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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

NAKIA WILLIAMS and RITA TABIU,

Plaintiffs,

vs.

GERBER PRODUCTS COMPANY,

Defendant.

CASE NO. 05cv1278 JM(JFS)

ORDER GRANTING MOTION TO
DISMISS ALL CLAIMS WITH
PREJUDICE AND WITHOUT
LEAVE TO AMEND

Defendant Gerber Products Company ("Gerber") moves to dismiss all eight claims alleged in Plaintiff's Third Amended Complaint ("TCC"). Plaintiffs Naki Williams and Rita Tabiu oppose the motion. Pursuant to Local Rule 7.1(d)(1), this matter is appropriate for decision without oral argument. For the reasons set forth below, the court grants the motion to dismiss all claims with prejudice and without leave to amend.

BACKGROUND

On June 23, 2005 Plaintiffs commenced this action as a purported class action against Gerber and Novartis Corporation ("Novartis"). At issue is the advertising and product labeling used to promote one of Gerber's products known as Gerber Graduates for Toddlers Fruit Juice Snacks ("Snacks"). Plaintiffs allege that Gerber is a "part of the Novartis group of companies." In an unopposed motion, the court granted Novartis's motion to dismiss for lack of personal jurisdiction.

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1 Plaintiffs allege that the packaging for Snacks is deceptive in the following
2 ways: (1) the principal display panel features the words "Fruit Juice" and images of
3 oranges, peaches, strawberries, cherries, pineapple, and other berries but the juice only
4 contains "white grape juice from concentrate" and no juice from the fruits and berries
5 displayed on the label; (2) the side panel features the words "made with real fruit juice
6 and other all natural ingredients" but the product is mostly corn syrup and sugar; (3)
7 the side panel states that Snacks is "one of a variety of nutritious Gerber Graduates
8 foods and juices" but the product is not a nutritious food or juice; (4) the principal
9 display panel describes the product as "Fruit Juice Snacks" but the product is mostly
10 corn syrup and sugar and therefor a candy; (5) the descriptive phrase "Naturally
11 Flavored" does not comply with applicable type size requirements. (TAC ¶1).

12 Based upon these five allegedly misleading, deceptive, and false statements
13 Plaintiffs allege eight causes of action for violation of Bus. & Prof. Code §17200 et
14 seq., Bus. & Prof. Code §17500 et seq., negligent misrepresentation, intentional
15 misrepresentation, breach of express warranty, breach of implied warranty of
16 merchantability, breach of implied warranty of fitness for purpose, and violation of
17 California's Consumer Legal Remedies Act, Civil Code §1750 et. seq. For the third
18 time, Plaintiffs moves to dismiss all claims pursuant to Fed.R.Civ.Pro 12(b)(6).

19 DISCUSSION

20 Legal Standards

21 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in
22 "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.
23 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a
24 "cognizable legal theory" or sufficient facts to support a cognizable legal theory. See
25 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should
26 not dismiss a complaint "unless it appears beyond doubt that plaintiff can prove no set
27 of facts in support of his claim which would entitle [the party] to relief." Moore v. City
28 of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989) (quoting Conley v. Gibson, 355 U.S.

1 41, 45-46 (1957)), cert. denied, 496 U.S. 906 (1990). The defect must appear on the
2 face of the complaint itself. Thus, courts may not consider extraneous material in
3 testing its legal adequacy. See Levine v. Diamantheset, Inc., 950 F.2d 1478, 1482 (9th
4 Cir. 1991). The courts may, however, consider material properly submitted as part of
5 the complaint. See Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542,
6 1555 n.19 (9th Cir. 1989).

7 Finally, courts must construe the complaint in the light most favorable to the
8 plaintiff. See Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed,
9 116 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations
10 in the complaint, as well as reasonable inferences to be drawn from them. See Holden
11 v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations
12 of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion.
13 See In Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

14 **The Allegedly Deceptive Statements**

15 In order to state a claim under California's Bus. Prof. Code §17200 et seq. or the
16 Consumer Legal Remedies Act, Civil Code §1750, et seq., Plaintiffs must allege that
17 Defendants' statements are likely to deceive a reasonable consumer. See Consumer
18 Advocates v. Echostar Satellite Corp., 113 Cal.App.4th 1351, 1358-60 (2003);
19 Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995). The term "likely" means
20 probable, not just possible. Freeman, 68 F.3d at 289. If the alleged misrepresentation
21 would not mislead a reasonable consumer, then the allegation may be dismissed on a
22 motion to dismiss. See Haskell v. Time, Inc., 857 F.Supp. 1392, 1399 (E.D. Cal.
23 1994). The court properly considers the alleged deceptive product labeling as the
24 product packaging is specifically attached to the TAC. See Hal Roach Studios, 896
25 F.2d at 1555 n.19. In determining whether a statement is misleading under Section
26 17500, "the primary evidence in a false advertising case is the advertising itself."
27 Brockey v. Moore, 107 Cal.App.4th 86, 100 (2003).

