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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Matthew Gates and John Martinez, Individually And On Behalf Of All Others Similarly Situated,

Plaintiffs,

v.

MusclePharm Corporation,

Defendant.

Case No.: 15-cv-02870-BAS-DHB

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: May 9, 2016
Time: NO ORAL ARGUMENT REQUESTED
Courtroom: 4B
Judge: Hon. Cynthia Bashant

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TABLE OF CONTENTS

KAZEROUNI LAW GROUP, APC
245 FISCHER AVENUE, UNIT D1
COSTA MESA, CA 92626

TABLE OF AUTHORITIES

CASES

///

KAZEROUNI LAW GROUP, APC
245 FISCHER AVENUE, UNIT D1
COSTA MESA, CA 92626

STATUTES

KAZEROUNI LAW GROUP, APC
245 FISCHER AVENUE, UNIT D1
COSTA MESA, CA 92626

RULES

OTHER AUTHORITIES

KAZEROUNI LAW GROUP, APC
245 FISCHER AVENUE, UNIT D1
COSTA MESA, CA 92626

KAZEROUNI LAW GROUP, APC
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I. INTRODUCTION

The average consumer spends a mere 13 seconds making an in-store purchasing decision, or between 10 to 19 seconds for an online purchase.[1] That decision is heavily dependent on a product's packaging, and particularly the package dimensions: "Most of our studies show that 75 to 80 percent of consumers don't even bother to look at any label information, no less the net weight . . . . Faced with a large box and a smaller box, both with the same amount of product inside . . . consumers are apt to choose the larger box because they think it's a better value."[2]

Defendant MusclePharm Corporation ("Defendant" and/or "MP") seeks to capitalize on consumers' reasonable reliance and instinctual human nature of selecting the "larger box" (regardless of the actual contents of the box) by packaging its protein products, including its Arnold Schwarzenegger Series Iron Whey, MusclePharm Combat Protein Powder, MusclePharm Combat Powder, MusclePharm Combat Black Weight Gainer, and MusclePharm FitMiss Delight, (collectively, "Products" or "Protein Products") in large, opaque containers that contain more than 45% empty space (i.e., non-functional slack-fill). Dkt. No 1, Plaintiff's Complaint ("Complaint" and/or "Compl."), 2:9-15. Consumers, in reliance on the size of the containers, paid a premium price for the Products, which they would not have purchased had they known that the containers were substantially empty. *Id*. Defendant's conduct is not only injurious to consumers

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[1] *See* http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-windown.html (citing the Ehrenberg-Bass Institute of Marketing Science's report "Shopping Takes Only Seconds…In-Store and Online").

[2] *See* http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm (quoting Brian Wansink, professor and director of the Cornell Food and Brand Lab, who studies shopping behavior of consumers).

who purchase Defendant's Protein Products in reliance on these false and misleading representations, but also to other businesses in the marketplace that do not use non-functional slack-fill, properly disclose the amount of product contained in the product's container, or lower the price of their product to account for the lower amount of product within a container.

Based upon Defendant's false and misleading advertising and unfair business practices, plaintiffs Matthew Gates ("Plaintiff Gates") and John Martinez ("Plaintiff Martinez") (collectively "Plaintiffs"), individually and on behalf of all others similarly situated, brought this Class Action Complaint alleging violations of: (1) California's Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1750, et seq., (2) California's Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200 et seq., (3) California's False Advertising Law ("FAL"), Bus. & Prof. Code §§ 17500 et seq., (4) New York's Deceptive Trade Practices Act, New York General Business Law ("NY GBL") § 349, and (5) negligent. *See generally* Compl.

