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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 JANINE SUGAWARA,

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

11 Plaintiff,

12 v.

MEMORANDUM AND ORDER

13 PEPSICO, INC.,

14 Defendant.

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16 Plaintiff initiated this putative class action on June 9,
17 2008, and, on September 23, 2008, filed the operative First
18 Amended Complaint ("FAC") alleging causes of action arising under
19 California Business & Professions Code §§ 17200, et seq., and
20 17500, et seq., for Intentional Misrepresentation, Breach of
21 Express Warranty, Breach of Implied Warranty, and violation of
22 the Consumer Legal Remedies Action, California Civil Code § 1770.
23 Presently before the Court is Defendant's Motion to Dismiss the
24 FAC. For the following reasons, Defendant's Motion is granted.¹

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

1 **BACKGROUND²**

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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 ² 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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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).

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12 **ANALYSIS**

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

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.

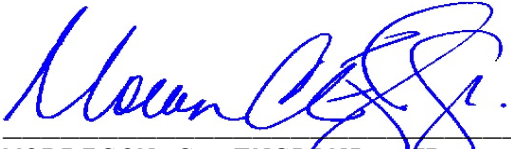
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7 **CONCLUSION**
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9 For the reasons just stated, Defendant's Motion to Dismiss
10 (Docket No. 23) is GRANTED without leave to amend.

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

19 _____ IT IS SO ORDERED.

20 Dated: May 20, 2009

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23 MORRISON C. ENGLAND, JR.
24 UNITED STATES DISTRICT JUDGE
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