28 Advertisements that amount to "mere" puffery are not actionable because no

1 reasonable consumer relies on puffery. See Cook Perkiss & Liehe v. N. Cal. Collection
2 Serv., 911 F.2d 242, 245 (9th Cir. 1990) (statement “we’re the low cost commercial
3 collection experts” non-actionable puffery). As noted in Cook,

4 The common theme that seems to run through cases considering puffery
5 in a variety of contexts is that consumer reliance will be induced by
6 specific rather than general assertions. ‘[A]dvertising which merely states
7 in general terms that one product is superior is not actionable.’ . . .
8 ‘However, misdescriptions of specific or absolute characteristics of a
9 product are actionable.’

10 Id. at 246; Consumer Advocates v. Echostar Satellite Corp., 113 Cal.App.4th 1351
11 (2003) (advertisement that satellite system provided “crystal clear picture” and “CD
12 quality” sound found to be non-actionable puffery while statements that the consumer
13 would receive “50 channels and a 7-day schedule” were actionable specific
14 representations and not puffery).

15 The “Fruit Juice” Statement and the Displayed Images

16 Plaintiffs allege the words “Fruit Juice” and images of oranges, peaches,
17 strawberries, cherries, pineapple, and other berries displayed on the packages creates
18 confusion and misrepresents the product’s contents because the product only contains
19 a small portion of grape juice and no juice from the fruits displayed on the packaging.
20 (Compl. ¶1(a)). To place this claim in context, the court notes that the words are
21 displayed in a banner and read in full “Fruit Juice Snacks,” not “Fruit Juice.” The fruit
22 displayed on the package includes pictures of both real fruit and fruit-like substances
23 that appear to be fruit flavored candy such as gum drops or hard candy in the shape of
24 fruit. Plaintiffs do not dispute that the packaging truthfully identifies “white grape
25 juice from concentrate” as the third most prominent ingredient, following corn syrup
26 and sugar. (Request for Judicial Notice Exh. D).¹

27 Plaintiffs contend that these statements are deceptive because Snacks does not
28 contain any of the fruit depicted on the packaging. One difficulty with this argument

¹ The court takes judicial notice of the actual packaging submitted by Gerber in its January 31, 2006 Request for Judicial Notice, Exh. D. The actual packaging better portrays the packaging than the black and white photocopies attached to the TAC.

1 is that the mere depiction of fruit, or fruit like substances, is not a specific affirmative
2 representation that the product contains those fruits. Another difficulty with Plaintiff's
3 argument is that no reasonable consumer upon review of the package as a whole would
4 conclude that Snacks contains the juice from the actual and fruit-like substances
5 displayed on the packaging particularly where the ingredients are specifically
6 identified. Plaintiffs repeatedly assert -- perhaps correctly -- that Snacks is primarily
7 flavored sugar water, a characterization even if true, would not mean that Snacks is
8 deceptively advertised. Where a consumer can readily and accurately determine the
9 nutritional value and ingredients of a product, and the product packaging does not
10 affirmatively mislead the consumer by means of specific representations, no reasonable
11 consumer would be misled by the words "Fruit Juice Snack" or deceived by depictions
12 of fruit and fruit-like substances on the primary packaging label.

13 Furthermore, as argued by Gerber, the images are not deceptive because the
14 depiction of the fruit and fruit-like images indicates that Snacks is fruit flavored and
15 the FDA authorizes the manner in which Gerber labels Snacks. The depictions of the
16 fruit suggest that the product is fruit flavored and, as indicated on the packaging label,
17 Snacks is a naturally flavored drink containing grape juice and natural flavors, along
18 with corn syrup, sugar, Vitamin C, and other listed ingredients.

19 Finally, the court rejects Plaintiffs' contention that Gerber's subsequent
20 alteration of the packaging demonstrates the deceptive qualities of the packaging at
21 issue. Whether the packaging at issue is actionable depends on the deceptive qualities
22 of the particular packaging, and not subsequent alterations to that packaging.