Defendant now moves to dismiss Plaintiffs' claims because: (1) Plaintiffs' claims are not alleged with the requisite particularity; (2) Plaintiffs lack standing to pursue prospective injunctive relief; (3) Plaintiffs lack standing to pursue claims based on products they did not purchase; (4) Plaintiffs' lack standing to pursue claims based on Defendant's website representations; and, (5) Plaintiffs' claims for negligent misrepresentation are barred by the economic loss doctrine. *See generally* Dkt. No. 10-1, Defendant's Memorandum Of Points And Authorities In Support Of Motion To Dismiss ("Def. MTD"); *see also* Dkt. No. 10, Defendant's Notice Of Motion To Dismiss, ¶¶ 1-5. However, Plaintiffs claims are sufficiently pleaded; Plaintiffs have standing to pursue injunctive relief; Plaintiff have standing to pursue claims for products they did not specifically purchase; and lastly, Plaintiffs' negligent claim should not be dismissed. For these reasons, and as further discussed herein, Defendant's motion should be dismissed.

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II. STATEMENT OF FACTS

The facts in this case are simple and straightforward. Defendant promotes and markets its Products in large, opaque containers that contain more than 45% empty space. Compl. 2:9-15. In other words, Defendant's Products contain more than 45% non-functional slack-fill. Plaintiffs and similarly situated consumers, in reliance on the size of the containers, paid a premium price for the Products, which they would not have purchased had they known that the containers were substantially, almost half, empty. *Id.* at 2:14-17. Consequently, since Plaintiffs expected to receive full containers of Defendant's Products and not half empty ones, they filed the current action. Specifically, Plaintiffs brought this Class Action Complaint alleging violations of: (1) California's Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1750, et seq., (2) California's Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200 et seq., (3) California's False Advertising Law ("FAL"), Bus. & Prof. Code §§ 17500 et seq., (4) New York's Deceptive Trade Practices Act, New York General Business Law ("NY GBL") § 349, and (5) negligent. *See generally* Compl.

Defendant does not deny that its Products contain more than 45% non-functional slack-fill or that Defendant meets one of the enumerated exceptions to the non-functional slack-fill laws.[3] *See generally* Def. MTD. Instead, Defendant

[3] Pursuant to 21 C.F.R. §100.100(a), a container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity *for reasons other than*:

(1) Protection of the contents of the package;

(2) The requirements of the machines used for enclosing the contents in such package;

(3) Unavoidable product settling during shipping and handling;

(4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such

argues that Plaintiffs' claims should be dismissed based on legal technicalities that hold little weight or that are easily curable through an amended complaint, as will be discussed below.

III. LEGAL STANDARD

On a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss, "[a]ll allegations of material facts are taken as true and construed in the light most favorable to the nonmoving party." *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). In addition, the Court must also "draw inferences in the light most favorable to the plaintiff." *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009); see also *U.S. S.E.C. v. ICN Pharm., Inc.,* 84 F. Supp. 2d 1097, 1098 (C.D. Cal. 2000) ("The court must accept as true the factual allegations of the complaint and indulge all reasonable inferences to be drawn from them, construing the complaint in the light most favorable to the Plaintiff.") (citing *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir.1993); *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986).

A court will not normally look beyond the four corners of the complaint in resolving a Rule 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). A Rule 12(b)(6) Motion to Dismiss "is viewed with disfavor and is

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function is inherent to the nature of the food and is clearly communicated to consumers;

(5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or durable commemorative or promotional packages; or

(6) Inability to increase level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

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COSTA MESA, CA 92626

rarely granted." *McDougal v. County of Imperial*, 942 F.2d 668, 676 n.7 (9th Cir. 1991) quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). Therefore, a dismissal of a plaintiff's complaint, without leave to amend, is appropriate only where "it appears beyond doubt that plaintiff can prove no set of facts that would entitle her to relief." *Smith,* 84 F.3d at 1217. A dismissal for failure to state a claim with Rule 12(b)(6) "should ordinarily be without prejudice. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003).

In light of the foregoing standards, Defendant's Motion should be denied or, alternatively, Plaintiffs should be granted leave to amend their Complaint.

