
6 well. Through those causes of action, Plaintiff alleges, *inter*  
7 *alia*, that Defendant warranted the Product contained berries and  
8 that "the Product was a substantially fruit-based product  
9 deriving nutritional value from fruit." FAC, ¶¶ 61, 66.

10           First, Plaintiff's Breach of Express Warranty claim fails as  
11 a matter of law. In California, "[e]xpress warranties by the  
12 seller are created as follows: (a) Any affirmation of fact or  
13 promise made by the seller to the buyer which relates to the  
14 goods and becomes part of the basis of the bargain creates an  
15 express warranty that the goods shall conform to the affirmation  
16 or promise. (b) Any description of the goods which is made part  
17 of the basis of the bargain creates an express warranty that the  
18 goods shall conform to the description. (c) Any sample or model  
19 which is made part of the basis of the bargain creates an express  
20 warranty that the whole of the goods shall conform to the sample  
21 or model." Cal. Com. Code § 2313(1).

22           As stated, Plaintiff claims Defendant expressly warranted  
23 that the Product contains berries. However, that simply is not  
24 the case. Defendant chose the moniker "Crunchberries" for its  
25 brightly colored cereal balls. As far as this Court has been  
26 made aware, there is no such fruit growing in the wild or  
27 occurring naturally in any part of the world.

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1 Furthermore, a reasonable consumer would have understood the  
2 Product packaging to expressly warrant only that the Product  
3 contained sweetened corn and oat cereal, which it did.  
4 Accordingly, Defendant did not promise Plaintiff that the Product  
5 contained fruit, nor did the Product contain anything other than  
6 that which was actually expressly warranted. Thus, Defendant's  
7 Motion to Dismiss Plaintiff's Breach of Express Warranty cause of  
8 action is granted with leave to amend.

9 Plaintiff's Breach of Implied Warranty claim fails as well.  
10 California law states that goods are merchantable if they: "(a)  
11 Pass without objection in the trade under the contract  
12 description; and (b) in the case of fungible goods, are of fair  
13 average quality within the description; and (c) are fit for the  
14 ordinary purposes for which such goods are used; and (d) run,  
15 within the variations permitted by the agreement, of even kind,  
16 quality and quantity within each unit and among all units  
17 involved; and (e) are adequately contained, packaged, and labeled  
18 as the agreement may require; and (f) conform to the promises or  
19 affirmations of fact made on the container or label if any."  
20 Cal. Com. Code § 2314(2). The implied warranty "does not impose  
21 a general requirement that goods precisely fulfill the  
22 expectation of the buyer. Instead, it provides for a minimum  
23 level of quality." American Suzuki Motor Corp. v. Superior  
24 Court, 37 Cal. App. 4th 1291, 1296 (2d Dist. 1995) (internal  
25 citations and quotations omitted).

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1 As per the above discussion, because the Product packaging  
2 was not misleading or deceptive, Plaintiff received exactly what  
3 was described on the box. Accordingly, Plaintiff has failed to  
4 state a claim, and Defendant's Motion to Dismiss Plaintiff's  
5 Fifth Cause of Action is also granted with leave to amend.

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**CONCLUSION**

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10 For the reasons just stated, Defendant's Motion to Dismiss  
(Docket No. 23) is GRANTED without leave to amend.

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\_\_\_\_\_ IT IS SO ORDERED.

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Dated: May 20, 2009

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MORRISON C. ENGLAND, JR.  
UNITED STATES DISTRICT JUDGE