23 In sum, the court finds that these statements are not deceptive as a matter of law.

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1 The “Made with Real Fruit Juice and Other All Natural Ingredients” Statements

2 Plaintiffs contend that the statements on the side panel featuring the words
3 “made with real fruit juice and other all natural ingredients” are deceptive because
4 Snacks is (1) a manufactured product consisting mostly of corn syrup and sugar and (2)
5 an “affirmation of the fact that the product is made with all natural ingredients.”
6 (Oppo. at p.1:25). While Plaintiffs certainly set forth one possible interpretation of the
7 statement, that is not the applicable standard. In order to state a claim, Plaintiffs must
8 set forth a statement that is likely to deceive a reasonable consumer. That is, the term
9 “likely” does not mean possible, but probable. See Freeman, 68 F.3d at 289.

10 Here, the statement is truthful in the sense that Snacks contains grape juice and
11 other natural flavors. Viewed in context, Plaintiffs fail to identify a statement which,
12 when taken in context, would cause a reasonable consumer to likely be deceived by the
13 statement. Furthermore the word “other” does not mean “only” or “all” as suggested
14 by Defendants. Accordingly, the motion to dismiss the claims based upon these
15 statements is granted with prejudice.

16 The Snacks Is “One of a Variety of Nutritious Gerber Graduates Foods and Juices”
17 Statement

18 The court addressed this statement in its December 21, 2005 Order granting
19 Gerber’s motion to dismiss. As the court dismissed this claim as a basis for liability,
20 and Plaintiffs fail to articulate any basis to revisit that Order, the court incorporates the
21 prior Order.

22 In sum, the motion to dismiss this statement is granted with prejudice.

23 Applicable Type Size Requirements for the Term “Naturally Flavored”

24 Plaintiffs contend that the type size of the words “Naturally Flavored,” compared
25 to the type size of “Fruit Juice Snacks” does not comply with applicable FDA
26 regulations and therefore constitutes an unfair business practice. As set forth by
27 Defendants, “Section 101.22(i)(1)(i) provides that the type size of ‘Naturally Flavored’
28 should be half the size of ‘Fruit Juice Snacks.’” (Reply at p.5:1-2). In moving to

1 dismiss this claim, Gerber argues that one “would have to split hairs with a ruler to
2 determine whether or not the type size of ‘Naturally Flavored’ is one-half the size of
3 ‘Fruit Juice Snacks.’” (Motion at p.13:21-24).

4 Gerber’s argument has merit. Any reasonable consumer, upon viewing the
5 purple colored banner displaying the two phrases, would conclude that the words
6 “Naturally Flavored” are approximately one-half the size of the words “Fruit Juice
7 Snacks.” Moreover, the purpose of the regulation is to identify for the consumer “the
8 name of the characterizing flavor” of the product, 21 C.F.R. §101.22(i)(1)(i). Here, the
9 words “Naturally Flavored” are clearly and plainly visible thereby informing
10 consumers that the product contains natural flavorings.

11 In sum, the court concludes that the presentation of the words “Naturally
12 Flavored” in relation to the “Fruit Juice Snacks” is not actionable.

13 **The First, Second, and Eight Causes of Action**

14 For the above stated reasons, the court concludes that the depiction of the fruit
15 and fruit-like substances on the packaging, as well as the alleged statements, are not
16 likely to deceive a reasonable consumer as a matter of law and do not constitute an
17 unfair business practice within the meaning of section 17200. The court similarly finds
18 that Plaintiffs fail to state a false advertising claim under the CLRA for the same
19 reasons. These claims are dismissed with prejudice.

20 **The Third and Fourth Misrepresentation Causes of Action**

21 In order to prevail on a claim for negligent or intentional misrepresentation,
22 Plaintiff must allege a material misrepresentation. See Manely v. General Motors
23 corp., 108 F.3d 1176, 1181-82(9th Cir. 1997); Croeni v. Goldstein, 21 Cal.App. 4th 754,
24 758 (1994). For the above stated reasons, the court finds that the challenged statements
25 and images, viewed in context, are truthful or constitute non-actionable puffery. These
26 claims are dismissed with prejudice.

27 **The Fifth, Sixth, and Seventh Causes of Action for Breach of Warranty**

28 Plaintiff’s fifth, sixth, and seventh causes of action allege claims for breach of

1 express warranty, breach of implied warranty of merchantability, and breach of implied
2 warranty of fitness, respectively. For the above stated reasons, the depiction of fruit
3 and fruit-like substances, as well as the challenged statements, are truthful in context
4 and non-actionable puffery.

5 In sum, the court dismisses each claim with prejudice and without leave to
6 amend.

7 **IT IS SO ORDERED.**

8 DATED: 5/22, 2006

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10 
11 **JEFFREY T. MILLER**
12 United States District Judge

11 cc: All parties

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