IV. ARGUMENT

As more fully stated below, (A) Plaintiffs have properly and sufficiently pleaded their claims under both Fed. R. Civ. P. 8 and 9; (B) Plaintiffs have standing to pursue injunctive relief, as Plaintiffs have adequately alleged the threat of future injury and because Defendant's reasoning would eviscerate the intent of consumer protection statutes; (C) Plaintiffs have standing to pursue claims for products they did not specifically purchase based on the "substantially similar test"; and lastly, (D) Plaintiffs' negligent misrepresentation claim is appropriate in this case because a "special relationship" exists between the Parties. Alternatively, if the Court finds Defendant's arguments persuasive Plaintiffs should be give leave to amend the Complaint, as the deficiencies mentioned by Defendant are easily curable.

A. PLAINTIFFS' CLAIMS ARE PROPERLY AND SUFFICIENTLY PLEADED

Defendant argues that Plaintiffs failed to plead their claims with sufficient particularity, as required under Fed. R. Civ. Pro. 9(b) for claims sounding in fraud. *See* Def. MTD 3:21-24. However, Plaintiffs' misrepresentations claims must only meet the "short and plaint statement" standard of Fed. R. Civ. P. 8(a)(2); and, even if the heightened Fed. R. Civ. P. 9(b) standard governs, Plaintiffs have sufficiently pleaded the required information or can easily cure the alleged deficiencies.

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COSTA MESA, CA 92626

1. FEDERAL RULE OF CIVIL PROCEDURE 8 GOVERNS NEGLIGENT MISREPRESENTATION CLAIMS

Plaintiffs' claims are "grounded" in Defendant's *misrepresentations* (emphasis added), and not in fraud as Defendant argues. *See generally* Compl. In order to satisfy the elements of a claim of negligent misrepresentation, the allegations must be pleaded pursuant to Fed. R. Civ. P. 8(a)(2), which simply requires a short and plaint statement of the claim showing that the pleader is entitled to relief. *In re Heritage Bond Litig*., 289 F. Supp. 2d 1132, 1154 (C.D. Cal. 2003). Although Fed. R. Civ. P. 9(b) does not expressly apply to a claim for negligent misrepresentation, Fed. R. Civ. P. 8 does require plaintiffs to give defendants fair notice of the claim against them. *Id*.; *see also Foster v. Allstate Ins. Co.*, 1993 U.S. Dist. LEXIS 20851, *6 (S.D. Cal. Oct. 7, 1993). The complaint should state, among other things, the facts alleged to have been misrepresented by the defendant and the identity of the person who made the statements. *Id.*

Here, Plaintiffs easily meet the requirements of Fed. R. Civ. P. 8. First, the Complaint states the facts alleged to have been misrepresented by Defendant. Specifically the Complaint alleges that Defendant packages it's Products in large, opaque containers that contain more than 45% empty space (Compl. 2:9-15; 4:12-18; 9:5-8) and that consumer, in reliance on the size of the containers, paid a premium price for the Products, which they would not have done had they known that the containers were substantially empty (id. 2:14-17; 5:22-24; 6:1-3; 11:5-7; 11:21-17; 24:12-14; and, 24:22-26). Second, the Complaint alleged the identity of the entity that made the misrepresentation (i.e., Defendant). Compl. 2:9-15 and 6:6-8. Accordingly, the Complaint is sufficiently pleaded.

2. PLAINTIFF HAS SATISFIED THE HEIGHTENED PLEADING STANDARD REQUIRED UNDER FEDERAL RULE OF CIVIL PROCEDURE RULE 9(b)

Even if Plaintiffs' claims are "grounded" in fraud, Plaintiffs' have sufficiently pleaded their claims under Fed. R. Civ. P. 9(b). Alternatively, the

alleged pleading deficiencies are easily curable through amendment.

Claims arising under fraud, as well as "claims of deceptive advertising brought under the UCL and the false advertising law must be pled with particularity. *Astiana v. Ben & Jerry's Homemade, Inc*., 2011 U.S. Dist. LEXIS 57348, *13 (N.D. Cal. May 26, 2011) (citing to *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-26 (9th Cir. 2009)). A Plaintiff who brings a fraud-based claim must "articulate the who, what, when, where, and how of the misconduct alleged." *Kerns* at 1125-26. In *Astiana,* defendant Ben and Jerry's Homemade, Inc. moved to dismiss the plaintiffs' fraud-based claim, in part based on defendant's assertion that plaintiffs had not alleged the elements of injury or deception with sufficient particularity. *Astiana,* 2011 U.S. Dist. LEXIS 57348 at *13. In Astiana's Opposition to defendant's motion, plaintiffs demonstrated: (1) "[t]he 'who' is Ben & Jerry's, Breyers, and Unilever[;]" (2) "[t]he 'what' is the statement that ice cream containing alkalized cocoa is 'all natural[;]'" (3) "[t]he 'when' is alleged as 'since at least 2006,' and 'throughout the class period[;]'" (4) "[t]he 'where' is on the ice cream package labels[;]" and (5) "[t]he 'how the statements were misleading' is the allegation that defendants did not disclose that the alkalizing agent in the alkalized cocoa was potassium carbonate, which plaintiff allege is a 'synthetic.'" *Id.* at 15. Ben and Jerry's motion to dismiss plaintiffs' claims was denied. *Id.* at 16.

Defendant claims that Plaintiffs have not: (1) identify which product they purchased (Def. MTD 4:1-17), (2) where and how they purchased the products (id. at 4:20-5:4), and (3) when they purchased the products (id. at 5:4-27). However, Plaintiffs here satisfy the heightened pleading standard required under Fed. R. Civ. P. 9(b), as the "who, what, where, when, how" were articulated in the Complaint.

- **Who**: The who is Defendant, MusclePharm Corporation, a manufacturer and distributor of the Products at issue (Compl. 2:9-14 and 6:6-8);

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- **What**: The what is Defendant's misrepresented Protein Products that contain non-functional slack-fill (*id*. at 2:9-16; 5:20-21; 5:27-6:1; and, 9:9-28);[4]
- **When**: The when is the four years prior to the filing of the Complaint (*id.* At 5:20-24 and 5:27-6:1);[5]
- **Where**: The where is Defendant's Protein Products' packaging, specifically the size of the container, and the fact that they contain non-functional slack-fill (*id.* at 2:9-14; 4:12-18; and, 9:9-13); furthermore, the misrepresentations affecting Plaintiffs occurred in in San Diego, California and West Nyack, New York[6] (*id.* at 5:20-21 and 5:27-6:1); and,
- **How**: the how the conduct was misleading is the allegation that Defendant packages its Protein Products in large, opaque containers that contain more than 45% empty space, indicating to the reasonable consumer that there's more product in the container than there actually is (id. 2:9:16).

Accordingly, the Complaint alleges Plaintiffs' claims with sufficient particularity. Furthermore, the information Defendant requests can easily and could have easily been provided to Defendant. Rather than delay the proceedings and waste resources, Defendant could have asked for this information prior to making its current Motion to Dismiss. This information can also be provided after the Court rules on this motion, including during the appropriate discovery procedures. On the other hand, if this Court finds Defendant's argument persuasive, Plaintiffs

[4] More specifically, Plaintiffs purchased Defendant's Arnold Iron Whey Protein product.

[5] More specifically, Plaintiff Gates purchased Defendant's product in November 2015; Plaintiff Martinez purchased Defendant's product in October 2015.

[6] More specifically, both Plaintiffs bought Defendant's Products, as depicted in on page 9, line 14 of the Complaint, from local GNC stores.

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COSTA MESA, CA 92626

respectfully request leave to amend the complaint, as the information sought by Defendant is readily available.

B. INJUNCTIVE RELIEF IS APPROPRIATE IN THIS CASE

Defendant argues that Plaintiffs lack standing to pursue injunctive relief because Plaintiffs "have not alleged they have any intention of purchasing [Defendant's] products in the future."[7] Def. MTD 7:7-8. Therefore, Defendant argues, "Plaintiffs may not represent a class seeking that relief." *Id.* at 7:20-21. Defendant's argument seeks to unfairly bar Plaintiffs from seeking injunctive or declaratory relief simply because they discovered Defendant's deceptive, unlawful and wrongful conduct. More importantly, Defendant's reasoning is flawed, not only because Plaintiffs have adequately alleged the threat of future injury, but also because Defendant's reasoning would eviscerate the intent of the California and New York legislature in creating consumer protection statutes.

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[7] In support of Defendant's injunctive relief argument, Defendant cites to *Mason v. Nature's Innovation, Inc.,* 2013 U.S. Dist. LEXIS 68072, (S.D. Cal. May 13, 2013), among others. However, *Masson* and the other cases cited by Defendant are clearly distinguishable from the current case, as the court in *Mason* (and the other cases) found that "[p]laintiff has no intention of buying Defendant's … product again in the future." *Id.* at 15. The *Mason* court came to this conclusion because plaintiff acknowledged that the product at issue did not work. *Id.* at 5 In fact, the court in *Mason* found that "it is an exaggeration to claim that injunctive relief would never be available in false advertising cases." *Id.* at 13. "There are cases where a consumer would still be interested in purchasing the product if it were labeled properly - for example." *Id*. The *Mason* court specifically finds that "[w]hen analyzing standing to seek injunctive relief under the UCL and CLRA, the California Supreme Court has been guided by the statutory language and has not imposed additional requirements, such as the need to show future injury. *Id.* at 14-15. Here, Plaintiffs do not allege that they have no intention of buying Defendant's Products again, or that the Products do not work; rather, they allege Defendant's Products have been misrepresented and falsely advertised. Plaintiffs and the Class Member could be willing to buy the Protein Products in the future if correctly and truthfully packaged and advertised.

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First, Plaintiffs have adequately alleged the threat of future injury. Specifically, Plaintiffs' Complaint states that, as a result of Defendant's conduct, Plaintiffs and the Class Members were misled (and Class members will continue to be misled) into believing that they were receiving more product in the container than they actually were. *See* Compl. 12:4-6; 19:22-23; 21:12-14; and, 24:3-4. Notably, the Complaint also states that Plaintiffs and Class Members will continue to be harmed as they are unable to rely on Defendant's packaging. *Id*. at 11:13-16; 16:24-27; 16:9-13; 21:14-17; and, 24:27-25:3. Accordingly, the threat of future injury will continue as to both Plaintiffs and the Class Members, who could be willing to buy the Defendant's Products if correctly and truthfully packaged and advertised.

Second, although there is a split of authority, consumers may have standing to seek injunctive relief even though it is not likely that they will re-purchase a product, as holding otherwise would eviscerate the intent of consumer protection statutes. *See Koehler v. Litehouse*, Inc., 2012 U.S. Dist. LEXIS 176971, *16 (N.D. Cal. Dec. 13, 2012); *see also Henderson v. Gruma Corp.*, 2011 U.S. Dist. LEXIS 41077, *20 (C.D. Cal. Apr. 11, 2011) (finding that "while [p]laintiffs may not purchase the same … products as they purchased during the class period, because they are now aware of the true content of the products, to prevent them from bringing suit on behalf of a class in federal court would surely thwart the objective of California's consumer protection laws, [which] objective is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services) (internal quotation omitted); *Shahinian v. Kimberly-Clark*, 2015 U.S. Dist. LEXIS 92782, 2015 WL 4264638, at *4 (C.D. Cal. Jul. 10, 2015) (holding that plaintiffs had standing to seek injunctive relief even though they would not purchase the food items in question again because of their synthetic ingredients); *Cabral v. Supple, LLC*, 2012 U.S. Dist. LEXIS 137365, *5 (C.D. Cal. Sept. 19, 2012) (the court "at this stage of the litigation will not dismiss Cabral's

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COSTA MESA, CA 92626

prayer for injunctive relief."); *Belfiore v. Procter & Gamble Company*, 2015 WL 1402313, (E.D.N.Y. 2015) (holding consumer who purchased flushable toilet wipes from consumer goods company, and who allegedly sustained toilet clogging and sewer back-up after flushing wipes, had standing to bring individual and putative class action against company, under New York law prohibiting deceptive acts or practices in the conduct of business, seeking injunctive relief, even though he was unlikely to re- purchase the wipes again); *Delgado v. Ocwen Loan Servicing, LLC*, 2014 WL 4773991, at *14 (E.D.N.Y. Sept. 24, 2014) ("Finding that [p]laintiffs have no federal standing to enjoin a deceptive practice once they become aware of the scheme would eviscerate the intent of the California legislature in creating consumer protection statutes.") (internal quotation marks and citation omitted). Accordingly, even if Plaintiffs alleged that they did not intend to re-purchase Defendant's Products (which they did not), they still have standing to seek injunctive relief. Furthermore,

Therefore, Defendant's argument, as pertaining to Plaintiffs' standing to pursue injunctive relief, is without merit.

C. PLAINTIFFS HAVE STANDING TO PURSUE PRODUCTS THEY DID NOT SPECIFICALLY PURCHASE

Defendant argues Plaintiffs' "Complaint should be dismissed to the extent that it is based on products that Plaintiffs did not purchase because Plaintiffs lack standing to pursue claims regarding such products." Def. MTD 7:26-28. Although Defendant failed to acknowledge it, there is a split of authority on this issue. *Dorfman v. Nutramax Labratories, Inc.,* 2013 WL 5353043, *6 (S.D. Cal. Sept. 23, 2013)(finding that "[t]here is no controlling authority on whether Plaintiff has standing to bring claims on behalf of others for a product that is similar (but not identical) to the product that Plaintiff purchased."

However, although some courts, like the ones cited by Defendant, have found that "a plaintiff has no standing to pursue claims based on products he or she

did not purchase, …[t]he **majority** [emphasis added] of the courts that have carefully analyzed the question and hold that a plaintiff may have standing to assert claims for unnamed class members based on products he or she did not purchase so long as the *products* and alleged *misrepresentations* are substantially similar." *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1197-1198 (S.D. Cal. 2015); *See also Stephenson v. Neutrogena*, 2012 U.S. Dist. LEXIS 1005, 1009 (N.D. Cal. July, 27, 2012); *Anderson v. Jamba Juice*, 888 F. Supp. 2d 1000, 1005-06 (N.D. Cal. 2012); *Werdebaugh v. Blue Diamond Growers*, 2013 WL 5487236,*14 (N.D. Cal. Oct. 2, 2013); *Simpson v. California Pizza Kitchen, Inc.*, 2013 WL5827671, *8 n. 2 (S.D. Cal. Oct. 1, 2013) ("At this stage in the litigation, the Court agrees with Plaintiff that she has standing to sue for products she never purchased because she is asserting her claims on behalf of a purported nationwide class and the products in question – frozen pizzas – are sufficiently similar to the products Plaintiff purchased."); *Quinn v. Walgreen Co*., 2013 WL 4007568 (S.D.N.Y. Aug. 7, 2013) (applying CA law, found products not purchased to be substantially similar); *Carideo v. Dell, Inc*., 206 F. Supp. 2d 1122, 1134 (W.D. Wash. 2010). The very recent case of *Holt v. Foodstate, Inc*., 2015 U.S. Dist. LEXIS 173403 (S.D. Cal. Dec. 31, 2015) from this District is also instructive on the standing issue.

1. *THE TEST FOR SUBSTANTIALLY SIMILAR PRODUCTS*

Despite this split of authority, the Southern District Court of California recently addressed whether plaintiffs have standing to sue for substantially similar products. In *Dorfman*, plaintiff challenged defendant's products, including defendant's substantiality similar products not purchased by plaintiff, based largely on the same primary active *ingredients* and *representations*. *Dorfman*, 2013 WL 5353043, *7 (S.D. Cal. Sept. 23, 2013). However, Defendant argued that plaintiff lacked standing to allege claims concerning defendant's product Cosamin ASU because plaintiff did not purchase or use the product. *Id*. The court found that the plaintiff had alleged sufficient similarities between the ingredients and represented

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COSTA MESA, CA 92626

health benefits of both products to avoid dismissal. *Dorfman*, 2013 WL 5353043, *8 (emphasis added); *see also Astiana v. Dreyer's Grand Ice Cream, Inc.*, No. C-11-2910 EMC, 2012 U.S. Dist. LEXIS 101371, at *11 (N.D. Cal. July 20, 2012) (noting that "the critical inquiry seems to be whether there is sufficient similarity between the products purchased and not purchased"); *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 869 (N.D. Cal. 2012) (noting that where composition of the product is less important, "cases turn on whether the alleged misrepresentations are sufficiently similar across product lines). The Court concluded, "differences in the … products and/or product representations are best addressed at the class certification stage rather than the motion to dismiss stage." *Id.*; *accord Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000, 1005-1006 (N.D. Cal. 2012) (noting that "if there is a sufficient similarity between the products, any concerns regarding material differences in the products can be addressed at the class certification stage).

Here, both the Products and alleged misrepresentations are substantially similarly, if not essentially identical. The Products at issue are all made primarily from some sort of protein powder meant for working out or gaining weight. The alleged misrepresentations are identical in that Defendant's products all contain some non-functional slack-fill. Therefore, Plaintiffs in this case have standing to assert claims on behalf of the Class Members for products they did not purchase.

2. *PUBLIC POLICY FAVORS PLAINTIFFS' POSITION*

Despite the split in persuasive authority, and lack of controlling authority, there is a growing trend to allow Plaintiffs to allege claims regarding products they did not purchase, as long as they are substantially similar, which is the case here. From a policy perspective, it also makes sense to find standing to sue for substantially similar products not actually purchased because this would facilitate the cessation of Defendant's widespread practice of false and deceptive advertising in violation of California and New York consumer laws. Further, this would promote

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judicial economy by permitting resolution of such claims in one action, as opposed to several actions that may be brought by other plaintiffs, and discourage other non-compliant manufacturers to change their ways.

Even if the Court finds that Defendant's other products are different from the Products purchased by Plaintiffs, the methods and representations used by Defendant to package and market those Products are nonetheless substantially similar to the Products purchased by Plaintiffs. Therefore, Defendant's arguments against the standing of Plaintiffs to sue for products that are substantially similar that were not actually purchased by Plaintiff are without merit. This Court should follow the line of cases holding that there is standing to sue for substantially similar products even when those products were not allegedly purchased by Plaintiffs.

D. PLAINTIFFS' NEGLIGENT MISREPRESENTATION CLAIM IS APPROPRIATE

Defendant argues that Plaintiffs' negligent misrepresentation claim is barred by the Economic Loss Doctrine, which bars recovery for economic loss without alleging personal injury or property damage. Def. MTD 10:3-28. In California, economic losses are defined as damages for inadequate value, costs of repair and replacement of a product or consequent loss of profits. *Frank M. Booth, Inc. v. Reynolds Metals Co.*, 754 F.Supp. 1441, 1449 (E.D. Cal. 1991). In the absence of (1) personal injury, (2) physical damage to property, (3) a "special relationship" existing between the parties, or (4) some other common law exception to the rule, recovery of purely economic loss is foreclosed. *Kalitta Air, L.L.C. v. Cent. Tex. Airborne Sys.,* 315 Fed. Appx. 603, 605 (9th Cir. Cal. 2008) (citing *J'Aire Corp. v. Gregory,* 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60, 62-63 (Cal. 1979). As defendant states, Plaintiffs have not alleged personal injury or physical damages to property. However, a "special relationship" exists between the parties, as explained below, which allows Plaintiffs' negligence claim to survive Defendant's MTD.

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1. A "SPECIAL RELATIONSHIP" EXISTS BETWEEN THE PARTIES

The California Supreme Court has consistently employed a six factor "special relationship" analysis to determine whether a plaintiff may recover purely economic loss in claims for negligence. *See J'Aire,* 598 P.2d at 63 (finding a "special relationship" to allow recovery of lost business and lost profits arising out of negligent performance of renovation services by a defendant not in privity with the plaintiff); *see also Aas v. Superior Court,* 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718, 12 P.3d 1125, 1138 (Cal. 2000) (applying the "special relationship" analysis to a claim for economic loss in a negligence action brought by a homeowner not in privity with a building contractor to recover costs to repair defective construction, but denying the claim because plaintiff showed no present injury). Specifically, the court will look to see: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm. *Kalitta*, 315 Fed. Appx. at 605-606 (9th Cir. Cal. 2008) (citing *J'Aire,* 598 P.2d at 63).

Here, the transactions (i.e., the purchases of Defendant's Products) were directly intended to affect Plaintiffs and the Class Members, as Defendant offers its Products for consumption to consumers like Plaintiffs and the Class. Accordingly, it is clearly foreseeable that including non-functional slack-fill in its Products would harm consumers, like Plaintiff and the Class, as reasonable consumers rely on the size of the container as an indication of the amount of product contained therein. Further, there is no doubt that Plaintiffs and the Class suffered injury, since, in reliance on the size of the Products containers, they paid a premium price, which they would not have done had they known that the containers were substantially empty. For the same reasons, there is clearly a close, if not direct,

connection between Defendant's conduct and the injury suffered by Plaintiffs and the Class. Defendant's conduct is clearly blameworthy, as Defendant knew the amount of product that was being placed in each container, but still decided to package and advertise it's Products in non-functional slack-filled containers, some of which contained over 45% empty space. Lastly, public policy supports finding a duty of care in the present case, which is evident by the existence of slack-fill laws, unfair competition laws and false advertising laws. In light of these factors, it is apparent that Defendant had and currently still has a duty not to include non-functional slack-fill in it's Products. Accordingly, Defendant's motion as to this issue should be dismissed.

E. WEBSITE MISREPRESENTATIONS

Defendant argues that Plaintiff lacks standing to pursue claims based on Defendant's website because Plaintiffs have not alleged that they saw or relied on those statements. Plaintiffs do not oppose this section of Defendant's argument only.

F. ALTERNATIVE LEAVE TO AMEND

Alternatively, should this Court find any of Defendant's arguments persuasive, Plaintiffs respectfully request leave to amend the Complaint to cure any such perceived deficiencies. As this Court is well aware, leave to amend should be "freely given" when the plaintiff could cure the pleadings defects and present viable claims. Fed. R. Civ. P. 15(a); see *Foman v. Davis*, 371 U.S. 178, 182 (1962).

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V. CONCLUSION

Based on the reasoning above, Plaintiffs' Complaint should not be dismissed, as Defendant's Motion to Dismiss is unsupported. Accordingly, Defendant's Motion should be denied, or in the alternative, Plaintiff respectfully request the Court grant leave to amend Plaintiffs' Complaint.

Dated: April 25, 2016

Respectfully submitted,

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